Date: 20070918

Docket: T-2066-03

Citation: 2007 FC 923

Ottawa, Ontario, September 18, 2007

PRESENT: The Honourable Madam Justice Layden-Stevenson

BETWEEN:

NAWAL HAJ KHALIL,
ANMAR EL HASSEN, and ACIL EL HASSEN,
by her Litigation Guardian, NAWAL HAJ KHALIL

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This matter is about delay in the processing of an application for permanent residence in Canada. When a determination of the plaintiffs' application was delayed, they sued.

[2] Nawal Haj Khalil is the primary plaintiff. She is the mother of the plaintiffs Anmar El Hassen and Acil El Hassen. Born in Syria, she is 57 years old and a stateless Palestinian. Her husband, Riyad El Hassen, resides in Gaza. Ms. Haj Khalil is a Convention refugee.

[3] Anmar El Hassen is the 23-year-old son of Ms. Haj Khalil. He is a university graduate and is entering medical school in Dubai this semester. He was granted permanent resident status in Canada on February 2, 2007.

[4] Acil El Hassen is Ms. Haj Khalil's 18-year-old daughter. Acil graduated from high school in 2007 and is attending university this fall. She was granted permanent resident status in Canada on December 21, 2006.

[5] In this action, the plaintiffs allege that the defendant's delay in processing their applications for permanent residence caused them harm for which they claim damages. They assert that their entitlement to damages arises from the defendant's negligence and the infringement of their sections 7 and 15 rights under the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act, 1982*, c. 11 (U.K.) [R.S.C., 1985, Appendix II No. 44] (the *Charter*). For this infringement, they claim a remedy under subsection 24(1) of the *Charter*.

[6] More specifically, Ms. Haj Khalil claims damages for: psychological distress (depression); economic loss; loss of guidance, care and companionship of her husband; and punitive damages. Anmar and Acil claim damages for the loss of guidance, care and companionship of their father and punitive damages. Anmar also claims unspecified special damages for the loss of a summer job.

[7] Relying on sections 2 and 15 of the *Charter*, the plaintiffs also seek a declaration that, under subsection 52(1) of the *Constitution Act, 1982*, paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) is unconstitutional and of no force and effect.

[8] I conclude that the plaintiffs' action must fail. Although they have established that there was unreasonable and inordinate delay in the processing of their applications for permanent residence, delay is not a free-standing cause of action.

[9] There is insufficient proximity between the plaintiffs and the defendant to found a private law duty of care. Additionally, there are compelling policy reasons that militate against the imposition of such a duty. Even if it were otherwise, causation has not been established. Consequently, the plaintiffs cannot succeed in negligence.

[10] The plaintiffs have not established that their liberty interests under section 7 of the *Charter* are engaged on the facts of this matter. The section 7 security of the person interests are not engaged because the alleged harm is not state imposed. The primary plaintiff's allegation of infringement of her equality rights under section 15 of the *Charter* was not seriously advanced. Consequently, I am unable to address it.

[11] The plaintiffs' attack on the constitutionality of paragraph 34(1)(f) of the IRPA on the premise that it contravenes section 2 of the *Charter* has been authoritatively determined by the

Supreme Court of Canada. The challenge on the basis of section 15 of the *Charter* fails because the primary plaintiff has not demonstrated that she was treated differentially by virtue of her nature as a stateless Palestinian. The allegation that the provision is unconstitutional because the remedy under subsection 34(2) of the IRPA is illusory fails because it constitutes an attack on the manner in which the legislation is administered rather than the validity of the legislation itself. No subsection 34(2) determination has been made regarding the primary plaintiff. Should the decision be negative, it may be judicially reviewed on the basis that the provision was applied unconstitutionally.

Preliminary Observations

[12] My discussion of the issues in this action is detailed. It is important to note at the outset that the merits of Ms. Haj Khalil's admissibility (or inadmissibility) to Canada or her suitability for ministerial exemption (if inadmissible) are not in issue here. Consequently, my commentary should not be seen as an expression of opinion on such matters.

[13] The table of contents below identifies the topics addressed in these reasons and their location.

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The Legislative Context

[14] The legislative context underlying this matter is important. Ms. Haj Khalil was found to be a Convention refugee under the provisions of the *Immigration Act,* R.S.C. 1985, c. I-2 (the former Act). Her application for permanent residence was submitted under the former Act. On June 28, 2002, the IRPA came into force. By virtue of section 190 of the IRPA, Ms. Haj Khalil's application for permanent residence, after June 28, 2002, was to be determined in accordance with the provisions of the IRPA.

[15] Although the IRPA introduced a number of changes in many respects, the substance of the legislative provisions relevant to Ms. Haj Khalil's application for permanent residence remains the same as that under the former Act. Therefore, I propose to refer only to the provisions contained in the IRPA. The full text of all statutory provisions referenced in these reasons is set out in the attached Schedule "A".

[16] Subsection 21(2) of the IRPA, subject to one exception that is not relevant here, provides that a Convention refugee who applies for permanent residence becomes a permanent resident if the application has been made in accordance with the regulations (within 180 days of the Convention refugee determination) and the Convention refugee is not inadmissible on any ground referred to in sections 34 or 35, subsection 36(1) or sections 37 or 38 of the IRPA. Section 34 is the material provision in this matter.

[17] Subsection 34(1) of the IRPA sets out the conditions regarding inadmissibility on "security grounds". In Ms. Haj Khalil's case, we are concerned with paragraphs 34(1)(c) and (f). Those

paragraphs, together, provide that a permanent resident or a foreign national is inadmissible on security grounds for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism.

[18] A finding of inadmissibility can be overcome if an individual satisfies the Minister that the person's presence in Canada would not be detrimental to the national interest. This process is referred to as "ministerial exemption" or "ministerial relief" and is provided for in subsection 34(2). The terms "ministerial exemption" and "ministerial relief" are used interchangeably throughout these reasons. Although the IRPA permits the Minister to delegate authority in favour of another person (to act in the Minister's stead), the Minister may not delegate authority with respect to subsection 34(2). The ministerial exemption power is non-delegable.

[19] Under subsection 44(1) of the IRPA, when an immigration officer determines that a permanent resident or a foreign national is inadmissible, the officer may prepare a report on inadmissibility. Such a report is to be provided to the Minister. If in the Minister's opinion the report is well-founded, pursuant to subsection 44(2) the matter may be referred to the Immigration Division for an admissibility hearing. Except in relation to a Convention refugee, the admissibility hearing can result in a removal order. Canada's international obligations under the *Convention Relating to the Status of Refugees,* July 28, 1951, 189 U.N.T.S. 137, Can. T.S. 1969 No. 6 (entered into force 22 April 1954) (the *Refugee Convention*) require Canada to respect the principle of non-refoulement. Section 115 of the IRPA prohibits the removal of a Convention refugee to a country where the person would be at risk of persecution for any of the grounds set out in the *Refugee Convention* or at risk of torture or cruel and unusual treatment or punishment. An exception is

provided for in circumstances where the person is determined to be a danger to the security of Canada. The debate in relation to this provision has no application in this matter because Ms. Haj Khalil is not considered to be a danger to the security of Canada.

[20] One significant change in the IRPA is the transfer of enumerated powers from the Minister of Citizenship and Immigration (traditionally responsible for the administration of the Act) to the Minister of Public Safety and Emergency Preparedness. Under subsection 4(2) of the IRPA, the Minister of Public Safety and Emergency Preparedness is responsible for the administration of the IRPA in relation to: examinations at ports of entry; the enforcement of the IRPA, including arrest, detention and removal; the establishment of policies respecting the enforcement of the IRPA and inadmissibility on grounds of security, organized criminality or violating human or international rights; and determinations under any of subsections 34(2), 35(2) and 37(2) of the IRPA.

[21] This change resulted from the Prime Minister's creation of the portfolio of Public Safety and Emergency Preparedness Canada (PSEPC) in December of 2003. The structure of the PSEPC is complex. For present purposes, it is sufficient to say that the PSEPC is an umbrella department with many components. In conjunction with the creation of PSEPC, the Canada Border Services Agency (CBSA) was created and forms part of the PSEPC. The Citizenship and Immigration Canada (CIC) Security Review Department (I will refer to CIC Security Review in more detail later) was moved to the CBSA and became the Counter-Terrorism Branch of the CBSA. Subsequently, the IRPA was amended to vest responsibility for the above-noted sections with the Minister of Public Safety and Emergency Preparedness. I note parenthetically that the title of this department has recently been

changed to Public Safety Canada. Given that the new title is less cumbersome, I will refer henceforth to this department as the Department of Public Safety (PS).

[22] Consequently, while under the former Act, Ms. Haj Khalil's case (as it has unfolded) would have been the responsibility of the Minister of Citizenship and Immigration, it now falls under the authority of both the Minister of Citizenship and Immigration and the Minister of Public Safety.

[23] Subsection 95(2) of the IRPA provides that a Convention refugee is a protected person. A protected person, determined to be inadmissible, may request judicial review in the Federal Court. Section 72 permits judicial review with respect to any matter under the IRPA, with leave of the Court.

[24] The *Federal Courts Act*, R.S.C. 1985, c. F-7 (the *Federal Courts Act*), specifically section 18, outlines the remedies available on applications for judicial review. They include: an injunction; writs of certiorari, prohibition, mandamus and quo warranto; and declaratory relief. Judicial review of any matter under the IRPA is subject to the time limits prescribed in section 72 of the IRPA and is to be disposed of without delay and in a summary way. Under paragraph 74(d), an appeal to the Federal Court of Appeal can be initiated only if a Federal Court judge certifies that a serious question of general importance is involved and states the question.

The Chronology

[25] Ms. Haj Khalil and her children arrived in Canada, via the United States, in March of 1994. Upon arrival, Ms. Haj Khalil claimed refugee status. In April, she was determined eligible to make

a refugee claim. The hearing (to determine whether she was a Convention refugee) was conducted over two days in October and December of 1994. She and her children were granted refugee status on December 21, 1994. In January of 1995, Ms. Haj Khalil applied for permanent residence and included her children and her husband as dependents on her application. She received provisional approval of her application shortly thereafter. Requests for screening action regarding Ms. Haj Khalil and her "dependant husband abroad" were dated January 11, 1995.

[26] In April of 1996, Ms. Haj Khalil received a call-in notice to appear for an interview in May. Ms. Haj Khalil was interviewed, as scheduled, by a representative of the Canadian Security and Intelligence Service (CSIS). CSIS generated a report dated July 31, 1997. This report was forwarded to CIC Security Review where further investigations were conducted. A Security Review report was prepared and sent to the CIC regional office in Toronto for transfer to the CIC local office in Windsor. In June of 1998, the file was assigned to Windsor senior immigration officer, Kelly White.

[27] Ms. White interviewed Ms. Haj Khalil in November of 1998 and prepared a report (the White Report) with respect to Ms. Haj Khalil's inadmissibility. The White report was sent to CIC Security Review in February of 1999. By August of 1999, Security Review had examined and approved the White Report. In November of 1999, Ms. White drafted a refusal letter with respect to Ms. Haj Khalil's application and forwarded the draft to CIC Security Review. Ms. White's letter, with minor modifications, was approved in January of 2000. Approximately one month later, Ms. Haj Khalil received notice of the refusal.

[28] In March of 2000, Ms. Haj Khalil applied for leave and judicial review of the inadmissibility determination. She requested that the decision be quashed on various grounds — including non-compliance with the *Charter* — and that an order for mandamus issue. Leave was granted and the matter was scheduled for hearing on May 15, 2001. For reasons that are not apparent from the record, the date was twice rescheduled, presumably at the request of the Minister. In July of 2001, the Minister consented to the application for judicial review and in October, under Rule 369 of the *Federal Courts Rules*, SOR/98-106 (the *Federal Courts Rules*), the Minister requested judgment. Ms. Haj Khalil opposed the motion and asked that the matter proceed to a hearing in January of 2002. By order dated November 16, 2001, Mr. Justice Gibson allowed the application for judicial review, quashed the inadmissibility decision and remitted the matter for determination on the basis of "open source information". He denied Ms. Haj Khalil's request for a hearing because the matter was moot.

[29] Shortly thereafter, Ms. Haj Khalil's counsel wrote to CIC counsel requesting that the re-determination of her client's admissibility be completed within two weeks. CIC counsel, in response, indicated that the two-week time frame was not possible, but the file would be handled expeditiously.

[30] Ms. Haj Khalil was interviewed by Windsor senior immigration officer John Swizawski in March of 2002. Her counsel specifically requested that Ms. Haj Khalil, if found inadmissible, be considered for ministerial exemption. Mr. Swizawski determined that Ms. Haj Khalil was inadmissible. He submitted his report (the Swizawski Report) to CIC Security Review in the summer of 2002. Ms. Haj Khalil did not receive a copy of the Swizawski Report although she

learned of its existence and obtained a copy of it through the disclosure process in relation to this action.

[31] In October of 2002, CIC Security Review analyst, Roseanne Da Costa, prepared a memorandum recommending against the granting of ministerial relief. Although this memorandum was forwarded to the Director of Security Review, it did not make its way to the Minister because ministerial relief cases were suspended pending review of the ministerial relief process and the formatting of memoranda in relation to that process. In May of 2003, a departmental decision — to "park" 120 ministerial relief cases until CIC Security Review cleared its backlog — was taken. The backlog was comprised of more than 1000 cases (600 cases involving individuals where there was insufficient information to find them inadmissible and 400 cases involving individuals where CIC Security Review would recommend inadmissibility).

[32] In October of 2003, CIC Security Review erroneously informed Ms. Haj Khalil that her file was before the Minister. In November of that year, another memorandum (recommending that ministerial relief be refused) was authored by analyst Lara Oldford. As noted earlier, in December of 2003, CIC Security Review became the Counter-Terrorism Branch of the newly-created CBSA.

[33] The plaintiffs filed their statement of claim in November of 2003. One month later, the defendant Crown moved to strike the action. Prothonotary Milczynski dismissed the motion. On May 19, 2004, Madam Justice Heneghan dismissed the Crown's appeal of Prothonotary Milczynski's order. The plaintiffs filed an amended statement of claim less than one month after Justice Heneghan's order.

[34] In June of 2004, analyst Lara (Oldford) Armit prepared a further memorandum wherein she recommended against the granting of ministerial relief. Ms. Haj Khalil received disclosure of this "CBSA recommendation" in January of 2006. Ms. Haj Khalil provided reply submissions with respect to the CBSA recommendation. Correspondence between CBSA and Ms. Haj Khalil continued for another year. In view of the time lapse since the preparation of the Swizawski Report, CBSA Counter-Terrorism recommended the preparation of a new admissibility decision. Ms. Haj Khalil received a call-in notice to appear for an interview in March of 2007. The resulting negative decision was withdrawn because the immigration officer had failed to consider Ms. Haj Khalil's reply submissions. At the end of the trial, the admissibility decision remained outstanding as did the request for ministerial relief.

The Departmental Protocol

[35] It is important to properly situate the chronology within the context of the CIC administration. The composition and structure of government departments change over time. So it was in this case. An assessment of Ms. Haj Khalil's allegation of delay requires an appreciation of the nature of CIC Security Review as well as its interaction with other CIC departments and external agencies. In my recitation of the department's policies and practices, I have relied on the evidence of Ian Taylor, Kathleen O'Brien and Louis Dumas. Detail has been omitted in favour of an overview. While some of the background is generic, for the most part I am speaking of admissibility cases where it appears that an individual applying for permanent residence has been a member of an organization that engaged in terrorist acts.

[36] During the 1980s, CIC Security Review was primarily concerned with counter-intelligence and counter-surveillance due to the activities of the Soviet Bloc. In 1985, the Security Review unit was comprised of six people. In the late 1980s, it became part of the CIC Enforcement Branch and in 1991, it was transferred to the CIC Case Management Branch. During the 1990s, coincident with the fall of the Soviet Bloc and the influx of refugees claiming asylum in Canada, the unit's focus shifted to increased emphasis on counter-terrorism. It was staffed by ten people and was responsible for handling the files for both Security Review and War Crimes.

[37] Applications for permanent residence were sent first to the centralized processing centre (CPC) in Vegreville, Alberta, and from there, to other departments or agencies as required. Security screening was conducted by CSIS and its screening briefs, once completed, were forwarded to CIC Security Review. Security Review did not consider the contents of the CSIS screening briefs to be determinative. An analyst was assigned responsibility for reviewing each file in greater depth and arriving at a recommendation to be submitted to the Director of Security Review. Once the Director approved and signed the recommendation, the Security Review memo was sent, along with the CSIS brief and information on the "terrorist" organization in question, to the CIC local office via the CIC regional office.

[38] A local office immigration officer was responsible for making both an admissibility determination and a recommendation with respect to ministerial relief (the latter was made only if the individual was determined inadmissible). The immigration officer's report required the concurrence of the CIC local office supervisor. After the concurrence was obtained, the officer's

report was forwarded to Security Review where an analyst considered the viability of ministerial exemption. At the time, reports of inadmissibility determinations were not provided to applicants until the ministerial relief process had been completed. If CIC Security Review recommended relief, the required documentation was sent up the chain of command to the Minister for determination. Accordingly, some applicants would never know they had been found inadmissible because permanent residence was granted through the ministerial exemption process.

[39] Those applicants for whom ministerial relief was not recommended were provided with the immigration officer's report containing the inadmissibility finding and the recommendation with respect to ministerial relief. During this period, absent a specific request for ministerial relief at the time of the application (for permanent residence), only those cases where a positive recommendation for ministerial relief had been rendered made their way up the chain of command. Although the admissibility decisions were made by a CIC local office immigration officer, Security Review was not bound by the immigration officer's recommendation regarding ministerial relief. The rule of thumb dictated that individuals who merited relief were those who had no personal history of violent activity (and could therefore not be considered true terrorists) and who generally would have been in Canada at least three to five years (to allow for an informed assessment of any security risk). The files of persons not recommended for ministerial relief, whom it was thought might merit ministerial relief in the future, were "BF'd" (brought forward) to a future date.

[40] The events of September 11th in 2001 and the case of Ahmed Ressam led the government to alter its approach to admissibility and screening. In November of 2001, front-end screening was introduced. Unlike the former method whereby individuals were screened after they filed their applications for permanent residence, this process enabled immigration officers to identify potentially inadmissible persons at the first port of entry (POE).

[41] Additionally, the protocol surrounding the ministerial exemption process became somewhat more formalized. In the absence of a specific request for relief, inadmissible applicants were refused permanent residence by the immigration officer. That is, CIC Security Review no longer unilaterally identified potential meritorious candidates for ministerial exemption. However, Security Review recommended that where local immigration officers perceived that applications contained "an indirect request" for ministerial relief, the officers were encouraged to refer the matter to Security Review in the same manner as a direct request.

[42] Immigration officers were not required to inform applicants of the availability of the ministerial relief. Cases forwarded for assessment of a ministerial exemption went up the chain of command. The practice – that inadmissibility determinations and the immigration officers' reports were not provided to applicants until such time as the ministerial relief applications had been assessed and, then, only if the decisions were negative – remained the same. I should also note that departmental policy dictated that applicants who wished to obtain their inadmissibility reports could do so through a "formal privacy request".

[43] In March of 2002, CIC created the Intelligence Branch. This branch incorporated Security Review, Organized Crime, War Crimes, Research and Intelligence Co-ordination and the "more traditional" intelligence area (review of trends and analysis of improperly documented arrivals). At this time, an analyst's recommendation memorandum wended its way through a chain of command which included the: Director; Senior Director; Director-General; Assistant Deputy Minister; Minister's Executive Services; Deputy Minister; Minister's Chief of Staff; and, ultimately, the Minister.

[44] Also during this time-frame, "border pressure" and the events of 9/11 resulted in an increased focus on national security. By 2002, the Security Review unit employed 20 people. At some point following the creation of the Intelligence Branch (the record is not clear as to the precise timing), a directive was issued from the Minister's office regarding the necessity of achieving uniformity in the format of the ministerial exemption memoranda emanating from three of the units within the CIC Intelligence Branch (Security Review, Organized Crime and War Crimes). As a result of the directive, a review was conducted. As earlier noted, during the review ministerial exemption memoranda to the Minister were held in abeyance.

[45] By May of 2003, the CIC Intelligence Branch staff numbered 20 to 25 persons. In December of that year, the Intelligence Branch was transferred to CBSA jurisdiction. As a result, the Intelligence Branch became part of a larger organization with a broader mandate including immigration intelligence, immigration enforcement, Canada Customs, and other border activities. As a result of this change, Security Review reported to the Minister of Public Safety. From roughly May of 2003 until May of 2004 new guidelines regarding the processing of

ministerial exemption applications were developed and encapsulated in the CIC Inland-Processing Manual (IP10).

[46] Although not made "formal" until February of 2005, the IP10 guidelines were implemented in their draft form. The guidelines introduced a new disclosure process whereby the security analysts' ministerial relief memoranda were disclosed to applicants before the files were presented to the Minister for consideration. Additionally, the IP10 guidelines discouraged immigration officers from providing recommendations with respect to ministerial relief. Immigration officers, henceforth, were to determine admissibility and forward applicants' submissions on ministerial exemption to Security Review where analysts would be charged with preparing recommendations for the Minister. The chain of command changed dramatically and is best left to be described by the chart depicting it which is attached to these reasons as Schedule "B" (Exhibit D113).

[47] In early 2005, Security Review was renamed the "Counter-Terrorism" unit within CBSA. The Director of Security Review became the Manager of Counter-Terrorism. Although the unit retained responsibility for matters pertaining to espionage and subversion, it was, and is, highly focussed on "membership in terrorist groups".

The Evidence

[48] Twenty-one witnesses testified at the trial. I do not intend to delineate their evidence here. Rather, it will be reviewed, as required, in my analysis of the issues. Ms. Haj Khalil's evidence was lengthy. The summary provided below is an overview of the evidence that is

necessary for an understanding of the issues that are relevant to this action. Her evidence also will be referenced, as necessary, elsewhere. Anmar and Acil El Hassen's testimony will be mentioned here and in my discussion of specific issues. Unfortunately, Mr. Riyad El Hassen did not testify. Consequently, many questions surrounding his intentions and actions remain unanswered, except as perceived by Ms. Haj Khalil.

[49] Ms. Haj Khalil was raised in Syria. In 1978, during her third year of university (faculty of engineering), following a referendum regarding the re-election of President Hafez Assad, she was arrested by the Syrian Intelligence Forces in connection with the distribution of pamphlets. She was suspected of being a member of the Syrian Communist Party and a member of the political bureau of the Communist Party. She was detained, beaten and tortured for a period of four months. She was repeatedly questioned about her fiancé's affiliations with the Communist Party, the political bureau and Fatah. She was eventually released when her father paid a bribe.

[50] Upon her release, she joined her fiancé, Mr. El Hassen, in Lebanon. They were married in July of 1978 in Beirut. In terms of obtaining employment in Lebanon, Ms. Haj Khalil's recollection at the trial was somewhat confused (Transcript, pp. 270-271). However, the Request to Admit Facts and the Reply indicate that at the end of 1978, Ms. Haj Khalil began to write small local affairs pieces for the Palestine Liberation Organization (PLO) papers in Beirut. Her husband had already been writing for the PLO "*Al-Quaeda*" (the base) and "*Sout Falestine*" (voice of Palestine). On June 1, 1979, Ms. Haj Khalil and her husband became full-time writers for *Filastin al Thawra* (Palestine, the Revolution).

[51] The *Filastin al Thawra* (FAT) was the official publication of the PLO. It consisted of a daily newspaper and a weekly magazine. The couple wrote for FAT in Lebanon from 1979 until 1982. Ms. Haj Khalil used the name "Amal Ghanem" both for writing and for all other purposes. She was known as Amal Ghanem. Ms. Haj Khalil testified that her function was to report events or news. This task consisted of condensing information provided to her. There was no opportunity for the expression of personal opinion. Occasionally, some analysis of the events was provided, but it had to be within the scope provided by the editor-in-chief of FAT.

[52] In 1982, they had to leave Lebanon. Mr. El Hassen left for Tunisia and Ms. Haj Khalil returned to Syria where she remained for one month before joining her husband in Tunisia. The couple's children were born in Tunisia. While there, Ms. Haj Khalil continued doing the same work for the FAT magazine. At that time, she wrote about one article per week. When she was in Lebanon and Tunisia, Ms. Haj Khalil returned to Syria to visit her parents. From Lebanon, she would borrow a friend's ID and cross the border. From Tunisia, she used her Syrian travel document. She ceased visiting her parents in 1990 when her father-in-law received a "summons" requiring her presence for questioning at the security office in Damascus in relation to her smuggling, out of Syria of the names of imprisoned persons.

[53] In 1993, after the Oslo Accords, Ms. Haj Khalil was to return to Syria. When she objected, she was offered a position writing for FAT in Iraq. She declined and her employment was terminated. The family applied for visitor visas for the United States. Mr. El Hassen's application was rejected. Ms. Haj Khalil and the children travelled to the United States and then

to Canada. When they arrived in Canada and made refugee claims, her claim was assessed in relation to persecution in Syria.

[54] In her personal information form (PIF), and at her refugee hearing, Ms. Haj Khalil described the torture she had sustained during her detention in Syria. She also relied on the "continuing criticism" in her writing "of the Syrians in Lebanon, and as the rift between the PLO Fatah and the Syrian government deepened, of Syria itself". She claimed that if it "has been discovered, or ever was discovered, that [she] was 'Amal Ghanem', [she] would be imprisoned indefinitely in Syria". The final paragraph of her PIF stated:

> I believe that I cannot return to Syria because of my past experiences there. I have further participated in the collection of human rights details which have probably been used to embarrass the Syrian government further complicating the issue. And further still, I believe that I have now caused offence to the Syrian authorities by failing to acknowledge their summons and surrender and for all of these reasons I believe I will suffer long term detention in Syria where my death may either result from purposeful torture or from the conditions and treatment in Syrian prisons. Furthermore I cannot predict or otherwise know whether my employment and membership in the PLO-Fatah has been discovered but I have no doubt that I would be apprehended immediately upon entering Syria for having smuggled human rights material from Syria. As a detainee I would undergo great pressure to admit to my errors and under torture might reveal my own culpability as a former anti-Syrian writer for the PLO faction Fatah.

[55] To support her claim, Ms. Haj Khalil submitted three articles that she claimed to have written. As earlier noted, she was successful before the Immigration and Refugee Board. She and the children were determined to be Convention refugees.

[56] Ms. Haj Khalil testified that when she applied for permanent residence, she listed her husband and her children as dependants. She denied that her husband told immigration officials that he did not want to come to Canada. She referred to her affidavit (sworn following the first inadmissibility determination) exhibiting the first page of his application for permanent residence date-stamped as being received in the Canadian Embassy, in Tel Aviv, Israel. Ms. Haj Khalil's evidence regarding her husband's current position was confusing. She stated first that she did not think he is the deputy minister [of the Palestinian Authority]. After some discussion regarding the correlation between rank and salary, she said, "He is, if he is a deputy minister, and it's a great possibility he is, it's the employment ranking" (Transcript, p. 948). She claimed that if the newspapers say that her husband was a campaign manager for Fatah, "it means that it is true" (Transcript, p. 946).

[57] Regarding her plans, Ms. Haj Khalil stated that when she arrived in Canada she did not speak English. She began attending a program for language but when she learned of the Adult Learning Centre, where she could obtain her high school equivalency diploma, she combined the two programs and received her Ontario high school diploma in the summer of 1996. She intended to enter St. Clair College to take business and then find a part-time job. However, as a Convention refugee, she did not qualify for the Ontario Student Assistance Program (OSAP) and she said that she could not attend. Instead, she began a program at the Women's Enterprise Skills Training of Windsor (WEST), which she described as "a school for language, also for LINC program and computer programs" (Transcript, p.582). My understanding is that this program involved some hands-on training. Ms. Haj Khalil was assigned to the CIBC Bank on Walker Road. She testified that she was discriminated against when she was not hired as a teller

(upon the completion of her training program) on the basis of her Social Insurance Number (SIN) 900 series number and her status as a refugee.

[58] Following this experience, she applied at the Toronto School of Business but was again unable to attend because of her inability to qualify for OSAP. Eventually, she did take courses at St. Clair College which she completed just prior to her move from Windsor to Ottawa. She stated that she sought out jobs of every kind but was never called for an interview. She believed this was the result of her 900 series SIN. She volunteered in various capacities and ultimately obtained part-time employment at an accounting firm. She has not worked since she moved to Ottawa in August of 2003.

[59] Ms. Haj Khalil stated that her life was in limbo. Referring to her affidavit sworn in support of her application for judicial review of the first inadmissibility decision, she claimed that every year she had to go through the "renewal of the student authorization, renewal of health card, and lately renewal of social insurance number". She maintained that "[she] kept busy with going after these things" and she felt that it consumed "a lot of [her] mind". She viewed it as "disgraceful that [her] life [was] going around renewing papers, for what reason [she didn't] know". She feels that she does not have "ownership of [her] own destiny". She asked "what is the future? One week, two weeks, my life…50 years, 100 years? It is inhumane to leave people like that" (Transcript, p. 479-480).

[60] When asked about the effect of the physical separation of her husband from the family, Ms. Haj Khalil stated:

> Actually, it's…it is hard for all of us, not my children, because I can watch my children growing up in Canada, and, whether they have the papers or not, they actually, they are Canadian. It's not a paper. It's how you have been raised. They grow up in this country. They think the Canadian way. Their mind is Canadian.
>
> To watch your kids growing up without a dad, have to take care of every single thing. Every single thing. Take them to doctors. Take them to labs, for doing, whether it's blood test, urine tests, whatever. Take them to go with them to school, for either interview with teacher or…This is too much for me by myself. Too much. It's not only too much for me, because I am by myself. (Transcript, pp. 535, 536).

[61] She testified that, initially, telephone contact with her husband was once a week and she often made the calls. When Acil began to experience migraine headaches, Ms. Haj Khalil and her husband decided that he would call each morning to wake Acil for school. Consequently, the calls are now made on a daily basis. Ms. Haj Khalil stated that her husband "plays a big, big role in their life. Every problem we have, we talk to him about it" (Transcript, p. 538).

[62] In discussing her medical condition, Ms. Haj Khalil was unable to say when she first felt depressed. She suggested "maybe six years, maybe seven years, maybe five years" (Transcript, p. 657). She consulted a psychiatrist, Dr. Ross, in Windsor in either 2001 or 2002. She spoke of suicide with her Ottawa psychiatrist, Dr. Dimmock, but stated that she will not do it because she believes that her children still need her. She resisted taking medication because it was useless. She felt that she needed counselling, but the Ontario Health Insurance Plan (OHIP) does not cover psychologists. She said that she had been diagnosed with fibromyalgia. Her understanding was that her fibromyalgia and arthritis were the result of her stress and depression. She did not believe that there was any treatment for fibromyalgia, but the arthritis medication

"gets [her] better" (Transcript, p. 1366). She also said that she suffered from severe migraine headaches and did not know what brought them on. She endured panic attacks and stated that they were precipitated by interviews with immigration officers. She also had memory problems that come and go.

[63] Anmar testified that he had difficulty adjusting when he arrived in Canada. He felt different than the other children. As time went on, he realized that others had their fathers while he did not. Because Windsor was a border town, school trips and social events often involved crossing the border to Detroit. He was not able to attend because once he left the country, he did not have the required authorization to re-enter.

[64] Anmar was heavily involved in the Canadian Forces cadet program. He very much enjoyed his years as a cadet except for two occasions when the members of his corps attended functions in the United States and he was unable to accompany them. Additionally, he stated that he lost out on a summer employment opportunity because he was not a permanent resident at the time.

[65] Anmar was able to obtain part-time employment. He stated that although he got jobs, they were not the jobs that he wanted. He attributed this problem to his 900 series SIN.

[66] Anmar was a strong student during his public school days. When he entered university, he aspired to become a medical doctor. As a result of his attendance at informational seminars, he learned that the medical schools in which he was interested required applicants to be

Canadian citizens or permanent residents. He attributed the decline in his marks (lower than his capability) to this knowledge.

[67] When he entered university, Anmar did not qualify for OSAP and had to borrow the money to attend school from his maternal uncle. He later repaid most of the money to his uncle with money from his father. Anmar said that he will have to repay his father when he is finished university and begins working. When OSAP became available to him, he elected not to pursue it because he would rather owe money to his family than to the government.

[68] Anmar stated that he missed having his father in his life. The telephone calls were not a substitute for physical contact. He testified that he will see his father when he attends medical school in Dubai.

[69] With respect to the applications for permanent residence, Anmar testified that, for the most part, he was not aware of the details until he was older. His mother had looked after everything and had not shared much information. He did recall discussion about severing his application and his sister's from their mother's application. He supported his mother's decision not to sever although, eventually, he and his sister did apply separately and were granted permanent resident status.

[70] Acil's testimony was similar to that of Anmar. She too had missed out on school field trips and shopping trips across the border. She knew little of the difficulty with the applications for permanent residence until recently. She was inclined to be very private and, with two

exceptions, she did not discuss her situation with her friends. She had been successful in obtaining part-time employment before she was a permanent resident.

[71] She and her father have an extremely close relationship which was evident in the manner in which she described him. She stated that her father sent money and gifts from Gaza and sent her gifts of clothing when he travelled. She had plans to meet her father in Cairo over the summer. Acil expressed resentment over the fact that her father had been in Detroit when the family was in Windsor, yet, they could not see him. Acil's plans were to attend university this fall. At the time of trial, she had not yet decided on which school.

Delay

[72] The plaintiffs regard CIC's delay in processing their application as the foundation upon which their action rests. They point to a time-line beginning with the date upon which the application was submitted in January of 1995, flowing through to the present and claim that a decision has yet to be made. That is not totally correct. While it is true that Ms. Haj Khalil does not have a decision at this time, it is not accurate to say that she has been more than 12 years without a decision. She received an inadmissibility determination on February 25, 2000.

[73] It seems to me that the processing of Ms. Haj Khalil's application entails two discrete stages. The first stage encompasses the period from the submission of the application through to the date of Justice Gibson's order. The second stage begins with the date of Justice Gibson's order and continues through to the present. In examining the file's progression through each of these stages, I do not intend to detail the innumerable entries in the various data bases nor will I refer to every

inquiry, response or conversation that occurred. It is sufficient to relate how and when the file wended its way through the process.

Stage One

[74] To reiterate, the application was submitted in January of 1995. It went to CPC Vegreville where the requests for background checks were initiated in a timely manner. Ms. Haj Khalil received provisional approval of her application, pending fulfillment of all legal requirements in relation to her and her dependents. The legal requirements typically include medical and criminality checks and security screening.

[75] The CSIS interview with Ms. Haj Khalil was conducted in May of 1996. CPC Vegreville informed Ms. Haj Khalil, in April of 1997, that her husband had not submitted his application. The CSIS screening brief, dated July 31, 1997, was sent to CIC Security Review. Upon its receipt, the Director (Mr. Taylor) briefly reviewed the file and noted that Ms. Haj Khalil, although likely inadmissible, could be a good candidate for ministerial relief. He expressed concern about her husband, whom he felt was perhaps more "operationally active" than Ms. Haj Khalil claimed, and transferred the file to Security Review analyst Ralph Sullivan.

[76] Meanwhile, information transmitted from the Canadian Embassy in Tel Aviv, Israel, raised questions regarding whether Ms. Haj Khalil was residing in Canada or the United States. This transmission was proximate to a report received in CPC Vegreville that Ms. Haj Khalil was driving a vehicle with U.S. licence plates.

[77] Mr. Sullivan's task was to review the file in greater detail. As a result of his departure from the department, Ms. Haj Khalil's file was transferred to analyst Diane Toikko. When Heather Weil joined the department, the file was transferred to her. Ms. Weil reviewed the CSIS screening brief, made additional inquiries about the file, conducted independent research, provided an analysis and made a recommendation that Ms. Haj Khalil "may not make a good candidate for ministerial relief". Approximately seven months had passed since Mr. Taylor's preliminary observations. Ms. Weil's recommendation was forwarded for Mr. Taylor's approval.

[78] Once Mr. Taylor approved the recommendation, a CIC Security Review memorandum (the Weil memo) was prepared and sent to the regional office in Toronto. From there, it was forwarded to the CIC local office in Windsor. The memo included the CSIS screening brief and provided background information on terrorism. It explained the rationale for the admissibility provisions and the ministerial exemption and identified points of concern that could be resolved when Ms. Haj Khalil was interviewed in Windsor.

[79] The file arrived at the Windsor CIC office in the summer of 1998. The local office manager, Gerry Belanger, promptly reported back to Security Review that, due to backlog and summer absences from the office, he could not assign the file until September. Subsequently, the file was allocated to Kelly White, one of two senior immigration officers within the enforcement branch in Windsor. Ms. White's task was to determine whether Ms. Haj Khalil was admissible. If Ms. Haj Khalil was not, Ms. White would also include her recommendation regarding ministerial relief. In preparation for her interview with Ms. Haj Khalil, Ms. White reviewed the CIC Security Review information package and drafted a list of questions to ask of Ms. Haj Khalil.

[80] Ms. White conducted an interview with Ms. Haj Khalil in November of 1998 and prepared a report (the White report) setting out her reasons for concluding that Ms. Haj Khalil was inadmissible. Because Ms. Haj Khalil was a Convention refugee, Ms. White recommended "no action" with respect to the inadmissibility decision, that is, the case would not be referred to an admissibility hearing (Ms. Haj Khalil would not be subject to removal from Canada). Regarding ministerial relief, Ms. White's recommendation stated that Ms. Haj Khalil was not a good candidate at that time, but her case should be reviewed in the future. The White report required the concurrence of Ms. White's supervisor before it became final. Ms. White's decision and recommendation were communicated to Security Review in Ottawa. Security Review received the report in February of 1999.

[81] Because the Weil memo indicated that it was not Ms. White's role to advise Ms. Haj Khalil of the opportunity to seek ministerial relief, Ms. White did not so advise Ms. Haj Khalil. However, when Ms. Haj Khalil appeared at the Windsor CIC office the day following the interview and provided documents relating to her establishment in Canada, Ms. White included the documents in her package to Security Review.

[82] In January of 1999, the Haj Khalil file at CIC Security Review had been transferred from Ms. Weil back to Ms. Toikko. Office protocol dictated that the analyst with carriage of the file would review the admissibility report (which included the ministerial relief recommendation) and indicate whether the analyst concurred with the findings. Then, the admissibility report was

presented to the Director of Security Review. At the time, Mr. Brian Foley was temporarily replacing Mr. Taylor.

[83] Ms. Haj Khalil, not having received a copy of the White report, made a request under the *Privacy Act*, R.S.C. 1985, c. P-21 in relation to her CIC records. This request "hampered" Ms. Toikko's ability to deal with the White Report and resulted in a six-month delay of Ms. Toikko's response to the White report. Ms. Toikko indicated her concurrence in July of 1999 and Mr. Foley's opinion was obtained approximately one month later. In August of 1999, Ms. Toikko communicated to Ms. White that Security Review agreed with her recommended course of action. Ms. White was instructed to advise CIC Security Review when the application for landing was formally refused. Ms. Toikko indicated that Ms. White could contact her if she required assistance in the preparation of the refusal letter.

[84] In November of 1999, Ms. White forwarded a draft refusal letter for Ms. Toikko's review. In December of that year, the file within Security Review was transferred from Ms. Toikko to analyst Audrey Mitchell. Ms. Mitchell consulted with Legal Services regarding the refusal letter. Minor modifications were suggested. The changes were transmitted to Ms. White and she issued the final refusal letter to Ms. Haj Khalil in February of 2000.

[85] Since neither Ms. Haj Khalil nor her counsel had requested ministerial exemption (in the event of an inadmissibility finding), and since the White report contained an inadmissibility determination and a negative recommendation regarding ministerial relief with which CIC Security Review agreed, no Security Review memorandum was prepared. Had the Security Review analyst

and Director disagreed with Ms. White's recommendation regarding ministerial relief, a Security Review memo recommending ministerial exemption would have been prepared and forwarded up the chain of command to the Minister.

[86] Ms. Haj Khalil filed an application for leave and judicial review of the White "inadmissibility" decision. In July of 2000, Mr. Taylor requested an update on Ms. Haj Khalil from CSIS. As noted earlier in "The Chronology" portion of these reasons, in November of 2001, Mr. Justice Gibson allowed Ms. Haj Khalil's application for judicial review.

[87] Throughout this time-frame, Ms. Haj Khalil and her counsel made several inquiries of CIC officials regarding the progress of the application. Letters of inquiry were sent to CIC officials by her local Member of Parliament, the Honourable Herb Gray. In one or two instances, the responses provided by CIC officials turned out to be incorrect. Generally, the inquiries during this period were accompanied by timely and appropriate responses.

[88] The processing time for Ms. Haj Khalil's application (from January of 1995 until she received the White report in March of 2000) appears protracted. The question is whether the time frame was unreasonable, inordinate or inexcusable. While I consider the processing time to be at the outer edge of the range, I do not find that it crosses the line into the realm of unreasonable, inordinate or inexcusable.

[89] The context is important. Security Review and the local offices had no choice but to operate within the resources put at their disposal. The timing of Ms. Haj Khalil's application coincided with

the shift in focus from counter-intelligence and counter-surveillance to counter-terrorism. This represented new territory for Security Review and local office personnel. Applications for permanent residence, absent concerns, were normally processed in approximately one year.

[90] Mr. Taylor explained that cases that were "geographically complex", that is, cases involving applicants who had lived in various countries and had dependents who lived in various countries tended to take more time to review. In Ms. Haj Khalil's case, she had lived in Syria, Lebanon and Tunisia, as had her husband. Additionally, her husband was, or had been, in France and Gaza.

[91] There were indications of concern with respect to Ms. Haj Khalil's residence, specifically whether she was residing in Canada or the United States. These concerns prompted investigations.

[92] Ms. White testified about her wide variety of responsibilities. These included: conducting interviews with potentially inadmissible individuals; dealing with violations of the Act; dealing with refugee eligibility claim processing; escorting people out of the country; responding to field calls and engaging in field investigations. The Windsor local CIC office was responsible for a geographical area that extended to Grand Bend, including Sarnia. The officers carried pagers after hours.

[93] The operational requirements of the Windsor office prevented the Khalil matter from being dealt with over the summer months. The inexperience of both senior immigration officers in relation to security cases compounded the two-month delay. Ms. White, having had no previous involvement in such cases, learned that a training course was scheduled for the fall of 1998. She

elected to postpone Ms. Khalil's interview until she (Ms. White) had obtained the benefit of the training that was offered in October. She interviewed Ms. Haj Khalil the following month (November). Her determination was forwarded to Security Review within 2 ½ months of the interview.

[94] The departmental policy of the day precluded notification of negative determinations to applicants (until completion of the assessment regarding potential ministerial relief). The former editor (a witness at the trial) obtained permanent residence because he was granted ministerial exemption without ever knowing that he had been determined inadmissible. In Ms. Haj Khalil's case, however, the recommendation for ministerial relief was negative. Mr. Taylor concurred with the analyst's view that there were concerns about Ms. Haj Khalil's credibility, her associations (past and current) and her husband's activities. There were also "establishment issues" (including her reliance on social assistance since her arrival in Canada). A positive recommendation was considered inappropriate at the time.

[95] Mr. Taylor was the Director of Security Review until May of 2002. He is now retired. He was an impressive witness who explained that "unsuitability" could change within a "couple of years". His approach was to "keep the door open" and allow an applicant such as Ms. Haj Khalil more time in Canada to enable her to better establish herself and explain the discrepancies. Also, time enabled Security Review to gain additional information about her associations and her husband's activities. In Mr. Taylor's words, Canada doesn't "want to keep people in limbo any longer than necessary". His philosophy prompted him to request a CSIS update in July of 2000 in order to initiate a further review of Ms. Haj Khalil's file. Mr. Taylor also testified that it was not

unusual for an inadmissibility and potential ministerial exemption case to take three to five years to process.

[96] There were periods of delay that probably should not have occurred. The file appears to have been shuffled from analyst to analyst at CIC Security Review. However, viewed in totality, and given the policies and practices of the time coupled with the resources available, I do not find the process to have been so hampered that I would characterize the delay as unreasonable, inordinate, or inexcusable. The time frame, in the circumstances, does not offend the community's sense of decency and fairness.

[97] As for the application for leave and judicial review in the Federal Court, it took 11 months for leave to be granted. The Court, as well, was operating on limited resources. Judicial positions that had been allocated had not been filled at that time and there existed a shortage of judges to adjudicate on the large backlog of leave applications. The delay, regrettably, was unavoidable.

[98] Notably, Justice Gibson allowed the application for judicial review and denied Ms. Haj Khalil's request for a hearing on the basis that the issue was moot. In so doing, he provided an analysis and his reasons reveal that he considered the arguments advanced by Ms. Haj Khalil. Indeed, Justice Gibson specifically directed that the redetermination was to be made on the basis of "open information" (the White report included classified information). It is, in my view, reasonable to infer that Justice Gibson did not consider that the delay had been excessive or inordinate at that time. Were it otherwise, his reasons, in all likelihood, would have so indicated.

[99] All of which is to say that I do not find that the delay during the first stage was unreasonable or inordinate.

Stage Two

[100] The second stage (starting on November 16, 2001) began in the aftermath of September 11th and the Ahmed Ressam case. Mr. Taylor completed his term as Director of Security Review in May of 2002 and was replaced by Kathleen O'Brien. Ms. O'Brien, after one year, was replaced by Mr. Louis Dumas in May of 2003.

[101] As noted earlier, Ms. Haj Khalil's counsel demanded that the application be determined within two weeks. The matter was assigned to Mr. John Swizawski, senior immigration officer, in the Windsor CIC local office. He was tasked with reviewing the file (which no longer included the CSIS screening brief and the Weil memo) and re-interviewing Ms. Haj Khalil to determine her admissibility to Canada. Mr. Swizawski immediately informed his supervisor in Windsor that he could not comply with the requested time frame. CIC counsel responded to Ms. Haj Khalil's counsel's correspondence and indicated that the file would be expedited, but could not be finalized within two weeks.

[102] Mr. Swizawski received revised instructions on determining admissibility along with "open source" information on the PLO and its constituent groups from Security Review analyst Roseanne Da Costa. In addition to reviewing the information provided to him, Mr. Swizawski conducted his own internet research on the PLO. In preparation for his interview with Ms. Haj Khalil, Mr.

Swizawski drafted questions and requested that Ms. Da Costa review them before the scheduled interview.

[103] By this time, Security Review had become part of the newly-created Intelligence Branch. The protocol for local immigration officers regarding ministerial exemption had become more formalized. The details in this respect have been discussed elsewhere in these reasons.

[104] Mr. Swizawski interviewed Ms. Haj Khalil on March 1, 2002. On June 3rd, Ms. Haj Khalil's counsel's written submissions asserted that Ms. Haj Khalil was not inadmissible and requested, in the alternative, that she be considered for ministerial relief. On July 31, 2002, Mr. Swizawski determined that Ms. Haj Khalil was inadmissible. Mr. Swizawski was not certain that he had authority to "deal with" the ministerial relief (to make a recommendation) but he understood that he could put forward information from Ms. Haj Khalil on this issue to CIC Security Review. Ms. Haj Khalil's request for a copy of Mr. Swizawski's report was met with the response that she could access it through a formal privacy request.

[105] Upon receipt of Mr. Swizawski's report, analyst Da Costa prepared Security Review's memorandum regarding ministerial relief (the Da Costa memo). The Da Costa memo was completed in September, transferred to Brian Foley who finalized it in December and placed it before Director O'Brien for approval in December of 2002. The memo was not forwarded through the chain of command to the Minister because the ministerial directive regarding the structure of memoranda from the three different units of the Intelligence Branch had issued and all memoranda were held back. During the review period, Security Review continued its preparation of

memoranda in the expectation that analysts would simply amend them once the review process was completed.

[106] During Ms. O'Brien's tenure, due to September 11th, an increased focus on national security and "border pressure" characterized the work at Security Review. Processing priorities included the admissibility determinations of persons posing an immediate risk to national security, security certificate files, and visitor visa applications, in that order.

[107] Ms. Haj Khalil's counsel twice requested information regarding the status of her application during this period. The evidence indicates that, in response to an inquiry from Mr. Swizawski, he (Mr. Swizawski) was informed that the memo for the Minister had been prepared but would be submitted only when the review process had been completed.

[108] When Mr. Dumas replaced Ms. O'Brien as Director of Security Review, he immediately set about addressing the backlog of files. First, he directed that an inventory be taken. This process took several months. Upon ascertaining that there were 1064 admissibility files (which required analysts to comment on CSIS screening briefs before forwarding their memos to local CIC offices) and 120 ministerial relief memos (which had been placed on hold during the review process) Mr. Dumas decided to prioritize the admissibility files and "park" the ministerial relief files.

[109] The unit first focussed its attention on clearing approximately 600 files for which the CSIS screening briefs indicated little information to conclude that the individuals in question were inadmissible. The rationale underlying this decision was that it would facilitate the landing of these

people and avoid further delays in the processing of admissibility files. Then, the unit turned to the roughly 400 files where the CSIS screening briefs contained sufficient information that immigration officers might reasonably conclude that the persons in question were inadmissible to Canada. Incoming admissibility files would be processed in "real time". Upon completion of its work in relation to these 1000 or so files, Security Review would then turn its attention to the 120 ministerial relief applications in the backlog.

[110] Curiously, by correspondence dated October 3, 2003, in response to a query from Ms. Haj Khalil's counsel, an official signing for Mr. Dumas, indicated that Ms. Haj Khalil's "submissions and our recommendations are presently before the Minister of Citizenship and Immigration, Denis Coderre, for decision. Unfortunately, we are not able to provide you with an estimated time frame when a decision will be rendered" (Exhibit P-76). Mr. Dumas testified that the information in the correspondence was erroneous for the Haj Khalil matter had not been forwarded to the Minister.

[111] In November of 2003, Mr. Dumas asked CIC Security Review analyst Lara Oldford to provide him with a "short synopsis" of the Haj Khalil file. The Oldford response explained that the Da Costa memo, prepared in September of 2002, had never been placed before the Minister because of the Minister's request for review of the memoranda. Ms. Oldford indicated that the memo was ready for signature and recommended that the memo be sent up through the chain of command.

[112] In December of 2003, the CBSA was created. The developments and consequences in this regard have been discussed earlier under "The Departmental Protocol" section of these reasons.

[113] In the spring, Security Review began to address the 120 ministerial relief applications and the first ministerial relief memo went to the Minister in May of 2004. The new IP10 guidelines were in use. Near the end of June of 2004, Lara Oldford (now Lara Armit) penned a memo explaining that the new guidelines and procedures surrounding the ministerial relief process mandated an updated assessment of the Haj Khalil file. In May, Ms. Armit drafted a new memo with respect to Ms. Haj Khalil's application.

[114] In January of 2006, Security Review (now Counter-Terrorism) produced yet another memo with respect to Ms. Haj Khalil's request for ministerial relief. This memo (the Zangari memo) was disclosed to Ms. Haj Khalil and she replied in February. Her response noted inaccuracies in the memo. Counter-Terrorism decided to correct the errors and "re-disclose" to Ms. Haj Khalil before forwarding the memo to the Minister. The revised Zangari memo was disclosed in August. Counsel requested additional time to reply. At the end of October, Counter-Terrorism notified Ms. Haj Khalil that it was in receipt of new information concerning her file and that another revised memo would be forthcoming. Counter-Terrorism recommended that Ms. Haj Khalil wait until its analysts had an opportunity to complete the revision before tendering additional submissions. In January of 2007, a further revised Zangari memo was disclosed to Ms. Haj Khalil.

[115] Mr. Dumas was appointed the Director of National Security at CBSA in October of 2006. Brian Foley replaced him as Manager of Counter-Terrorism. Although it is not evident from the record when a decision to render a new determination on Ms. Haj Khalil's admissibility was taken, it is clear that someone decided that the Swizawski determination was "stale-dated" and a new admissibility determination would be necessary. At the time of trial, the new admissibility

determination remained outstanding. Ms. Haj Khalil's file had not been placed before the Minister of Public Safety because of Counter-Terrorism's desire to draft a new memo if and when Ms. Haj Khalil is determined inadmissible. It is not clear to me whether, as a result of the cross-examination of Mr. Dumas, Ms. Haj Khalil intends to reply to the existing memo in an effort to have the matter forwarded to the Minister before the new admissibility determination is provided to her.

[116] It seems to be stating the obvious to say that the delay during stage two has been inordinate and unreasonable. However, that may not be so for the entire time-frame. In fairness, there was significant apprehension and anxiety throughout the country in the aftermath of September 11th. Security Review was inundated and its volume increased to the point where, as Ms. O'Brien testified, overtime and shift work were the norm. Yet, on November 16, 2001, the determination on Ms. Haj Khalil's file was to be made, not at CIC Security Review, but at a local CIC office. On November 28, 2001, Security Review informed the local CIC office in Windsor that the Haj Khalil file should get priority. Ms. Da Costa forwarded CIC Security Review's instructions to Mr. Swizawski on January 31, 2002. Although the environment at Security Review was undoubtedly hectic, there was no explanation as to why it took two months to forward what would have been revised instructions.

[117] As noted earlier, Mr. Swizawski was quick to inform his supervisor that his work load was such that it was impossible for him to address the file within two weeks. At that time, Mr. Swizawski was on assignment four days per week with the RCMP Immigration and Passport Section assisting in alien smuggling and other immigration-related matters. He had only one day per week at the local CIC office to attend to his case load. Further, at that time, he was the only

senior immigration officer within the Windsor office's enforcement branch who could deal with the file. Mr. Swizawski testified that he felt ill-equipped to assume carriage of the Haj Khalil file. He had not had the benefit of the training session that Ms. White had attended. Because of his lack of training and his secondment to the RCMP, he doubted his ability to handle the file. He was aware that the CIC regional office in Toronto had a unit that dealt specifically with security cases and he suggested that it would be better if the Haj Khalil file was sent to Toronto. His request to his supervisor that the file be transferred to Toronto for assessment was refused. The reason for the refusal was not known to Mr. Swizawski and no evidence was called to explain it.

[118] In any event, in spite of his workload, Mr. Swizawski prepared the questions for his interview with Ms. Haj Khalil and forwarded them to CIC Security Review for its perusal. He interviewed Ms. Haj Khalil on March 1, 2002. The record is somewhat confusing at this point. Ms. Haj Khalil was represented by counsel in Windsor and also by counsel in Toronto. In May, her Toronto counsel requested a status report on the file but on June 3rd, her counsel in Windsor delivered extensive written submissions to Mr. Swizawski with respect to Ms. Haj Khalil's admissibility, and alternatively, her request for ministerial relief.

[119] Mr. Swizawski's report was completed and forwarded to CIC Security Review on July 31st. Security Review then went about its business and by December, the analyst's memo was on the Director's desk for approval. Because of the ministerial directive on the uniformity of memoranda, the moratorium on ministerial relief was in effect and the memo was not placed in the chain of command.

[120] I am not able to determine when the ministerial directive was issued. The evidence was sadly lacking in this respect. However, it seems more probable than not, had Ms. Haj Khalil's file been addressed in a timely manner by CIC Security Review (following its November 28th directive that it should receive priority), and had it been allocated to Toronto (as requested by Mr. Swizawski), it would not have been caught in the moratorium. In my view, in the face of an order of the Federal Court and the specific representation of CIC counsel that the file would be expedited, it ought to have been completed (including the ministerial review aspect) by the end of July of 2002. That constitutes a period in excess of eight months from the date of Justice Gibson's order. Instead, Ms. Haj Khalil's application remains outstanding.

[121] In relation to Mr. Dumas and his decision to "park" all ministerial relief files, he provided no justification for such action. When pressed on cross-examination for some explanation, he repeatedly stated what he did, but not why he did it. I acknowledge and accept that it is not for the Court to tell governmental departments how to go about their business. Yet, it cannot be right that a Convention refugee's application for permanent residence, submitted more than eight years prior, and returned by the Court for redetermination, would not only be put on the back burner, but would be virtually ignored. I found Mr. Dumas's evidence equivocal, defensive and generally unreliable. However, I do not find that he acted in bad faith or intended to cause Ms. Haj Khalil (or any applicant) harm.

[122] I do not disagree with the defendant Crown's submission that once Ms. Haj Khalil's judicial review application was allowed, the clock was reset. I agree that a fresh determination had to be made, but the clock was ticking in the context of what had transpired. Put another way, it was not

open to CIC to ignore the fact that Ms. Haj Khalil's file had been in the queue since January of 1995. Moreover, having had the benefit of the Oldford synopsis of the Haj Khalil file in November of 2003, Mr. Dumas chose to leave it "parked", contrary to Ms. Oldford's recommendation.

[123] I am cognizant of the defendant Crown's submission that the archivists retained by Counter-Terrorism confirmed that the articles submitted by Ms. Haj Khalil at her refugee hearing were not contained in any of the FAT publications. That may well be a factor for consideration when her admissibility or her ministerial relief application (neither of which are being assessed in this action) are determined. It is not probative in relation to the allegation of delay for no such inquiry was taken until this litigation was well underway. It appears that the request to the archivists was made sometime in 2006. It is not open to the Crown to use what it learned in 2006 to justify delay in 2003. The same reasoning applies to Ms. Haj Khalil's eve-of-trial disclosure of a new and previously undisclosed alias.

[124] Thus, for the foregoing reasons, I conclude that Ms. Haj Khalil's application ought to have been finalized by the end of July, 2002. I am not satisfied that delay beyond that date was adequately explained or justified. To the contrary, I find that the delay was inordinate and unreasonable. In a word, it was inexcusable. I have no difficulty in concluding that it would offend the community's sense of decency and fairness.

[125] However, my determination in this respect does not end the matter. Delay, *per se*, does not mean that the defendant Crown was negligent or that the plaintiffs' *Charter* rights were breached. It

is for the plaintiffs to establish these allegations. Accordingly, I turn now to the issues to be addressed.

The Issues

[126] There are four primary issues to be determined. Each entails an analysis of subsidiary issues. I will address them in the order in which they were argued.

(1) The Threshold Issue – Do the principles enunciated in *Grenier* and *Prentice* mean that the plaintiffs' action is barred?

(a) *res judicata*

(b) *Grenier*;

(2) The Allegation of Negligence

(a) duty of care

(b) causation;

(3) The Alleged *Charter* Breaches

(a) section 7

(i) liberty interests

(ii) security of the person interests

(b) section 15;

(4) The Constitutionality of paragraph 34(1)(f) of the IRPA

(a) section 2 of the *Charter*

(b) section 15 of the *Charter*

(c) subsection 34(2) of the IRPA.

The Threshold Issue – Do the principles enunciated in *Grenier* and *Prentice* mean that the plaintiffs' action is barred?

[127] The Crown asserts that the recent and clearly-enunciated principles in *Grenier v. Canada*, [2006] 2 F.C.R. 287; (2005), 262 D.L.R. (4th) 337; 344 N.R. 102 (F.C.A.) (*Grenier*) and *Prentice v. Canada*, [2006] 3 F.C.R. 135; (2005), 264 D.L.R. (4th) 742; 346 N.R. 201 (F.C.A.) leave to appeal dismissed, [2006] 1 S.C.R. viii (*Prentice*) constitute a "complete bar to any action for damages grounded in negligence or breach of *Charter* rights".

[128] I need not detail the Crown's comprehensive overview of what is described as the "divergence in the law predating *Grenier* and *Prentice*". Distilled, the Crown's position is that the plaintiffs must successfully and in a timely fashion exhaust their available judicial review remedies before they may proceed with an action for damages. It maintains that the pith and substance of the plaintiffs' claim relates to delay in an administrative decision-making process.

[129] The Crown notes that the dismissal of its motion to strike the plaintiffs' statement of claim in 2004 predates *Grenier* and *Prentice* wherein the Federal Court of Appeal clarified the law in the Crown's favour on this issue. Based on these recent clarifications, according to the Crown, it is beyond debate that "complaints of unreasonable delay in administrative proceedings must be

remedied by way of a judicial review application for a writ of mandamus or a declaration of unreasonable delay and not by way of an action for damages". The summary procedure relating to applications for judicial review was designed by legislators to lead to a quick and efficient resolution of administrative issues. In circumstances of administrative delay, mandamus is the most responsive remedy and, says the Crown, is best suited to put the plaintiffs in the position they would have been in, but for the delay. Moreover, the Federal Court is well suited and experienced regarding mandamus applications.

[130] In short, the Crown argues that the plaintiffs must first successfully and in a timely fashion exhaust available judicial review remedies, "including mandamus and/or a declaration before there is even a possibility of proceeding with an action for damages". There is no rational justification for exempting the administrative conduct of delay from the general application of the principles articulated in the noted authorities. As for the recent decision in *Samimifar v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 248, F.C.J. No. 926 (*Samimifar*), the Crown says that it has no bearing on the legal determination facing me because, in *Samimifar*, the Court of Appeal did not revisit a refusal of a Federal Court judge to summarily dismiss a delay claim. Moreover, the Court of Appeal made no pronouncements of law on the relevant issues and, in effect, it deferred to the judge's findings that there is a genuine issue for trial.

[131] For their part, the plaintiffs point first to the Court of Appeal's determination in *Samimifar* and then submit that Madam Justice Snider, having had the benefit of the *Grenier* decision, nonetheless determined in *Samimifar v. Canada (Minister of Citizenship and Immigration)* (2006), 58 Imm. L.R. (3d) 24, F.C.J. No. 1626 (F.C.) (*Samimifar 1*) that Mr. Samimifar is not precluded

from bringing his action (based on delay in the processing of his application for permanent residence) because he "did not first seek relief by way of extraordinary remedy under s. 18.1 of the *Federal Courts Act*". Further, the plaintiffs argue that they did seek mandamus when they commenced their application for leave and judicial review on March 15, 2000, in relation to the first inadmissibility decision.

[132] It seems to me that, although characterized as the determination of a question of law, the Crown's position, in substance, is a request of me to set aside or vary the Federal Court's order (denying the Crown's request to dismiss the plaintiffs' statement of claim) ostensibly on the premise that subsequent appellate court jurisprudence is inconsistent with the result arrived at by the Court in its determination. Indeed, the Crown acknowledges that it seeks to have me "revisit" the earlier determination. The *Federal Courts Rules* contemplate the setting aside or variance of an order "by reason of a matter that arose…subsequent to the making of the order" (see Rule 399(2)(a)). However, jurisprudence does not constitute a "matter" within the meaning of the rule: *Ayangma v. Canada* (2003), 313 N.R. 312 (F.C.A.).

Res judicata

[133] In my view, the Crown's argument constitutes a collateral attack on Madam Justice Heneghan's order. The issue advanced by the Crown as a threshold issue for determination in this proceeding is *res judicata*, specifically on the basis of *issue estoppel*. It is settled law that for *issue estoppel* to apply, three conditions must be met: the same question must have been decided in an earlier proceeding; the decision in the earlier proceeding must be final; and the parties must be the

same as those in the previous proceeding (mutuality): *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (*Danyluk*). All three conditions are met in this instance.

[134] The issue — whether the plaintiffs can bring this action without first having sought mandamus — was determined by Prothonotary Milczynski by order dated February 17, 2004. The Crown appealed that order and Justice Heneghan dismissed the appeal on May 19, 2004. Justice Heneghan did not refer the issue over to the trial judge for further determination. No appeal was taken with respect to Justice Heneghan's order. Consequently, her order constitutes a final order disposing of the issue. The elements of *issue estoppel* are made out.

[135] As to whether, as a matter of discretion, *issue estoppel* ought to be applied in this instance, I am of the view that it should. Justice Binnie stated in *Danyluk* that the application of the discretion is very limited in relation to determinations made by superior courts. Greater latitude exists in relation to the decisions of administrative tribunals. The factors enumerated in *Danyluk* are in the context of and primarily relate to an administrative tribunal. I see nothing in the circumstances of this case such that the usual operation of the doctrine of *issue estoppel* would work an injustice.

[136] I should also state that I have not overlooked that in some recent cases it has been accepted that *issue estoppel* or *res judicata* may not apply to bar a claim where there has been a change in circumstances, including a change in the law: *Robb v. St. Joseph's Health Care Centre* (2001), 5 C.P.C. (5th) 252 (Ont. C.A.) (*Robb*). As explained by Justice Rothstein, then of the Federal Court of Appeal, in *Metro Can Construction Ltd. v. Canada* (2001), 203 D.L.R. (4th) 741; 273 N.R. 273 (F.C.A.), the cases cited in *Robb* allow for "the exercise of discretion by a court, in special

circumstances, in deciding whether to permit an issue, that would otherwise be prevented from being raised by reason of *res judicata* or *issue estoppel*, to be relitigated in subsequent proceedings" (my emphasis). That is not the situation here.

Grenier

[137] In any event, even if I were to conclude otherwise regarding the doctrine of *res judicata*, I am not convinced that the Crown's position is correct. The *Grenier* decision involved an inmate who was placed in administrative segregation for fourteen days after an incident involving a correctional officer. Rather than challenging the administrative segregation decision by way of judicial review, the inmate brought an action in damages three years later. At trial, the prothonotary concluded that the administrative segregation decision was arbitrary. Liability was found to be established and damages were awarded. The Federal Court dismissed the Crown's appeal. On appeal to the Federal Court of Appeal, the primary issue was whether it was necessary for the litigant to attack the administrative segregation decision by way of judicial review before bringing an action in damages.

[138] Mr. Justice Létourneau, writing for the Court, held that the decision of Madam Justice Desjardins in *The Queen v. Tremblay*, [2004] 4 F.C.R. 165; 244 D.L.R. (4th) 422; 327 N.R. 160 (F.C.A.) (*Tremblay*) applied. At paragraph 20, Justice Létourneau stated:

> For the reasons expressed below, I think the conclusion our colleague, Madam Justice Desjardins, arrived at in *Tremblay*, is the right one in that it is the conclusion sought by Parliament and mandated by the *Federal Courts Act*. She held that a litigant who seeks to impugn a federal agency's decision is not free to choose between a judicial review proceeding and an action in damages; he must proceed by judicial review in order to have the decision invalidated.

[139] In arriving at this conclusion, Justice Létourneau provided the following reasons:

- compromising of legal security
  - permitting litigants to impugn administrative decision by way of action instead of judicial review is also to allow an infringement of the principle of finality of decisions and the legal security that this entails;
  - these principles exist in the public interest and Parliament's intention to protect this interest is illustrated by the short time limit allowed for challenging an administrative decision.
- promotion of indirect challenges
  - the principle of the finality of decisions likewise requires that in the public interest, the possibilities for indirect challenges of an administrative decision be limited and circumscribed, especially when Parliament has opted for a procedure for direct challenge of the decision within defined parameters;
  - of concern is the increased likelihood of attempted collateral attacks as a means of circumventing the deference which often results from a pragmatic and functional analysis.
- the prothonotary's lack of jurisdiction to hear an application for judicial review
  - to find the appellant liable as a result of administrative segregation, the prothonotary had to review the lawfulness of the institutional head's decision ordering it and set it aside. If the respondent had proceeded directly by an application for judicial review, as required by subsection 18(3) [of the *Federal Courts Act*], the prothonotary would have had no jurisdiction to carry out such a review;
  - the collateral attack undertaken by the respondent therefore enabled the prothonotary to assume and exercise a jurisdiction reserved to a Federal Court judge, thus doing indirectly what the *Federal Courts Act* and the Rules do not allow him to do directly.

[140] In *Grenier*, the expressed concern of the Court was the possibility of a litigant launching an action in damages in order to circumvent the judicial review process (either by seeking to avoid the

deference accorded to administrative decision makers when reviewed at the Federal Court or finding a means to secure a remedy when the litigant was out of time to bring a judicial review application).

[141] *Prentice* involved a member of the RCMP who took part in UN peacekeeping missions overseas. After he was released by the RCMP for medical reasons, he brought an action in the Federal Court claiming damages for breach of his *Charter* rights, specifically section 7. The Federal Court of Appeal held that the action was a disguised claim for a disability pension and that it did not come within the framework of an action in damages. Because the compensation which he sought could be recovered under various federal statutes, *Prentice* could only claim (in the action under section 7 of the *Charter*) the difference in compensation. However, the action was certain to fail, even if there was a violation of section 7 of the *Charter* and even if his action under the *Charter* was not precluded by Crown immunity. Mr. Justice Décary, writing for the Court, concluded at paragraph 76:

> My conclusion is consistent with what the Court has recently decided, in *Grenier*: a plaintiff who wishes to bring action against the Crown in civil liability for damages must first exercise the remedies he or she is offered by administrative law. Section 24 of the Charter is not a life preserver for rescuing parties who fail to exercise the remedies that they have under the "ordinary" laws. It is not the role of the Federal Court to do the things that the statutes assign to arbitrators and ministers. It is quite simply not its function to decide, in an action brought under the Charter, whether a grievance or a claim for a disability pension is justified, let alone to determine the amount of damages or of the pension that arbitrators or ministers could have granted if the matter had been put to them.

[142] It does seem anomalous if on the one hand, pursuant to *Grenier*, an intended plaintiff must successfully challenge an administrative decision by way of judicial review before initiating an

action for damages and yet, on the other hand, one who has not received a decision is free to commence such an action without first bringing an application for judicial review to prod the decision maker. Notwithstanding, for a variety of reasons, I entertain doubt that *Grenier* operates to bar an action for damages in the present circumstances. In *Peter G. White Management Ltd.*, 2007 FC 686, F.C.J. No. 931, Mr. Justice Hugessen, albeit in circumstances involving an alleged breach of contract by the Crown, cautioned against misreading *Grenier*.

[143] I have four concerns that prompt me to doubt that this matter falls within the *Grenier* reasoning.

[144] First, I have noted the factors, highlighted by the Court of Appeal, to support its conclusion in *Grenier*. A comparison of those factors with the circumstances existing in this matter is not a good fit. The "compromising of legal security" factor is premised on the existence of an administrative decision (one that has been made). Here, no decision has been made. The "promotion of indirect challenges" factor refers to indirect challenges of an administrative decision and the possibility of circumventing the deference which often results from a pragmatic and functional analysis. The pragmatic and functional analysis has no place in an application for mandamus. The remedy is a discretionary and equitable one, which in each case will turn on the specific factual context of the case at hand. Deference does not enter the inquiry. With respect to the factor relating to the "lack of jurisdiction of the prothonotary", I can think of nothing that would preclude a prothonotary from taking a plaintiff's failure to seek mandamus into consideration when determining the result of the action. The prothonotary would not and could not be indirectly

reviewing an administrative decision, for none would exist. It appears obvious that the *Grenier* factors do not seem to be applicable here.

[145] Second, the Crown has cited a host of post-*Grenier* authorities where actions were either summarily or ultimately dismissed in accordance with the reasoning in *Grenier*. That jurisprudence is of limited assistance because, in each case, there was a decision extant. *Morgan v. Canada* (1998), 117 B.C.A.C. 296 (*Morgan*), a pre-*Grenier* decision, is more helpful to the Crown. There, the British Columbia Court of Appeal concluded that the trial judge had been correct in determining that the Canadian human rights legislation did not create a private right of action for breach of a statutory duty to provide the service in question (to deal expeditiously with Morgan's human rights complaint against the Canadian Armed Forces). Additionally, the Court agreed with the finding of the trial judge that the human rights legislation did not constitute a statute that protected the public from economic damage. Therefore, the only available remedy was judicial review in the nature of mandamus. Undoubtedly, Morgan is persuasive authority. However, the determination regarding the remedy of mandamus appears to have been premised on the basis that the human rights legislation did not permit a private right of action. Such a determination has yet to be made in relation to the legislation applicable in this matter.

[146] Third, in *Samimifar 1*, the Crown moved for summary judgment to dismiss the plaintiff's claim for damages for negligence and breach of section 7 of the *Charter* allegedly resulting from the failure to process his claim for permanent residence within a reasonable time. The plaintiff had obtained approval to apply for permanent residence from within Canada in 1994, but his application was dismissed in 2003 and, on the return of the motion, no re-determination of the application had

been undertaken. Justice Snider dismissed the Crown's motion and held that the action was not barred due to the plaintiff's failure to seek mandamus during the period of delay.

[147] On appeal to the Federal Court of Appeal, Mr. Justice Ryer, writing for the Court, identified the appeal as one from a decision "dismissing a motion by the Crown for summary judgment to dismiss a claim for damages that the respondent allegedly suffered as a result of a delay on the part of Citizenship and Immigration Canada in processing his application for permanent residence in Canada". Justice Ryer noted that Justice Snider had identified the test for summary judgment. He observed that Justice Snider concluded that it had not been established that the case was so doubtful that it did not deserve to be heard by the trial court. Unable to discern any error of law or any palpable and overriding factual error and, without commenting upon the merits of the claim, the Federal Court of Appeal dismissed the appeal with costs.

[148] I agree with the defendant Crown that the Federal Court of Appeal did not make "pronouncements of law" in *Samimifar*. Nonetheless, the Court upheld Justice Snider's decision which encompassed a determination that failure to bring an application for mandamus did not bar an action for delay. Counsel (also on record as counsel on the *Samimifar* appeal) informed me that fulsome submissions, referencing *Grenier* and *Prentice* were argued before the Federal Court of Appeal. *Samimifar 1* bears close resemblance to this case.

[149] Four, the decision of the Federal Court of Appeal in *Szebenyi v. Canada* (1999), 247 N.R. 290 (F.C.A.) (*Szebenyi*) also appears to be analogous to the circumstances of this case. There, the plaintiffs appealed from a decision striking out a statement of claim on the ground that it disclosed

no cause of action. The action was one for damages arising from the manner in which an application for landing was handled by Canadian immigration officials in Austria. No decision on the application for landing had been made. In a brief decision, Mr. Justice Robertson, then of the Federal Court of Appeal, writing for the Court, stated at paragraphs 2 and 3:

> […] Despite the broad nature of the allegations contained in the statement of claim it is apparent that the cause of action is founded in the negligent handling of the application for landing. That being said we are also of the view that the appellants should restrict their attack to that ground only and, therefore, should restrain themselves from pursuing the grounds of "discrimination", "professional misconduct", "vexation" and "violation of privacy".
>
> The respondent takes the position that the substance of the statement of claim comes within the purview of an application for judicial review rather than an action. We disagree. The fact of the matter is that the appellants are seeking damages for the mishandling of the application for landing. More importantly, the appellants are not challenging a decision which has yet to be made with respect to that application. For this reason, *Zubi v. Canada* (1993), 71 F.T.R. 168 is not applicable.

[150] Counsel for the parties did not bring the *Szebenyi* decision to my attention. The Crown referred me to *Paszkowski v. Canada (Attorney General)*, [2007] 2 F.C.R. 507; (2006), 287 F.T.R. 116; 51 Imm. L.R. (3d) 299 (F.C.) (*Paszkowski*), a decision of Mr. Justice Mosley, in which the Crown's motion for summary judgment was granted. Justice Mosley distinguished *Szebenyi* on the basis that, in *Szebenyi*, no decision had been made that could be the subject of judicial review. It was my reading of *Paszkowski* that led me to *Szebenyi*.

[151] On its face, *Szebenyi* appears remarkably similar to the circumstances before me. It is clearly more analogous than the situation described in *Grenier*. I note parenthetically that following the trial in *Szebenyi*, Madam Justice Heneghan dismissed the action: *Szebenyi v. Canada*, [2007] 1

F.C.R. 527; (2006), 292 F.T.R. 253 (F.C.) aff'd. 2007 FCA 118; F.C.J. No. 407, application for leave to appeal to the Supreme Court of Canada dismissed, [2007] S.C.C.A. No. 232 (*Szebenyi 2*).

[152] The ultimate dismissal of the action in *Szebenyi 2* has no impact on the determination of the Federal Court of Appeal in *Szebenyi*, which does not appear to have been overruled. The *Grenier* decision does not extend to the circumstances described in *Szebenyi*. It is highly doubtful that *Szebenyi* was argued or cited to the Court in *Grenier* because the factual contexts are completely dissimilar. However, the fact remains that *Szebenyi* is authority from the Federal Court of Appeal and as such, it is binding upon me.

[153] For the foregoing reasons, *res judicata* aside, in the absence of further guidance from the Federal Court of Appeal, I am not prepared to hold, as a threshold ruling, that the plaintiffs' action is barred for failure to seek mandamus as a result of the ruling in *Grenier*. In my view, the Crown's submissions in this respect are better dealt with in other areas that are in issue in this proceeding. The argument has merit, but not on the basis of *Grenier*.

The Allegation of Negligence

[154] The plaintiffs claim that the Crown was negligent in its delay in processing their applications for permanent residence. Specifically, at paragraph 20 of their statement of claim, they state that:

> The Defendant and her officials have been negligent in that they owe a duty of care to ensure that the Plaintiffs' applications, made under Immigration legislation which involves the landing of a person recognized as a Convention refugee in need of protection and safe haven are resolved in a timely fashion. The Plaintiffs claim a breach of the duty of care owed to them in the processing of their

> applications to be landed in Canada as permanent residents. They claim that the harm caused to them is a reasonably foreseeable consequence of the breach of the duty of care owed to them. They claim damages as a result of the Defendant's negligence, both at common law and under s. 24(1) of the *Charter of Rights and Freedoms*.

[155] There is no need to cite well-known authority for the proposition that a claim of negligence will be made out where a plaintiff establishes: (a) the existence of a duty of care; (b) a breach of the duty; and (c) damage that results from the breach. Failure to satisfy any one of the noted elements will be fatal to the claim.

[156] Although the plaintiffs did not plead the relevant provisions of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (CLPA), Her Majesty did not take issue with the omission and, at this stage of the proceeding, neither will I. It is settled law that the concept of Crown liability is vicarious and not direct. Section 3 of the CLPA provides that the Crown is liable for damages in respect of a tort committed by its servant provided that, pursuant to section 10, the act or omission would have given rise to a cause of action for liability against that servant.

[157] The parties agree that in ascertaining whether a duty of care exists, regard must be had to the two-stage test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.). The Supreme Court of Canada reaffirmed the application of the *Anns* approach in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (*Cooper*) where it refined the considerations entailed at each of the stages. The clarified test was subsequently applied in *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (*Edwards*), *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 (*Odhavji*), *Childs v. Desormeaux*,

[2006] 1 S.C.R. 643 (*Childs*) and most recently in *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, S.C.J. No. 38 (*Syl Apps*), all of which have been relied upon by the parties.

[158] There is no debate that, in accordance with the noted authorities, the first stage of the *Anns* test entails an inquiry as to whether there exists a *prima facie* duty of care. Reasonable foreseeability and proximity are the factors to consider. Reasonable foreseeability involves asking whether the person harmed was "so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected": *Syl Apps* at para. 25 citing *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.). Proximity must supplement the reasonable foreseeability. Proximity evaluates the closeness of the relationship between the parties, and asks if it is one that warrants the imposition of a duty of care. Proximity involves factors such as "expectations, representations, reliance and the property or other interests involved": *Cooper* at para. 34. It will often be determined by reference to existing categories of negligence. It is a question of policy and a balancing of interests.

[159] If a *prima facie* duty of care is established, the second stage of the *Anns* test arises in novel situations and entails an inquiry as to whether there are policy considerations, outside the relationship of the parties, which would make the imposition of a duty of care unwise. The policy considerations at this stage are those involving "other legal obligations, the legal system and society more generally" and may include matters such as the existence of alternative legal remedies, the risk of unlimited liability to an unlimited class, the policy or operational nature of a decision and the existence of possible immunities from liability: *Cooper* at paras. 34 and 35.

[160] The plaintiffs argue that CIC immigration officials owe a duty of care to process Convention refugee applications for permanent residence in a timely manner. They maintain that this is an existing category of duty because the government has undertaken to do something; it has undertaken by statute to process permanent residence applications submitted by Convention refugees.

[161] Referencing subsection 21(2) of the IRPA, the plaintiffs assert that a Convention refugee or protected person "becomes…a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible". The provision is mandatory. Having undertaken to handle and process the applications, there is a duty to carry out the processing of the applications in a non-negligent way.

[162] The plaintiffs turn to the jurisprudence in the context of applications for mandamus to support their thesis that the duty of care is one that falls within a recognized category. In all mandamus cases, the first requirement is to establish a public duty to act. It is said that the existence of this requirement is beyond debate. Moreover, in *Canada (Minister of Employment and Immigration) v. Jiminez-Perez*, [1984] 2 S.C.R. 565, the Minister conceded the existence of a duty to process applications for exemption on humanitarian and compassionate grounds (H&C) [now contained in IRPA ss. 25(1)] even though no provision for a statutory right to the application exists (as it does for Convention refugees). Thus, according to the plaintiffs, by anology, the same is true of a duty of care in the present circumstances and the Crown cannot say otherwise.

[163] Alternatively, the plaintiffs contend that there is a relationship of proximity that indicates a duty of care. First, there is a statutory duty which strongly indicates a *prima facie* duty. Parliament

has expressly provided for the protection of members of a defined group, refugees or protected persons, in a specific manner (granting them access to an application for permanent residence). This is not a duty at large, but is a duty to members of this group.

[164] Next, the plaintiffs submit that refugees, in order to move forward with their lives, have reasonable expectations that their applications for permanent residence will be decided by immigration officials. In this case, the plaintiffs allege that immigration officials made a series of representations to Ms. Haj Khalil that a decision would be rendered in relation to her case. While various officials provided different time frames, she was always told that she would receive a decision. Hence, her reliance on the representations is a factor in establishing the duty to decide her application. The plaintiffs distinguish the case of *Premakumaran v. Canada*, [2007] 2 F.C.R. 191; (2006), 270 D.L.R. (4th) 440; 351 N.R. 165 (F.C.A.) leave to appeal to the Supreme Court of Canada dismissed, [2006] 2 S.C.R. xi (*Premakumaran*), relied upon by the Crown, on the basis that it was a case of alleged negligent misrepresentation rather than one wherein the plaintiff sought to establish a duty of care in the processing of applications.

[165] The plaintiffs point to the fact that refugee applications for landing involve deep personal interests in that they result in the provision of a permanent home to refugees who have been forced to flee their country of origin or habitual residence. Many have suffered torture and trauma and seek stability. These interests "support [the] finding of a duty [of care] by Immigration [officials] to process refugee applications for landing".

[166] Last, and particularly in light of the previous factors, the plaintiffs assert that it was foreseeable by the defendant that refugees will suffer psychological harm if their applications are not processed in a timely manner. In this respect, the plaintiffs rely on the evidence of Janet Dench, Executive Director of the Canadian Council for Refugees (CCR). The CCR is a federally incorporated, national umbrella organization comprised of approximately 175 member agencies that work with and on behalf of refugees and immigrants across Canada. It engages in extensive policy development and consultation on issues falling within its mandate, including professional development regarding refugee and immigrant issues, public education and the sharing of common concerns and information both within and outside Canada. For more than 10 years, the CCR has engaged in two roundtable meetings per year with CIC and CBSA, since the latter's inception. Additionally, it meets with Ministers, other Members of Parliament and government officials to discuss policy issues.

[167] Specifically, Ms. Dench testified that in the 1990s, the CCR identified Canada's delays in landing refugees as one of its major concerns. It delineated three principal causes with respect to the delays: (1) the imposition of processing fees in 1994 and the right of landing fee in 1995 (the latter was removed for refugees in 2000); (2) the strict requirement for identity documents which affected in particular Somali and Afghan refugees who did not have and could not obtain documents; and (3) security issues. Ms. Dench spoke of a series of reports and CCR resolutions, which she says were provided to the defendant, dealing with the adverse impact of delays in landing on refugees' lives.

[168] In relation to the second stage of the test, the plaintiffs say that the onus is on the defendant to establish that policy reasons negate the recognition of a duty to process refugee applications for landing in a timely way. In the plaintiffs' view, policy reasons support "recognition of a duty of care in this situation" because it is increasingly recognized that government officials should act without delay in general and if they fail to do so, they should be compelled to do their duty: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (*Blencoe*). Further, refugees are "fleeing risk and are required to make their applications for landing in order to ensure that they have permanent safety". Thus, they cannot be said to have been involved in the creation of the risk. Finally, the plaintiffs claim that this case involves the handling of an individual application which is clearly part of the operational aspect of a governmental activity and not immune from the imposition of a duty of care.

[169] At the end of the day, the plaintiffs' claim in negligence must fail. For the reasons that follow, I conclude that there is no private law duty of care owed to the plaintiffs and that causation has not been established in any event.

Duty of Care

[170] Regarding the issue of a private law duty of care, I accept the plaintiffs' submission that there is a statutory duty to determine a Convention refugee's application for permanent residence. The jurisprudence of the Federal Court, in the context of applications for mandamus, establishes that there is a public legal duty (to act) owing with respect to such applicants. However, it has long been established that breach of a statutory duty does not, in and of itself, indicate the existence of a

duty of care. It is but a factor to consider: *The Queen v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205.

[171] The plaintiffs' reliance on *Brewer Bros. v. Canada (Attorney General)*, [1992] 1 F.C. 25; (1991), 80 D.L.R. (4th) 321; 129 N.R. 3 (F.C.A.), to support the proposition that a statutory duty provides strong evidence of a private law duty of care, is misplaced. The Federal Court of Appeal concluded that the statute in that case constituted strong evidence of a private law duty of care. The legislative context was such that the statute required the Commissioner to establish and maintain standards in the interests of grain producers and it required the Commissioner to be satisfied of the solvency of a proposed elevator operation before issuing a licence. Indeed, the Court held that the Commissioner's role in duly administering the licensing and bonding provisions of the Act and Regulations was a cardinal component of the Canadian grain trade. Hence, the proximity component was found to be established.

[172] The plaintiffs have not provided any authority wherein delay in an administrative process has been held to constitute a free-standing cause of action. The defendant, on the other hand, has provided a number of authorities, although not necessarily in the context of delay, wherein it was determined that no common law duty of care exists.

[173] In *Premakumaran*, Mr. Justice von Finckenstein allowed a motion for summary judgment and dismissed the plaintiff immigrants' action based on negligent misrepresentation (regarding the conditions governing immigration to Canada for skilled workers) by government officials at the High Commission in London, England. On appeal, the Federal Court of Appeal characterized the

action of negligent misrepresentation as an existing category. The Court concluded that the trial judge had correctly found that no special relationship of proximity and reliance was present on the facts of the case.

[174] In *Szyebenyi 2*, the plaintiff commenced an action for damages against the Crown for alleged negligence in the handling of his mother's sponsorship application (prior to the refusal of the application). The Federal Court of Appeal affirmed Justice Heneghan's determination that the requisite proximity to give rise to a duty of care had not been established. The Supreme Court of Canada dismissed the application for leave to appeal.

[175] In *Farzam v. Canada (Minister of Citizenship and Immigration)* (2005), 284 F.T.R. 158 (F.C.) (*Farzam*) the plaintiff brought an action for damages against the Crown alleging that officials of the Department of Citizenship and Immigration, working outside Canada, were negligent in delaying the processing of his wife's application to come to Canada. Justice Martineau determined that no common law duty of care was owed.

[176] In *Paszkowski*, Mr. Justice Mosley allowed a motion for summary judgment and dismissed an action for damages against the Crown allegedly caused by delay in the processing of a permanent resident application. Justice Mosley determined that there was no *prima facie* duty of care because neither foreseeability nor proximity had been established.

[177] In *Benaissa v. Canada (Attorney General)* (2005), 142 A.C.W.S. (3d) 946 (F.C.) (*Benaissa*) Prothonotary Lafrenière granted a motion for summary judgement in an action where the plaintiff

claimed damages for a delay in processing his permanent resident application. The claim was framed in negligence and a *Charter* remedy was sought for various *Charter* breaches. In *obiter*, the prothonotary concluded that no *prima facie* duty of care was established on the facts pleaded and, in any event, residual policy considerations at the second stage of the [*Cooper*] analysis precluded the imposition of such a duty.

[178] While the cited authorities provide guidance, none is directly on point. *Benaissa* is closest to the situation before me and, as I noted, the prothonotary's determination regarding the duty of care was *obiter*. However, it is clear to me that an action against the Crown based on delay in the processing of a Convention refugee's application for permanent residence does not come within a recognized category of relationships giving rise to a duty of care. Imposing such a duty would represent a novel duty at law.

[179] The Crown's position is that neither foreseeability nor proximity is present here. Ms. Haj Khalil's serious clinical depression, allegedly the result of the delay, is too remote. Ms. Dench testified that the CCR did not address specific situations. Nor is there evidence of any discussion between a CCR representative and the defendant in relation to Ms. Haj Khalil. While the CCR reports and resolutions state that delay in processing may cause hardship, they do not suggest the serious long-term medical and psychological conditions of which Ms. Haj Khalil complains.

[180] As for proximity, the Crown maintains that the duty must be grounded in the statute. The imposition of a duty of care would conflict with the defendant's overarching statutory duty to the public.

[181] As noted in *Syl Apps*, the issue of foreseeability can be a complicated question. Here, the alleged misconduct is the delay in the processing of the application. The attributable harm is said to be, among other things, lack of family reunification, loss of income and depression. Even if I were to conclude that the "harm" was foreseeable, the proximity aspect of the analysis is, in my view, insurmountable for the plaintiffs.

[182] *Syl Apps*, the most recent pronouncement from the Supreme Court in relation to the application of the *Anns* test, reiterates the notion that when the relationship occurs in the context of a statutory scheme, the governing statute is a relevant context for assessing the sufficiency of the proximity between the parties.

[183] The governing statute in this matter is the IRPA. As its title signifies, the Act is concerned with matters of immigration and refugee protection. The various objectives with respect to each of these areas are contained in subsections 3(1) and 3(2) of the Act. An objective common to both is: "the protection of the health and safety of Canadians and to maintain the security of Canadian society" see paragraphs 3(1)(h) and 3(2)(g).

[184] The objectives unique to refugees specify that the refugee program is in the first instance about "saving lives and offering protection to the displaced and persecuted". Other objectives include: the offering of "safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment"; and supporting the "self-

sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada".

[185] The overarching parliamentary intent of the IRPA is articulated in subsection 3(3) which states that the act is to be construed and applied in a manner that furthers the domestic and international interests of Canada.

[186] The right relied upon by the plaintiffs in subsection 21(2) of the IRPA (that upon application in accordance with the regulations, a Convention refugee becomes a permanent resident) is subject to an important qualification. A Convention refugee is eligible for permanent residence only if the refugee is not inadmissible. If inadmissible, permanent residence can be granted only by ministerial exemption. As noted earlier, the power to grant ministerial exemption is non-delegable.

[187] Parliament has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada*: Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at pp. 733-734 (*Chiarelli*). In so doing, it is acting in the public interest.

[188] Returning to *Syl Apps*, Madam Justice Abella, at paragraph 28, states that where "an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity". Further, "such a conflict exists where the imposition of the proposed duty of care would prevent the defendant from effectively discharging its statutory duties".

[189] The delay in the processing of Ms. Haj Khalil's application for permanent residence arises in large part as a result of her potential inadmissibility under paragraph 34(1)(f) of the IRPA. The purpose of the legislated inadmissibility provisions is the protection of the public.

[190] Thus, there is the prospect of conflicting duties. To impose a private law duty of care on the relationship between the plaintiff and the defendant's officials "creates a genuine potential for serious and significant conflict" with the statutory duty to protect the public interest, including the health and safety of Canadians and the maintenance of the security of Canadian society.

[191] The length of time (the delay) taken to process Ms. Haj Khalil's application has been the subject of discussion elsewhere in these reasons. The IRPA does not provide a time limit within which a determination on an application for permanent residence is to be made. In general terms, where delay can be attributed to the statutory duty to protect the public from potentially inadmissible applicants, the potential for conflicting duties is manifest. If the Court were to find a private law duty of care was owed to individual applicants, what then of the public interest? Would the defendant's officials' duty to thoroughly investigate an applicant's potential inadmissibility be compromised because of an applicant's expectations regarding the length of time needed to process the application? Could not the imposition of such a duty result in a "chilling effect" on the defendant's officials if they were hesitant to engage in a complete investigation for fear that it could attract criticism or worse, an action for damages? To find a private law duty of care based merely on delay would compromise the paramount duty of the defendant's officials to protect the public interest.

[192] Ms. Haj Khalil's reasonable expectation, in fact, is that she will obtain permanent residence (Transcript, p. 6063). There is no guarantee that will be the case. She does not suggest, nor could she, that she has a right to permanent residence. She argues, in general terms, that refugees, who are fleeing risk, require permanent residence for permanent safety. They cannot be said to have "been involved in the creation of the risk". That may be true with respect to the risk from which Ms. Haj Khalil fled (persecution), but it is not to be conflated with creation of the risk in relation to the alleged negligence. The acquisition of permanent residence is inextricably linked to the provision of accurate and truthful information by an applicant. The failure to provide such information constitutes a factor that will be weighed in the eventual determination. It may well be seen as a contributing factor to the risk of not being ultimately successful.

[193] Proximity, above all, is a question of policy and a balancing of interests. Although Ms. Haj Khalil does not yet have a determination with respect to her application for permanent residence, she has certainly been the beneficiary of safe haven and protection. In my view, the proximity of the relationship required to establish a *prima facie* duty of care is not present in this case. However, even if I had concluded otherwise, residual policy considerations would negate the imposition of a duty of care.

[194] In *Syl Apps*, Justice Abella noted that an alternative remedy was available to the appellants. It is on this point that I find the defendant Crown's comments regarding the availability of mandamus most compelling.

[195] The IRPA constitutes a comprehensive scheme for immigration matters: *Reza v. Canada*, [1994] 2 S.C.R. 394. The scheme is an administrative regime whereby judicial review by the Federal Court lies with respect to any matter, upon leave being granted (IRPA ss. 72(1)).

[196] I reiterate that Ms. Haj Khalil received a negative admissibility decision in February of 2000. She applied for leave and judicial review on March 15, 2000. By order of the Federal Court dated November 16, 2001, the matter was remitted for redetermination. On November 21, 2001, Ms. Haj Khalil's counsel received correspondence from CIC counsel advising that although a new decision could not be rendered within two weeks [as requested] the application would not be put in the "ordinary queue". Rather, because the matter had been returned by the Federal Court, there would be an attempt to "expeditiously deal" with the application (Exhibit P-64).

[197] An order of mandamus compels the performance of a statutory duty owed to an applicant. It is common ground that the Federal Court regularly grants mandamus orders in immigration matters as evidenced by the plethora of jurisprudence tendered by the parties.

[198] In *Blencoe*, Mr. Justice LeBel stated, at paragraph 149, that "today there is no doubt that mandamus may be used to control procedural delays". Commenting on the abhorrence of delay, he said, at paragraph 150, "in our system's development of the courts' supervisory role over administrative processes through mandamus, we see a crystallizing potential to compel government officers to do their duty and, in so doing, to avoid delay in administrative processes".

[199] In a similar vein, the Supreme Court of Canada, in *Canada v. Addison & Leyen Ltd.*, 2007 SCC 33, S.C.J. No. 33, a matter involving a tax assessment under section 160 of the *Income Tax Act*, R.S.C. 1985, c. 1, stated at paragraph 10:

> The Minister is granted the discretion to reassess the taxpayer at any time. This does not mean that the exercise of this discretion is never reviewable. However, in light of the words "at any time" used by Parliament in s. 160 ITA, the length of the delay before a decision on assessing a taxpayer is made does not suffice as a ground for judicial review, except, perhaps, inasmuch as it allows for a remedy like mandamus to prod the Minister to act with due diligence once a notice of objection has been filed. Moreover, in the case at bar, the allegations of fact in the statement of claim do not disclose any reason why it would have been impossible to deal with the tax liability issues relating to either the underlying tax assessment against York or the assessments against the respondents through the regular appeal process.

[200] In my view, the Supreme Court has signalled that the appropriate remedy, in matters of administrative delay, is a request for an order of mandamus.

[201] When a decision was not forthcoming in this matter, it was open to Ms. Haj Khalil, armed with the order of the Federal Court and the correspondence of CIC counsel, to commence an application for leave and judicial review requesting an order of mandamus along with whatever other administrative law remedies she deemed appropriate. In this respect, I note that declaratory relief is available on judicial review: *Moktari v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 341; (1999), 250 N.R. 385 (F.C.A.) and the Court has jurisdiction to hear constitutional challenges with respect to the validity of legislation: *Moktari*; *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404; 157 F.T.R. 161; 242 N.R. 173 (F.C.A.)

[202] My colleagues, Justice Martineau in *Farzam*, and Prothonotary Lafrenière in *Benaissa*, have determined that an application for judicial review seeking an order for mandamus is the appropriate remedy in situations where there is an allegation of improper delay. Further, having determined that no *prima facie* duty of care exists, the determination of the British Columbia Court of Appeal in *Morgan* is apposite.

[203] Another related concern raised by the defendant Crown is the right of appeal to the Federal Court of Appeal. In the normal course, immigration cases (being matters of administrative law) proceed by way of judicial review. An appeal lies to the Federal Court of Appeal when a judge of the Federal Court certifies that a serious question of general importance is involved and states the question (IRPA paragraph 74(d)). By avoiding the alternative administrative law remedy, the plaintiffs are able to circumvent the requirements of the legislation (and the intent of Parliament), go directly to the Federal Court of Appeal, and bypass the certification process.

[204] Further, the attendant delay necessarily entailed in litigation (due to production, examinations for discovery and the like) allows for the effect of the delay to continue with potential aggravation of the alleged harm during the period in which the action follows its course. The present matter is illustrative. The statement of claim was issued on November 4, 2003. The trial commenced three years and five months later and, even then, the parties would have preferred a later date. According to Ms. Haj Khalil, her condition deteriorated significantly during that time frame. Had she sought judicial review for an order of mandamus, she could have obtained what she claims to want: a decision.

[205] The cost to society is an additional factor. The plaintiffs are in receipt of legal aid which is funded by taxpayers. The cost of pursuing the administrative law remedy pales in comparison to the cost of a trial that encompasses some two and one half months and involves the appearance of six expert witnesses and numerous public servants.

[206] In my view, there are strong residual policy considerations that militate in favour of the negation of an imposition of a private law duty of care in circumstances where, as here, the individual has not pursued the relief available under the administrative regime. The administrative scheme offers a solution to Ms. Haj Khalil's stated problem: "to process refugee applications in a timely way" (Transcript, pp. 5222, 5227).

[207] There are other policy considerations that make it unwise to impose a private law duty of care. These considerations have been relied upon in *Farzam*, *Benaissa* and *Paszkowski* and include the following: simple mistakes or errors in the processing of applications do not give rise to a right of compensation; the spectre of indeterminate liability would loom large if a common law duty of care was recognized based solely on the negative impact of delay on an applicant as opposed to actual misconduct on the part of immigration officers; the imposition of a duty of care would hamper the effective performance of the system of immigration control. The last factor was also considered in the proximity analysis. However, the possibility of overlap of some considerations may exist: *Cooper* at para. 27. In the end, my colleagues concluded that it would not be just, fair and reasonable for the law to impose a private law duty of care on those responsible for the administrative implementation of immigration polices, absent evidence of bad faith, misfeasance or abuse of process. I agree.

[208] All of which is to say that strong residual policy considerations exist which, even if a *prima facie* duty of care were established, negate the imposition of a private law duty of care in this case.

Causation

[209] Even if I had found that a private law duty of care exists and was breached, the plaintiffs have not discharged the burden of demonstrating that the alleged harm was caused by the negligence of the defendant Crown. The link (causation) between the "delay" and the "damage" has not been established on a balance of probabilities.

[210] The primary thrust of Ms. Haj Khalil's various allegations is that the delay in determining her application for permanent residence has resulted in her depression. She includes her inability to pursue studies at St. Clair College (because of her ineligibility as a non-landed Convention refugee to qualify for an OSAP loan) and her inability to obtain employment (because of a SIN that begins with a 900 series) as contributing factors. She contends that these factors could have been eliminated had the defendant processed her application in a timely manner. In the words of her counsel: "Nawal Haj Khalil suffered difficulties finding work related to her 900-series social insurance number. Her psychological condition, combined with her rejection from various jobs, combined by the time she moved to Ottawa in 2003 to make her unable to face searching for work – to face being asked questions about her background from anyone, and the suspicion with which she felt [she was] viewed". Ms. Haj Khalil also claims that she "suffered and suffers long-term separation from her husband".

[211] The plaintiffs did not call medical evidence nor did Ms. Haj Khalil tender a medical report from any of her physicians or specialists. The notes from the medical records of her attending physicians were entered as exhibits on consent. They are of limited assistance and very little weight, if any, can be attached to them. Under the circumstances, they do not constitute proof of the truth of their contents. During the presentation of the defendant's case, and after considerable jockeying between the parties, the Crown determined that it would call Dr. John Dimmock, Ms. Haj Khalil's treating psychiatrist. At the conclusion of Dr. Dimmock's evidence, the plaintiffs' counsel indicated that she would be making a motion to call rebuttal or reply evidence (Transcript, pp. 4918-4924). After hearing fulsome argument, I rejected the plaintiffs' request on the basis that it constituted an attempt to divide the evidence between the plaintiffs' case in chief and reply and was not proper reply or rebuttal evidence. I also determined that the circumstances were not such that I should exercise discretion to admit the evidence notwithstanding that it did not constitute proper reply evidence (Transcript, pp. 5160-5188).

[212] Dr. Dimmock was declared an expert witness in psychiatry, specifically depression, post traumatic stress disorder (PTSD) and the intersection of fibromyalgia and psychiatry. The plaintiffs did not cross-examine on Dr. Dimmock's qualifications and no objection was taken to the declaration of expertise.

[213] Dr. Dimmock has been a psychiatrist for more than 30 years. He began seeing Ms. Haj Khalil on a monthly basis in November 2003, after she was referred to him by her family physician, Dr. Basta. Her most recent appointment with him was on March 14, 2007.

[214] Dr. Dimmock described Ms. Haj Khalil as an intelligent woman willing to be involved in therapy. She did not question that she needed help and she sought it. She was willing to discuss her issues openly, except for her relationship with her husband (because her religion prohibited it).

[215] In Dr. Dimmock's opinion, Ms. Haj Khalil suffers from dysthymia (long-term depression) which he described as "chronic sadness". If exacerbating factors present, there could be episodes of major depressive disorder. He believed that Ms. Haj Khalil had experienced episodes of major depressive disorder and could be suicidal during those times. He explained that the distinction between the two diseases is that major depressive disorder "tends to be more of a biochemical issue and is more responsive to antidepressive medication" than dysthymia, which does "not usually respond to medication". Dysthymia "waxes and wanes" because it is a chronic disease. Ms. Haj Khalil exhibited anhedonia (lack of interest in life) along with general somatic issues (poor sleep, fatigue). He also felt that Ms. Haj Khalil exhibited traits of a passive aggressive personality. Passive aggressive personalities "tend to self distract" and are "very reluctant to give up their negative thinking".

[216] Dr. Dimmock stated that Ms. Haj Khalil suffered from physical infirmities as a result of fibromyalgia or osteoarthritis. She limped and reported that she required a hip replacement. She had problems with her hands. She also claimed to have deep vein thrombosis. She was prone to headaches that were precipitated by stress. She was in pain. Acknowledging that it was not his area of expertise, he stated that osteoarthritis is a "wear and tear" type of disease and is progressive. Fibromyalgia, on the other hand, does not follow a clean clinical course and is a vague soft tissue disease that results in swelling and pain in various trigger points.

[217] In Dr. Dimmock's opinion, Ms. Haj Khalil's depression was long standing. He noted that the referral from Dr. Basta indicated a history of depression since 1996 [Ms. Haj Khalil acknowledged in her evidence that as early as 1996 she reported to various physicians being depressed] but Dr. Dimmock's view was that the depression dated "back that far, if not further".

[218] Based on his observations, Dr. Dimmock did not subscribe to the view that Ms. Haj Khalil's depression was the result of PTSD, or that she suffered from PTSD. By definition, she probably had it in the late 1970s (because it would have manifested itself soon after the 1978 torture). It would not have been severe because the disorder is not compatible with her repeated returns to Syria. Avoidance is a primary criteria. The "avoidance" factor, coupled with the 27-year gap between the incident of trauma and the present, is a strong indication that the patient is not suffering from PTSD.

[219] It was Dr. Dimmock's opinion that the major exacerbating factor regarding Ms. Haj Khalil's chronic depression is her pain and the difficulties with fibromyalgia or arthritis. Pressed on cross-examination regarding her "immigration" problems, he opined that the immigration problem was a factor, but one of a multitude of less significant factors that contributed to, rather than caused, the depression. "Immigration was a small part of the overall process". He noted that she had been functioning fairly well until the onset of the arthritis or fibromyalgia difficulties.

[220] Dr. Dimmock's objective was to "change negative behaviour" by means of cognitive restructuring. The litigation (related to immigration) in which Ms. Haj Khalil was involved, in his

view, undermined the therapeutic process from the outset. He testified that the litigation, and the secondary gain issues associated with it, interfered with therapy and hindered Ms. Haj Khalil's progress. He observed a correlation between her "legal situation" and "fluctuations in depression". Overall, it was his opinion that the litigation situation lead to secondary gain issues in terms of Ms. Haj Khalil's symptoms and if the litigation were over, one would see more clearly that any "PTSD symptoms are secondary gain issues".

[221] On cross-examination, Ms. Haj Khalil's counsel forcefully challenged Dr. Dimmock's conclusions. Confronted with a question regarding his experience with Convention refugees, he conceded that he did not have extensive experience with refugees. Indeed, he had only dealt with two or three refugees over the course of his career. He had never researched "refugee immigration problems". He did not view depression in Convention refugees as being different than depression in the general population.

[222] Counsel suggested that the term "secondary gain" was suggestive of "faking", "exaggerating" or "malingering". Dr. Dimmock indicated that counsel's descriptors were demeaning and that the "secondary gain" of which he spoke was "more of an unconscious motivator". Ms. Haj Khalil, in his mind, was genuinely looking for help. When confronted with a question as to why he did not delve deeper into immigration research, his response was that whatever the problem (or problems) with immigration, it was not a psychiatric condition. There was nothing that he could do to change her immigration status. His function was to improve her mental health. Moreover, it was his impression that her immigration status was inconsequential

because Ms. Haj Khalil had often stated that she intended to leave Canada when her daughter was old enough.

[223] Ms. Haj Khalil's counsel urges me not to accept Dr. Dimmock's opinion that Ms. Haj Khalil's depression is causally connected to her pain. Counsel claims that the psychiatrist did not know what Ms. Haj Khalil meant when she referred to her "immigration problems". He didn't really ask and he didn't research it at all. Moreover, he has only treated two other refugees and is not familiar with refugee psychiatry. Counsel maintains that he does not know how issues affect refugees and assumes that they are like everyone else. Dr. Dimmock, in counsel's view, did not understand the delay aspect of Ms. Haj Khalil's immigration problem.

[224] Whether I reject Dr. Dimmock's opinion that Ms. Haj Khalil's "pain" was the primary cause of her depression or not, the evidence does not establish that her depression was caused or exacerbated by the delay in the processing of the claim. Dr. Dimmock was specific that Ms. Haj Khalil did well from time to time. He saw a direct correlation between her legal situation and the fluctuations in her depression. He specifically noted that she had been functioning fairly well until the onset of her physical problems. In this respect, it is useful to examine Ms. Haj Khalil's evidence.

[225] Ms. Haj Khalil testified that she moved to Ottawa in 2003 because her son would be attending university in Ottawa. She had been taking courses on a part-time basis in the evenings at St. Clair College in Windsor. She completed the courses (which were part of the "networking program" just before the move to Ottawa (Transcript, p. 584). She had been employed at an

accounting firm on a part-time basis from June 2001 until she left for Ottawa in 2003. She indicated that, more than once, her employer stated that later on he would give her a full-time job. In addition to taking part-time courses and working part-time, Ms. Haj Khalil stated that: she volunteered at a coffee shop in the hospital from April 2002 until she left Windsor in August of 2003; she volunteered with the organization "Windsor Women Working with Immigrant Women" until she left for Ottawa (she assisted as an interpreter and a fundraiser and served as a board member for approximately four years); she volunteered during elections by manning the telephone at the office and distributing pamphlets; and she volunteered as an interpreter for Legal Aid Windsor (Transcript, pp. 590-604). In relation to the distribution of pamphlets, Ms. Haj Khalil stated:

> And not only I volunteer; actually, I took my daughter with me. Whenever we used to distribute these pamphlets, my daughter will take one side of the street, I will take the other side. So I will keep watching her walking from door to door to put them in the…mailboxes. So I will take one side, she will take one side of the street. I can do it, actually, but I wanted to teach my daughter, to introduce her to volunteering. For me it was a new experience. I didn't used to do it in the Middle East. We didn't have volunteer. My first experience in Canada, and I was excited about it, and I wanted my daughter to do it. So my daughter will accompany me whenever I wanted to do something during this by election or election. So I recall I volunteered for these both (Transcript, p. 597).

[226] Ms. Haj Khalil testified that it was after the move to Ottawa that she felt that she was "unable to work anymore". Her counsel asks that I consider the following comment:

> Since then, actually, I kepted (sic) to myself. I stayed home. I didn't want anyone to know what is my status in the country, how long I been in the country. I don't want to tell anybody. How I live, I don't want to tell anybody. Why I'm there, I don't want to tell anybody. I can't. I feel if I will be questioned one more time I will kill myself. So it's better to stay home.

[227] I have considered that comment as well as her explanation that she inquired about employment at a paint store on Carling Avenue in Ottawa, but never received a phone call (Transcript, pp. 605-608). However, her evidence was equivocal with respect to her reasons for staying at home. She also stated:

> And I don't know; I understand that I'm staying home doing very honourable job for my children, helping them as much as I can. But since it is not considered, this job, very honourable to certain people, well, I will keep myself inside my home avoiding any contact with anybody. And I did. I am home. Can't do any job. Even if I want, my health won't help me. I have a lot of problems. So it is better to go around my treatment first. When I am okay. Nobody will be happy to hire a depressed, distressed person.

[228] The evidence is clear that Ms. Haj Khalil was active and functional before leaving Windsor. Her stated reason for moving to Ottawa was to be with her son "no matter what" until she felt that he "is old enough to handle his own life". She was not willing to separate from her children (Transcript, pp. 657, 658).

[229] Notably, the move to Ottawa was in August of 2003 and this litigation was started on November 4th of the same year. I accept Dr. Dimmock's statements that he observed fluctuations in Ms. Haj Khalil's depression that correlated to her legal problem. He also observed periods when she was doing quite well. I take it that her comments about being "imprisoned" in Canada were made during those times when she was not doing well.

[230] Anmar's evidence was to the same effect. He stated, in response to a question regarding the changes he observed in his mother, that she is stressed out almost all the time now, especially when it comes to meetings regarding this case (Transcript, p. 1574). He also testified that her physical

health isn't in the best of shape. However, his understanding (having attended at the doctor's office with his mother) is that any memory loss or dramatic changes in blood pressure are stress-related and stress-induced, not the result of underlying health problems (Transcript, pp. 1574, 1590).

[231] Acil's evidence was that lately her mum had been "crazy"; she was "irrational and irritated and just all the time stressed out" (Transcript, p. 1762). She described her mum as pathetic and claimed that, in the past, she had been "like a mum", was active and happy (Transcript, p. 1764). Acil does not like to leave the house for a night out because she is aware that her mum is stressed out. She thinks that if she were to move out (for university) that her mum will kill herself (Transcript, p. 1765).

[232] It is not possible for me to find, on the basis of the evidence before me, that Ms. Haj Khalil's depression arises from or was exacerbated by the delay in the processing of her application. By her own evidence, she acknowledges that her condition deteriorated dramatically since the move to Ottawa. That move was made voluntarily for the reasons stated by Ms. Haj Khalil. She has not functioned well since her arrival in Ottawa, but it has not been established that her deterioration is the result of delay in the processing of her application.

[233] Dr. Dimmock stated, and Ms. Haj Khalil does not dispute, that she has chronic depression. She sought help, but the therapeutic process was undermined by the litigation in which she is involved. Dr. Dimmock felt that her current condition is a multi-problem situation and that immigration was but a small part of the "overall" problem. I find no fault with that assessment.

[234] The basic test for determining causation is the "but for" test. This fundamental rule has never been displaced and remains the primary test for causation in negligence actions. In circumstances where there is more than one potential cause of an injury, it is not correct to say that the "material contribution" test must be used. To accept this conclusion is to do away with the "but for" test altogether, given that there is more than one potential cause in virtually all litigated cases of negligence: *Resurfice Corp. v. Hanke*, 2007 SCC 7, S.C.J. No. 7 at paras. 19, 21 and 22 (*Resurfice*).

[235] I am not satisfied that the plaintiff, Ms. Haj Khalil, has demonstrated a substantial connection between her depression (or its exacerbation) and the defendant's delay (which I have determined began in August of 2002) in processing her application for permanent residence.

[236] A defendant is not to be held liable for a plaintiff's injuries where they "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Resurfice* citing *Snell v. Farrell*, [1990] 2 S.C.R. 311.

[237] As for the allegation that Ms. Haj Khalil could not obtain work because her SIN began with a 900 series, the short answer is that she had a job in Windsor. Moreover, the editor who testified at the trial and whose circumstances were similar to those of Ms. Haj Khalil (when he came to Canada) did not mention any such problem. He was gainfully employed. Both of the children obtained employment before obtaining their permanent resident status (I will deal with Anmar's allegation with respect to the cadet camp application in due course). Ms. Haj Khalil's evidence in this respect was not persuasive.

[238] Regarding the inability to attend St. Clair College because of the unavailability of OSAP funding (a matter that has since been rectified), Ms. Haj Khalil's son, Anmar, was confronted with the same problem, yet he was able to attend university. He borrowed the money from Ms. Haj Khalil's brother. Even after OSAP became available to him, Anmar stated a preference for being indebted to family over being indebted to the government.

[239] Ms. Haj Khalil did not provide evidence of her efforts (if any) to find alternative funding for her proposed year of study. Once she learned that OSAP was not available, that apparently ended the matter.

[240] In relation to the "loss" of her husband's companionship, Ms. Haj Khalil's allegation turns on the assumption that the family is entitled to reunite in Canada. In arriving at this assumption, she ignores the fact that her husband applied for a visitor visa and was determined to be inadmissible. No application for leave and judicial review was taken with respect to that determination. Thus, he remains inadmissible to Canada.

[241] Much was made of the fact that Mr. El Hassen had been included on Ms. Haj Khalil's application for permanent residence as a dependant and that he had never been assessed in relation to that application. While counsel referred to various segments of Ms. Haj Khalil's previous statements and explanations regarding her husband's conduct and referred me to various documents tending to indicate that Mr. El Hassen's application for permanent residence has never been withdrawn, the fact remains that there is no indication that Mr. El Hassen is interested in coming to Canada. Ms. Haj Khalil claims that he was interested (in the mid-to-late 1990s) but she does not

claim that he is interested. Ms. Haj Khalil's counsel maintains that Mr. El Hassen has submitted an application for a temporary resident permit. The defendant has no record of such an application. Ms. Haj Khalil did not address it in her evidence. Any confusion regarding Mr. El Hassen could have been alleviated if he had given evidence. The arrangements were in place for him to testify by way of video conferencing. Counsel elected not to call him.

[242] Ms. Haj Khalil argues that the fact that Mr. El Hassen was recently found inadmissible does not relieve the defendant Crown of liability for the plaintiffs' loss of his care, companionship and guidance for the duration of the time that their case was being processed. Had the case been processed without delay, Mr. El Hassen's admissibility would have been assessed during the normal course of processing at a much earlier time and he could have applied for ministerial relief. This argument is circuitous and speculative. Mr. El Hassen is not admissible and, as a result, it is not possible for the family to reunite in Canada. An "earlier" determination regarding his admissibility does not change that. Success on a ministerial relief application is speculative at best. More importantly, Mr. El Hassen's intentions are not known to us. Except for Ms. Haj Khalil's comments, I do not know when, if ever, he actually intended to reunite with his family in Canada. Ms. Haj Khalil also testified that her husband had applied to bring the family to Gaza with him (Transcript, pp. 968-971).

[243] Insofar as Ms. Haj Khalil's inability to visit her husband is concerned, while she applied for Minister's permits to enable her children to visit their father, I do not recall any evidence that she applied for a permit for herself.

[244] For the foregoing reasons, I conclude that the harm alleged by Ms. Haj Khalil is not substantially connected to the delay in the processing of her application for permanent residence.

[245] Regarding the children, counsel submits that they suffered from the absence of their father. Specifically, it is said:

> He was absent except for a brief weekly call for their first five or six years in Canada – time which cannot be made up for. He is now a presence in their lives by phone. It speaks to the family's resilience that they have been able to maintain a close relationship despite the time and distance, particularly Acil's relationship with him. However, this does not make up for his actual presence in their lives. It does not make up for the sadness they feel about his absence, for the feelings they have that other children have fathers who do things with them, for their inability to understand (especially as children) what was wrong with them to not be able to see their father.

[246] My first observation is that the scarcity of telephone calls for the first five or six years was a choice made by Mr. El Hassen. He now calls daily and often twice each day and has done so for a number of years. Next, having seen, heard and observed Anmar and Acil, I find that their relationship with their father is a strong one, even more so with respect to Acil. The reasons I have provided in relation to Ms. Haj Khalil with respect to family reunification are equally applicable to the children. Without marginalizing the children's disappointment over not having physical contact with their father, the evidence discloses only one request for a Minister's permit when Anmar and Acil were 15 and 10 years old respectively. That application was refused and no further requests occurred. I am not prepared, on the basis of a single application, to conclude that the lack of physical contact is substantially connected to the delay in the processing of the application. Both Anmar and Acil are now permanent residents and both have plans to meet with their father. Had

their applications been separated from their mother's application earlier, they would have been able to meet with their father earlier.

[247] The plaintiffs argue that it was not the defendant's policy at the time to sever the applications of children before they became adults and "not a single official even suggested to Ms. Haj Khalil that she separate the children's applications from hers". There are two observations to be made here. First, in her immigration matter, Ms. Haj Khalil has been represented by counsel throughout. Any suggestion as to severance of the children from their mother's application would emanate from counsel advising Ms. Haj Khalil. Second, when it was suggested to Ms. Haj Khalil that she could sever the children's applications from her application, she refused. It was only through the intervention of her present counsel that she ultimately agreed to allow the children to apply separately.

[248] The children's lack of physical contact with their father is not substantially connected to the delay in the processing of their applications for permanent residence. Their applications were granted after severance from their mother's application.

[249] The plaintiffs also submit that the children suffered from not being able to participate in school trips and social events, especially because they grew up in a border city where much revolved around travelling across the bridge. Both children gave evidence that there were school field trips (two for Acil) as well as a graduation function (for Anmar) that took place in Detroit. Anmar missed out on two sea cadet ventures that took place in the United States while Acil was not able to go on a school-organized March break trip to the south. Additionally, their friends

frequently crossed the border to ski, shop and simply socialize. Because they did not have permanent resident status, they could not attend. They claim special damages in this respect, but the damages have not been particularized.

[250] It goes without saying that these events represented significant disappointments for Anmar and Acil. However, evidence of efforts to remedy the problem is scant. Ms. Haj Khalil testified that on one occasion she asked about whether her son could go on a school field trip. She said that she spoke with a man at CIC Windsor during August of 1997. She claimed to have asked him for a paper to present to the American Consulate to show that her son would be allowed back with his school. There was also discussion with this man (arising from his question) concerning the Michigan licence plates on her vehicle (Transcript, pp. 420-422). The individual with whom she discussed the licence plates was John Swizawski and he testified that he had never been approached by Ms. Haj Khalil with a request for permission for the children to leave Canada. Ms. Haj Khalil described a similar event elsewhere in her evidence but stated that it occurred on January 19, 1999 (Transcript, pp. 457-459). It is more probable that the inquiry was on January 19th. Exhibit P49 displays a notation by the supervisor of the Windsor CIC office regarding a ski trip and efforts to obtain the cooperation of the Windsor border officials to allow Anmar to re-enter Canada.

[251] In any event, as disappointing as it may have been for the children, with the exception of what I believe was a single inquiry, there is no evidence of any formal request to any official for the children to attend field trips. I return to the issue of severance of the children's applications. Such a course of action would have alleviated these problems. Further, even if there were a duty of care (and I have determined that there is not) and the defendant breached such a duty, in my view,

disappointment is not compensable. Anmar and Acil quite properly withdrew their claims for psychological harm because there is no evidence of any psychological harm to either of them.

[252] Last, Anmar claims that he is entitled to be reimbursed for the loss of the "summer job the weekend before he was to start" [his employment]. This request relates to Anmar's application for a civilian instructor position at HMCS Ontario in the Canadian Forces cadet program. Anmar had many years of experience as a sea cadet and had worked at the cadet camp, as a cadet, the previous summer. Under Canadian Forces Administrative Order 49-6 (CFAO 49-6), civilian instructors must be either Canadian citizens or permanent residents. Warrant Officer Mearle Doucet's evidence indicated that this requirement initially escaped the attention of the officials at CFB Kingston and it was only the weekend before Anmar was scheduled to begin his employment that he was told that he was not eligible for the position.

[253] The short answer to Anmar's allegation is to yet again return to the severance of the applications. Had Anmar's application been severed from that of Ms. Haj Khalil's (Anmar indicated that he agreed with his mother's decision not to sever), the whole situation could have been avoided. However, and in addition, the application form itself clearly indicated that Canadian citizenship or permanent residence was a requirement. Anmar testified that he signed the form and submitted it on the basis that he thought that the requirements were superseded by his work authorization. He also stated that "reading over the standards wasn't really my priority". This event is not substantially connected to the delay in the processing of the application for permanent residence.

[254] In summary, even if a private law duty of care exists (and I have concluded otherwise), the plaintiffs' claims in negligence fail for want of causation.

[255] Before leaving the issue of negligence, some further observations are in order. In closing submissions, the plaintiffs' counsel described the "decision-making" of the defendant's servants as "arbitrary", "perverse", "grossly unreasonable" and "righteous and moralistic". In reply to the defendant's closing submissions (taking exception to the plaintiffs' allegations), the following statement appears: "The plaintiffs' position is that this arbitrariness is bad faith". While I believe that these descriptors are related to the *Charter* submissions, to the extent that they may have slipped into the negligence arguments, they are inappropriate.

[256] An allegation of bad faith is a serious one that must be pleaded. There is no such allegation in the statement of claim. The plaintiffs cannot, in closing submissions and in the absence of notice to the defendant, accuse the defendant of bad faith.

[257] There is also a reference, again in closing submissions, to "conscious choices" of senior officials. To the extent that counsel, by innuendo, may be referring to misfeasance by public officials, the tort of misfeasance in a public office is an intentional tort. Its distinguishing elements are two fold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts: *Odhavji* at para. 32. The tort must be pleaded. There is no such pleading in this case.

Breach of Section 7 of the *Charter*

[258] The plaintiffs assert that the defendant's delay in processing their applications for permanent residence deprived them of their section 7 *Charter* rights to liberty and security of the person in a manner that was not in accordance with the principles of fundamental justice.

[259] During the closing submissions at the end of the trial, I initially found the plaintiffs' arguments on section 7 appealing. However, having conducted a fulsome review of the evidence and the jurisprudence, I do not find the plaintiffs' position persuasive and I am not satisfied that there has been any infringement of their section 7 rights.

[260] There is no allegation regarding a deprivation of the right to life. The plaintiffs contend that their right to liberty is engaged by "the [defendant's] delay in finalizing their applications" and by their "extended separation from Ms. Haj Khalil's husband, the children's father". Their security of the person interests "have been impacted by the failure of Canada to resolve the applications for landing in a timely fashion". Ms. Haj Khalil in particular has sustained injury in the form of depression which was caused or exacerbated by the delay. It is said that "she is stuck in Canada, at the mercy of Canadian officials who have failed to resolve her case" (Transcript, p. 5469).

[261] It is common ground that the plaintiffs are entitled to the protection of the *Charter*: ***Singh v. Canada (Minister of Employment and Immigration)***, [1985] 1 S.C.R. 177. Nor is there any debate that the rights provided for in section 7 extend beyond the sphere of criminal law. Section 7 protection extends to situations where there is state action which directly engages the justice system

and its administration: *Blencoe* at para. 46. See also: *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 (*Chaoulli*).

[262] The section 7 inquiry is a two-stage process: *Gosselin v. Quebec Attorney General)*, [2002] 4 S.C.R. 429 (*Gosselin*). There must first be a finding that there has been a deprivation of the right to life, liberty or security of the person and secondly, that the deprivation is contrary to the principles of fundamental justice. If no interest with respect to the right to life, liberty or security of the person is implicated, the inquiry stops there: *Blencoe* at para. 47.

Liberty Interests

[263] The plaintiffs rely on *Singh*, *Blencoe*, *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (*Children's Aid*), *Godbout v. Longueuil* (*City*), [1997] 3 S.C.R. 844 (*Godbout*) and various international instruments, principally the *Convention of the Rights of the Child,* 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3 (*CRC)*, the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) (*ICCPR*) and the *Refugee Convention*, to support their argument. Reference is also made to selected United Nations Committee General Comments and Resolutions.

[264] It is said that Ms. Haj Khalil's autonomy and that of her children has been impacted by the failure to finalize her application for permanent residence. The plaintiffs claim that their interests in maintaining the integrity of their family have been compromised because they cannot reunite as a family and they have not been able to visit with each other. Had the application been finalized in a

timely fashion, the family might have made different decisions about the future. Ms. Haj Khalil "might have applied for resettlement in a European country with her husband, or in another safe country". They maintain that the children have a right to family life under the CRC and that this right was frustrated by the delay. Moreover, leaving stateless persons without resolution of their status in Canada, with no means to acquire permanent residence for an extended period of time, is a restriction on liberty.

[265] The foundation of the plaintiffs' argument rests on the following excerpt from paragraph 43 of Madam Justice Wilson's comments in *Singh*:

> Certainly, it is true that the concepts of the right to life, the right to liberty, and the right to security of the person are capable of a broad range of meaning. The Fourteenth Amendment to the United States Constitution provides in part "... nor shall any State deprive any person of life, liberty, or property, without the due process of law...". In Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) at p. 572, Stewart J. articulated the notion of liberty as embodied in the Fourteenth Amendment in the following way:
>
> "While this Court has not attempted to define with exactness the liberty... guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized... as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska 262 U.S. 390, 399. In a Constitution for a free people there can be no doubt that the meaning of "liberty" must be broad indeed. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499-500; Stanley v. Illinois, 405 U.S. 645.

[266] Subsequent jurisprudence of the Supreme Court, according to the plaintiffs, has affirmed the broad scope of the liberty interest. Moreover, they assert that Canada has explicitly recognized that reunification in Canada with close family members abroad is a declared objective. Canada's human rights obligations with respect to children include the facilitation of a child's right to family life. The rights of Anmar and Acil were frustrated because they were not permitted to visit with their father either by travelling to see him or by having him come to Canada.

[267] The first point to be made is that the delay issue is not to be conflated with the threshold section 7 issue. Justice Bastarache cautions in *Blencoe*, at para. 47, "whether the section 7 rights are engaged is a separate issue from whether the delay itself was unreasonable". I understand this to mean that even in circumstances where a delay may be found to be unreasonable, delay (in and of itself) does not engage section 7. The plaintiffs must establish that their section 7 interests were engaged by the delay.

[268] The second point is the lack of unanimity in the Supreme Court of Canada with respect to how far the notion of liberty should be extended. Mr. Justice La Forest opined in *Children's Aid* that the "term 'liberty' has yet to be authoritatively defined in this Court although comments have been made on both sides of the spectrum" (para. 73). Addressing the excerpt of Justice Wilson's comments (relied upon by the plaintiffs) in *Singh*, Justice La Forest observed:

> …In Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177, Wilson J., speaking for Dickson C.J., Lamer J. (as he then was) as well, noted that it was incumbent upon the Court to define "liberty", and conceded that the concept was susceptible of a broad range of meanings. Although she did not venture to define the scope of the liberty interest protected under s. 7 of the Charter, she cited the following dictum of Stewart J. in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), at p. 572, as an example of

> the liberal interpretation the United States Supreme Court has given to the Fourteenth Amendment, at p. 205. (my emphasis)

[269] Justice Wilson continued to champion a liberal interpretation of the meaning of "liberty". Her dissent in *R. v. Jones*, [1986] 2 S.C.R. 284 (*Jones*) depicts her approach. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (*Morgentaler*), where the Supreme Court considered the constitutionality of Canada's abortion law, a 5-2 majority held that the legislation deprived women of their security of the person in a manner that was not in accordance with fundamental justice. Justice Wilson held that the scheme also infringed women's liberty interests (consistent with her decision in *Jones*). As noted by Justice La Forest in *Children's Aid*, Justice Lamer, as he then was, expressed an opposing view in *Reference re. ss. 193 and 195.1(1)(c) of the Criminal Code (Man,)*, [1990] 1 S.C.R. 1123.

[270] *Children's Aid* involved consideration of a wardship order made against a child of Jehovah Witness parents. The issue was whether the order violated the parents' rights to liberty (their parental rights to choose medical treatment for their child). The court dismissed the parents' claims, but was divided on the question of whether their liberty interests were engaged. Justice La Forest, writing for the justices who concluded that the parents' right to liberty was engaged, noted that section 7 does not afford protection to the integrity of the family unit as such. The *Charter*, and section 7 in particular, protects individuals (para. 68). He further stated that liberty does not mean unconstrained freedom, yet it does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy, to live his or her own life and to make decisions that are of fundamental personal importance (para. 80). He concluded that "the right to nurture a child, to care for its development and to make decisions for it in fundamental matters, such as medical care, are part of the liberty interest of a parent" (para. 83).

[271] In *Godbout*, the Supreme Court considered whether the city's requirement that all new permanent employees live within its boundaries infringed section 7 of the *Charter*. While the Court concluded that the requirement infringed the *Quebec Charter*, three of the nine justices concluded that it also infringed a person's liberty interest under the Canadian *Charter*. Justice La Forest, writing for the minority, commented that the section 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. Such inherently personal matters comprise a narrow class. Choosing where to establish one's home (a quintessentially private decision going to the very heart of personal or individual autonomy) falls within that class of decisions deserving of constitutional protection.

[272] In *Blencoe*, a majority of five concluded that the section 7 rights to liberty and security of the person of a former British Columbia cabinet minister were not engaged as a result of delays by the British Columbia Human Rights Commission in hearing two sexual harassment complaints against him. Four justices determined that the matter should be resolved on the basis of administrative law principles and it was therefore unnecessary to express a definite opinion on the application of section 7 of the *Charter*. The majority decided that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. Individuals are entitled to make decisions of fundamental importance free from state interference. The liberty interest protected by section 7 must be interpreted broadly and in accordance with the principles and values

underlying the *Charter* as a whole. Personal autonomy attracts protection (para. 49), but is not synonymous with unconstrained freedom (para. 54).

[273] In the context of immigration matters, the Supreme Court jurisprudence on section 7 has been essentially limited to circumstances involving deportation: *Singh*; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. (*Suresh*); *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 (*Medovarski*). In *Medovarski*, the Supreme Court, citing *Chiarelli*, reaffirmed the "most fundamental principle of immigration law" – "non-citizens do not have an unqualified right to enter or remain in Canada".

[274] A consideration of the noted jurisprudence reveals a Supreme Court trend toward a broader characterization of the word "liberty" in section 7 of the *Charter*. Initially thought to be applicable only in the criminal context, some advocated a more expansive interpretation. The circumstances in *Blencoe* are somewhat analogous to this matter. There, the majority definitively stated that section 7 of the *Charter* can extend beyond the sphere of criminal law, at least where there is state action which directly engages the justice system and its administration.

[275] The reach of this protection has not been articulated. What is clear is that the meaning of section 7 should be allowed to develop incrementally, otherwise its content would be frozen or exhaustively defined by precedent. Safeguarding a degree of flexibility in the interpretation and evolution of section 7 of the *Charter* is necessary: *Gosselin* at paras. 79, 82. At the same time, in my view, circumspection is required where there is a danger of extending the reach of section 7 to situations where the facts do not merit such action.

[276] Section 7 is frequently engaged in the immigration context because a threat of deportation to torture or cruel and unusual treatment or punishment will engage an individual's right to life, liberty or security of the person. However, that is not the situation here. Two of the plaintiffs have already received permanent resident status and Ms. Haj Khalil is a recognized Convention refugee. She is a protected person in Canada and no spectre of deportation looms.

[277] The plaintiffs claim that their section 7 rights to liberty are engaged because of state action which, according to them, has affected their ability to make "important and fundamental life choices". To reiterate, they claim that the delay in finalizing their permanent resident applications has compromised their interests in maintaining the integrity of their family; they cannot reunite as a family and they have not been able to visit with each other. They also claim that the delay has infringed the children's rights to family life as articulated by the CRC.

[278] I have spoken earlier in these reasons about the objectives of the refugee program in Canada. I do not share the plaintiffs' view that Article 34 of the *Refugee Convention* makes the settlement of refugees an obligation. Settlement is encouraged to be sure, but Article 34, unlike many of the other Articles, is permissive rather than mandatory. Paragraph 4 of Article 12 of the ICCPR provides that no one shall be arbitrarily deprived of the right to enter his own country. The plaintiffs' reliance on General Comment 27 of the United Nations Human Rights Committee (UNHRC), which advocates a broad interpretation of the words "own country", is misplaced. The General Comment does not purport to address the "arbitrary" requirement of paragraph 4. Thus, it does not assist the plaintiffs. Ms. Haj Khalil has never asked to be absent from and readmitted to Canada. Regarding the

children, a determination that has been the subject of judicial oversight cannot be defined as arbitrary.

[279] When regard is had to the fact that the family has now been separated for more than 13 years, the plaintiffs' submissions appear meritorious. This is a sympathetic case. The applications for permanent resident status were first submitted more than 10 years ago and Ms. Haj Khalil has yet to receive a final decision. I have determined that the delay in processing her application from August of 2002 has been inordinate, unreasonable and inexcusable. There is no doubt that Ms. Haj Khalil is entitled to a decision and the defendant's conduct has certainly not been above reproach. Nonetheless, the issue is whether this delay has impinged the plaintiffs' liberty rights. In my view, it has not.

[280] Family reunification in Canada is not possible if Mr. El Hassen remains inadmissible to Canada. He was denied a visitor visa on the basis of his inadmissibility and the decision has never been contested. In one sense, permanent resident status could have facilitated instances of family reunion by allowing the plaintiffs to visit with Mr. El Hassen outside the country and granting them the right to re-enter Canada after their visit. That said, the fact remains that the governmental action did not prevent or infringe Ms. Haj Khalil's right to make fundamental life choices. It was always open to her to leave Canada at any point and reunite her family elsewhere. Moreover, as I mentioned earlier in these reasons, there is no evidence that Ms. Haj Khalil made any request of the defendant with respect to authorization to visit her husband (or anyone) outside Canada. Severance of the children's applications at an earlier time would have facilitated their acquisition of permanent resident status and allowed for visitation with their father outside Canada.

[281] Ms. Haj Khalil alleges that had her "application for permanent residence been finalized in a timely fashion, she may have made different decisions about the future of the family as a whole". For example, had she been denied permanent resident status in Canada, "she might have applied for resettlement in a European country". The defendant, however, did nothing to prevent Ms. Haj Khalil from taking this action.

[282] This is not a situation analogous to *Children's Aid* where a wardship order had the effect of depriving the parents of the right to make medical decisions with respect to their child. In this case, the state has not assumed control over decisions affecting the individuals' liberty. There is no coercion or constraint. At its highest, the defendant is depriving the plaintiff Ms. Haj Khalil of the right to re-enter Canada, if she should choose to leave.

[283] Underlying this analysis is the fundamental principle that the plaintiffs are not entitled to permanent residence. Anmar and Acil, however, are permanent residents. Pending determination of her application for permanent residence, Ms. Haj Khalil is entitled to protection as a Convention refugee and it has been granted to her. Canada has provided her with safe haven, educated her children and given her the means to support herself and her family (through social assistance) for the past 13 years. International instruments encourage countries to facilitate the settlement of refugees, but they do not mandate that host countries accord refugees a status akin to that of citizenship.

[284] The choice to leave Canada and reunite the family elsewhere lay always within the plaintiffs' grasp. I can well understand why Ms. Haj Khalil did not wish to choose this option, but it was, nonetheless, an option available to her. The defendant did not compel her to stay in Canada and neither she nor her husband have an unqualified right to enter or remain in this country. Section 7 liberty rights are not engaged on these facts.

Security of the Person Interests

[285] The plaintiffs' submissions in relation to their section 7 security of the person interests are not developed. They cite a number of paragraphs from *Blencoe* and make peripheral reference to *R. v. Mills*, [1999] 3 S.C.R. 668 (*Mills*). There is a one line reference to a decision of the Inter-American Court of Human Rights Law cited in support of the proposition that "identity and nationality are similarly basic to individual autonomy, as recognized in the context of international human rights law". As for the infringement of section 7, the plaintiffs state:

> It is submitted that Ms. Haj Khalil and her children's security of the person interests have been impacted by the failure of Canada to resolve the applications for landing in a timely fashion. As the facts underlying the causation of harm, particularly in respect of Ms. Haj Khalil has (sic) been addressed under the common law, it is not covered [here].

[286] I propose to briefly canvass the development of the psychological trauma aspect of the section 7 security of the person interest. Reference will be made to those portions of the jurisprudence that I believe to be relevant to this case.

[287] In *Morgentaler*, the Supreme Court of Canada held that the security of the person does extend to protect an individual from state-induced psychological trauma. At paragraph 16, Chief

Justice Dickson stated that “security of the person” must be given content in a manner sensitive to its constitutional position. After reviewing previous cases on the issue, he stated at paragraph 22:

> The case law leads me to the conclusion that state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person. It is not necessary in this case to determine whether the right extends further, to protect either interests central to personal autonomy, such as a right to privacy, or interests unrelated to criminal justice.

[288] In *New Brunswick (Minister of Health and Community Services v. G. (J.)*, [1999] 3 S.C.R. 46 (*G. (J.)*), the Supreme Court determined that New Brunswick’s failure to provide the appellant with legal aid, in circumstances where the province intended to remove a child from parental custody, violated her rights under section 7 of the *Charter*. Chief Justice Lamer, for the majority, wrote at paragraphs 58-60:

> This Court has held on a number of occasions that the right to security of the person protects "both the physical and psychological integrity of the individual": see R. v. Morgentaler, [1988] 1 S.C.R. 30, at p. 173 (per Wilson J.); Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123, at p. 1177; Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519, at pp. 587-88. Although these cases considered the right to security of the person in a criminal law context, I believe that the protection accorded by this right extends beyond the criminal law and can be engaged in child protection proceedings. Before addressing this issue, I will first make some general comments about the nature of [page 77] the protection of "psychological integrity" included in the right to security of the person.
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> Delineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science. Dickson C.J. in Morgentaler, supra, at p. 56, suggested that security of the person would be restricted through "serious state-imposed psychological stress" (emphasis added). Dickson C.J. was trying to convey something qualitative about the type of state interference that would rise to the level of an infringement of this right. It is clear that the right to security of the person does not protect the individual from the

> ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected…
>
> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric [page 78] illness, but must be greater than ordinary stress or anxiety.

[289] In *Blencoe*, about which much has been said, Justice Bastarache for the majority, concluded that the section 7 security of the person interests in that case were not engaged. In delineating the nature of the harm required, he too referred back to *Morgentaler* and stated at paragraphs 57, 59 and 60:

> Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in Morgentaler, supra, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (G. (J.), at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn.
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> […]
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> Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial

> or process occurs within a reasonable time. We are therefore not concerned in this case with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.
>
> While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. In Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 447, Dickson J. (as he then was) concluded that the causal link between the actions of government and the alleged Charter violation was too "uncertain, speculative and hypothetical to sustain a cause of action". In separate concurring reasons, Wilson J. also conveyed the need to have some type of direct causation between the actions of the state and the resulting deprivation. (emphasis mine)

[290] Further, in relation to causation, the Court, at paragraph 64, stated that a higher level of certainty than "might reasonably be expected" is required in order to find that the government has caused a deprivation of an individual's *Charter* rights. The comments at paragraph 83 are particularly relevant here.

> It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental [page 357] personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.

[291] Last, in *Chaoulli,* three of nine justices found that the prohibition on private health insurance violated section 7 of the *Charter*. Chief Justice McLachlin, at paragraph 116, reiterated the proposition that serious psychological effects may engage section 7 protection for security of the

person. They need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

[292] The plaintiffs have not established that their section 7 security of the person interests are engaged by the delay in the processing of their applications for permanent residence. *Blencoe* clearly stipulates that there are two requirements involved in the analysis regarding the engagement of the security of the person interests:

(1) the psychological harm must be state imposed (the harm must result from the action of the state); and

(2) the psychological prejudice must be serious.

[293] As in *Blencoe*, the plaintiffs cannot transcend the first requirement. Ms. Haj Khalil's depression was not caused, or exacerbated, by the defendant's actions. Anmar and Acil have not alleged any psychological harm arising out of the delay. There are other ancillary issues that do not rise to the requisite level of harm. I have dealt with this issue extensively under the subtitle "causation" at paragraphs 83-128 of these reasons. The same reasoning is applicable here. The plaintiffs have failed to establish, on a balance of probabilities, that Ms. Haj Khalil's depression and anxiety is the result of the defendant's delay.

[294] Further, the caution expressed in *G. (J.)* bears repeating. If the right is interpreted too broadly, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected. See also: *Blencoe*, minority

position at para. 189. The jurisprudence teaches that it is only in exceptional cases that state-caused delay can trigger section 7 "security of the person" interests. This case is not analogous to *Chaoulli* or *Morgentaler*, where the security of the person interest, in the context of psychological integrity, was linked to physical suffering, bodily integrity and the possibility of death.

[295] The plaintiffs have failed to establish a deprivation of their rights to liberty or security of the person. Consequently, I need not determine whether the alleged deprivation was in accordance with the principles of fundamental justice.

Breach of Section 15 of the *Charter*

[296] The plaintiffs contend that "the delays (sic) in processing the application for landing is grounded in discrimination and therefore is in violation of their equality rights under section 15 of the *Charter*".

[297] The following assertions are made in support of the noted allegation:

- the processing delay failed to take into account the already disadvantaged position of Ms. Haj Khalil and her children within Canadian society as stateless Palestinians without permanent residence in Canada or elsewhere;

- they [the plaintiffs] have been subjected to differential treatment because they are foreign nationals and stateless Palestinians;

- the differential treatment has effected discrimination by withholding benefits from them, including landing and the maintenance of family integrity in a manner which reflects the stereotypical application of presumed group characteristics for Palestinians, and which perpetuates and promotes the view that Palestinians involved in any way with their representative national liberation movement are terrorists and as such are less worthy of recognition and value as human beings and as members of Canadian society, equally deserving of concern, respect and consideration.

[298] The proposed comparator group is "others". The plaintiffs say that the delay "has resulted in substantially different treatment between the plaintiffs and others".

[299] I have not been directed to any evidence upon which the plaintiffs propose to rely and their submissions consist solely of the statements noted above. It is not for me to engage in speculation as to what the plaintiffs' case might be. This allegation has not been seriously advanced as is evident by the brevity of the submissions and the failure to identify a comparator group. Consequently, I will not address it. The equality issue is explored in more depth in my analysis of the arguments on "The Constitutionality of paragraph 34(1)(f) of the IRPA".

The Constitutionality of paragraph 34(1)(f) of the IRPA

[300] In their statement of claim, the plaintiffs seek:

> A declaration that section 34(1)(f) of the *Immigration and Refugee Protection Act* on its face and/or in its application and operation infringes the plaintiffs' right to the freedoms of expression and association under section 2 of the *Charter of Rights and Freedoms* and is of no force and effect under section 52(1) of the *Constitution Act, 1982*, given that the sanction of inadmissibility was and can be

> premised entirely on lawful expressive activity and association. The denial of and delay in landing, and the resultant denial of family reunification, based on a person's journalistic career for the official representative of her people, strikes at the core of the freedoms of expression and association.
>
> A declaration that section 34(1)(f) of the *Immigration and Refugee Protection Act* infringes on its face and/or in its application and operation section 15 of the *Charter of Rights and Freedoms* and is of no force and effect under section 52(1) of the *Constitution Act, 1982* in proscribing activities which are lawful for Canadians and are in pursuit of an international recognized right to self determination, a fundamental human right for all peoples and in proscribing the association and activities of Palestinians engaged in the lawful activities on behalf of their representative organization, when others engaged in lawful activities on behalf of their state are not sanctioned by virtue of the relationship with the state, even though the state may engage in human rights violations, unless under section 35(1)(b) of the *Immigration and Refugee Protection Act* the state has been designated and the person has held a position of influence within the government.

Section 2

[301] To reiterate what has been stated earlier, subsection 34(1) of the IRPA contains the provisions relating to inadmissibility on security grounds. Paragraph 34(1)(c) coupled with paragraph 34(1)(f) provide that a person is inadmissible for being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in terrorism. Section 2 of the *Charter* guarantees, among other things, freedom of expression and association.

[302] The argument advanced in relation to section 2 of the *Charter* is that the impugned paragraphs of the IRPA make no distinction among different organizations. Rather, the provision penalizes members, or former members, regardless of the nature of the organization's

functions or the degree to which the specific branches within the organization engage in terrorism.

[303] Ms. Haj Khalil acknowledges that the Supreme Court of Canada, in *Suresh*, held paragraph 19(1)(f) of the former Act to be constitutional. I stated earlier in these reasons that, for present purposes, the pertinent provisions of the former Act and those of the IRPA are substantively the same. The plaintiffs do not suggest otherwise.

[304] With respect to section 2 specifically, Ms. Haj Khalil notes that her claim to freedom of expression and association "relates to events that date back to 1979, long before the *Charter* was in effect". Nonetheless, she maintains that the *Charter* is engaged on the basis that it is the application of Canadian law by Canadian officials at the present time that engages *Charter* interests. According to Ms. Haj Khalil, it matters not that the "exercise of her internationally recognized [right of] freedom of expression and association occurred outside of Canada and in part before the *Charter* was part of Canada's constitution". Rather, she contends that she has been determined to be inadmissible for residence in Canada under a specific provision of Canadian law which imposes a sanction on her for having exercised her freedoms in the past. Relying on *R. v. Gamble*, [1988] 2 S.C.R. 595 (*Gamble*) and *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (*Benner*), by analogy, Ms. Haj Khalil claims that it is the application of subsection 34(1) of the IRPA that is in issue. The fact that this "requires a consideration of past events does not prevent the *Charter* from being engaged".

[305] In my view, the decision of the Supreme Court in *Suresh* is dispositive of this issue. In *Suresh*, the Court considered whether the precursor to subsection 34(1) of the IRPA — subsection 19(1) of the former Act — conformed to the *Charter*. The Court discussed section 19 in detail at paragraphs 102 through 110 of its reasons. Although the discussion related to the intersection of sections 19 and 58 of the former Act, the comments with respect to the interpretation of subsection 19(1) are unequivocal and are equally suited to this case. The Court stated:

> Section 19 of the Immigration Act applies to the entry of refugees into Canada. The Refugee Convention, and following it the Immigration Act, distinguish between the power of a state to refuse entry to a refugee, and its power to deport or "refouler" the refugee once the refugee is established in the country as a Convention refugee. The powers of a state to refuse entry are broader than to deport. The broader powers to refuse entry are based inter alia on the need to prevent criminals escaping justice in their own country from entering into Canada. No doubt the natural desire of states to reject unsuitable persons who by their conduct have put themselves "beyond the pale" also is a factor. See, generally, Hathaway and Harvey, supra.
>
> The main purport of s. 19(1) is to permit Canada to refuse entry to persons who are or have been engaged in terrorism or who are or have been members of terrorist organizations. However, the Immigration Act uses s. 19(1) in a second and different way. It uses it in s. 53(1), the deportation section, to define the class of Convention refugees who may be deported because they constitute a danger to [page58] the security of Canada. Thus a Convention refugee like Suresh may be deported if he comes within a class of persons defined in s. 19(1) and constitutes a danger to the security of Canada.
>
> At this point, an ambiguity in the combination of ss. 53 and 19 arises. Is the class of persons designated by the reference to s. 19 those persons who at entry were or had been associated with terrorist acts or members of terrorist organizations? Or was Parliament's intention to include those who after entry committed terrorist acts or were members of terrorist organizations? The Minister interprets s. 19, as incorporated into s. 53, as including conduct of refugees after entry.

We do not find it necessary to resolve this ambiguity, as in our opinion on either interpretation, s. 19 as incorporated into s. 53 does not breach the rights of free expression and association guaranteed by ss. 2(b) and 2(d) of the Charter. If s. 19, as used in s. 53, is interpreted as referring only to conduct prior to the point of entry, no constitutional problem arises. On the other hand, if it is interpreted as referring to post-entry conduct, we are satisfied that the conduct caught by the section, interpreted properly by the Minister, fails to attract constitutional protection because it would be conduct associated with violent activity.

Section 53, as discussed earlier in connection with deportation to face torture, requires the Minister to balance a variety of factors relating on the one hand to concerns of national security, and to fair process to the Convention refugee on the other. In balancing these factors, the Minister must exercise her discretion in conformity with the values of the Charter.

It is established that s. 2 of the Charter does not protect expressive or associational activities that [page59] constitute violence: *Keegstra*, supra. This Court has, it is true, given a broad interpretation to freedom of expression, extending it, for example, to hate speech and perhaps even threats of violence: *Keegstra; R. v. Zundel*, [1992] 2 S.C.R. 731. At the same time, the Court has made plain that the restriction of such expression may be justified under s. 1 of the Charter: see Keegstra, at pp. 732-33. The effect of s. 2(b) and the justification analysis under s. 1 of the Charter suggest that expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter in the guarantees of the Charter.

The Minister's discretion to deport under s. 53 of the Immigration Act is confined, on any interpretation of the section, to persons who have been engaged in terrorism or are members of terrorist organizations, and who also pose a threat to the security of Canada. Persons associated with terrorism or terrorist organizations -- the focus of this argument -- are, on the approach to terrorism suggested above, persons who are or have been associated with things directed at violence, if not violence itself. It follows that so long as the Minister exercises her discretion in accordance with the Act, there will be no ss. 2(b) or (d) Charter violation.

Suresh argues that s. 19 is so broadly drafted that it has the potential to catch persons who are members of or participate in the activities of a terrorist organization in ignorance of its terrorist activities. He points out that many organizations alleged to support

> terrorism also support humanitarian aid both in Canada and abroad. Indeed, he argues that this is so of the LTTE, the association to which he is alleged to belong. While it seems clear on the evidence that Suresh was not ignorant of the LTTE's terrorist activities, he argues that it may be otherwise for others who were members or contributed to its activities. Thus without knowingly advocating terrorism and violence, they may be found to be part [page60] of the organization and hence subject to deportation. This, he argues, would clearly violate ss. 2(b) and 2(d) of the Charter.
>
> We believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to the national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.

[306] The observation to be made is that the Supreme Court has ruled on whether the statutory scheme, which deems foreign nationals inadmissible to Canada, contravenes subsections 2(b) and 2(d) of the *Charter*.

[307] More particularly, in *Suresh*, the Supreme Court was asked to determine whether the class of persons designated in section 19 of the former Act referred to persons who, at entry into Canada, were or had been associated with terrorist acts or members of terrorist organizations — or — was Parliament’s intention to include those who, after entry, committed terrorist acts or

were members of terrorist organizations? The Court explained at paragraph 105 why it need not answer the question:

> We do not find it necessary to resolve this ambiguity, as in our opinion on either interpretation, s. 19 as incorporated into s. 53 does not breach the rights of free expression and association guaranteed by ss. 2(b) and 2(d) of the Charter. If s. 19, as used in s. 53, is interpreted as referring only to conduct prior to the point of entry, no constitutional problem arises. On the other hand, if it is interpreted as referring to post-entry conduct, we are satisfied that the conduct caught by the section, interpreted properly by the Minister, fails to attract constitutional protection because it would be conduct associated with violent activity.

[308] In its explicit consideration of the question whether subsection 19(1) of the former Act contemplated conduct prior to or after entry into Canada, a unanimous Supreme Court concluded that concern regarding infringement of section 2 *Charter* rights stemmed only from conduct which occurred after entry into Canada. Put another way, the inadmissibility provision does not restrict the individual's freedom of expression or association when it operates to exclude the person from entry to Canada.

[309] In my view, this provides a complete answer to Ms. Haj Khalil's submissions. To arrive at any other conclusion requires that I find the Supreme Court of Canada's ruling — that Canada's inadmissibility provisions do not infringe section 2 of the *Charter* with respect to conduct occurring prior to entry to Canada — flawed. I will do no such thing.

[310] Moreover, I agree with the defendant Crown that *Benner* and *Gamble* deal with circumstances wherein the effect of a law passed prior to the entrenchment of the *Charter* continues to have on-going negative or discriminatory effect upon an individual. The impugned

paragraph of the IRPA was not applicable to Ms. Haj Khalil at the time of her alleged membership or activities. Consequently, it could not have a continuous or ongoing negative effect. No ongoing infringement of Ms. Haj Khalil's subsection 2(b) or 2(d) *Charter* rights has been demonstrated such that the *Charter* should apply to pre-*Charter* conduct. In short, the impugned inadmissibility provisions of the IRPA are not operating in a manner that restricts Ms. Haj Khalil's subsection 2(b) or 2(d) rights to association or expression.

[311] Next, Ms. Haj Khalil contends that subsection 34(2) of the IRPA is rendered illusory by virtue of the implementation of the "new policy" discussed by the current Director of National Security. I prefer to address Ms. Haj Khalil's section 15 *Charter* argument first. I shall return then to her submissions regarding subsection 34(2) of the IRPA, that is, the ministerial exemption or ministerial relief provision.

Section 15

[312] Section 15 of the *Charter* is concerned with equality rights. In general terms, it provides for equality before and under the law and equal protection and benefit of the law, without discrimination.

[313] Ms. Haj Khalil asserts that the inadmissibility provision draws a formal distinction between her and others on the basis of her character as a stateless Palestinian working for the representative of her people and fails to take into account her already disadvantaged position as a stateless Palestinian without permanent residence or citizenship in Canada or elsewhere. She claims that this has resulted in substantively differential treatment.

[314] As a Palestinian, Ms. Haj Khalil claims “entitlement to work in lawful ways for the representative of her people, the PLO”. She alleges differential treatment “in being sanctioned for having worked as a journalist for a PLO magazine”. She argues that others “may engage in lawful expressive employment, including in Canada, without fear of sanction. Others may work for their governments, while she does not have a government, only a recognized multi-faceted national liberation movement”. Further, others are not “penalized for employment with their government, even where that government engages in human rights abuses, but has not been proscribed as such by the Minister or, where proscribed under section 35 of the IRPA, are not sanctioned unless they have held positions of influence in the particular government”.

[315] Aside from citing excerpts from various Supreme Court decisions, the above-noted submissions constitute the totality of Ms. Haj Khalil’s argument. The proposed comparator group is Canadian citizens or “those whose political beliefs are favoured” [by the Canadian government]. In advancing her position, she relies on the evidence of Rex Jeffrey Bryen, the plaintiffs’ expert witness.

[316] Synoptically, Professor Bryen’s evidence indicated that after the original PLO of 1964 was discredited, the PLO, as we know it, was established as a vehicle for Palestinian nationalist aspirations. The PLO won formal recognition by the Arab League as the “sole legitimate representative of the Palestinian people” in 1974. It was accorded observer status in the United Nations. Canada has, for many years, permitted *de facto* PLO diplomatic representation through the office of the Arab League in Ottawa.

[317] By the late 1970s, the PLO had assumed a pre-eminent position and operated as a quasi-state entity (with a parliament, executive, military and social service institutions and diplomatic representation abroad) and was regarded by Palestinians as the "political expression of their politics and their aspirations for self-determination". It was the umbrella for virtually all Palestinian nationalist politics world-wide.

[318] Professor Bryen explained that the PLO does not have a system of formal "membership". Rather, it acts as a state-like entity, governed by a coalition of Palestinian nationalist organizations. Palestinians are not "members" of the PLO, but may work for it and/or be members of particular Palestinian political parties.

[319] Fatah has long been the largest Palestinian party and the mainstream nationalist group. Historically, it dominated the PLO and many of its institutions (including the PLO publication *Falastin al-Thawra*). The PLO and most of its constituent groups supported the use of "armed struggle" to achieve Palestinian self-determination. However, there has always been considerable diversity of opinion within the PLO (and among Palestinians) as to the merits of paramilitary versus diplomatic means for achieving Palestinian aspirations. In 1993, it was the Fatah-dominated PLO that signed the Oslo peace accords with Israel and was formally recognized by Israel as the "representative of the Palestinian people". With the signing of the Oslo accords, the PLO formally adopted a two-state solution and eschewed violence as a means for resolving its dispute with Israel.

[320] The role of Fatah in the evolution of Palestinian politics during the 1980s is a matter of debate. Professor Bryen preferred a more "nuanced" approach to the ideology of Yassar Arafat, who controlled Fatah, than did the defendant's expert David Schenker. I do not intend to delve into this debate. The experts are committed to their respective positions. I need not choose one view over the other because nothing turns on the point. The experts agreed that Fatah factions participated in acts of terrorism during the 1980s.

[321] Before turning to the issue of section 15, I note that exception was taken by plaintiffs' counsel to the use, throughout the record, of the term PLO to describe Fatah. While that criticism is justified, I think that it is fair to say that because Fatah controlled the PLO for many years, there was a tendency to use the terms interchangeably, notwithstanding that it is incorrect to do so. For example, it is clear to me that Ian Taylor was well aware of the distinction. Ms. Haj Khalil would be hard-pressed to say otherwise. Yet, during his evidence, even he at one point stated, "the fact that the PLO had used terrorism was a historical fact" (Transcript, p. 3610).

[322] The seminal authority regarding the section 15 analysis is *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The basic considerations entailed in the analysis were succinctly outlined in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at paragraph 17:

> To establish a violation of s. 15(1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human

> dignity or [page 461] treats people as less worthy on one of the enumerated or analogous grounds. …

[323] In *Auton v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, Chief Justice McLachlin stated that there is "no magic in a particular statement of the elements that must be established to prove a claim under s. 15(1)" and an "overly technical approach should be avoided".

[324] This Court has addressed the issue of whether paragraph 34(1)(f) infringes section 15 of the *Charter*. Madam Justice Snider, in *Al Yamani v. Canada (Minister of Citizenship and Immigration)* (2006), 149 C.R.R. (2d) 340; 58 Imm. L.R. (3d) 181 (F.C.) (*Al Yamani*), was confronted with the argument that paragraph 34(1)(f) is unconstitutional because it results in discrimination as contemplated by subsection 15(1) of the *Charter* in that it "proscribes associations and activities that are lawful for Canadians but are not lawful for non-citizens". Justice Snider's consideration of the argument is found at paragraphs 42-56 of her reasons:

> The first general problem that I have with Mr. Al Yamani's argument is the attempt to re-characterize his membership as being in the PLO. The application of s. 34(1)(f) is made in respect to his membership in the PFLP, an organization that has been found -- in the Board's decision and, on a broader base, by the Government of Canada -- to be a terrorist organization. As pointed out by the Board at para. 43:
>
> > Mr. Al Yamani has not been and is not subject to Immigration proceedings because he is a Palestinian who engages in activities of a political nature. He is not the subject of these proceedings based on any association he may have to the PLO and his support for the Palestinian cause, but based on his involvement and membership in an organization (the PFLP) which has engaged in terrorist activities.

Accordingly, when assessing the merits of Mr. Al Yamani's *Charter* arguments, the starting point is that Mr. Al Yamani's membership is in the PFLP.

The question posed by Mr. Al Yamani is, in my view, completely on all fours with the issue before the Supreme Court of Canada in *Suresh*. In that case, the Supreme Court was considering the deportation of Mr. Suresh who was a member and fundraiser of the Liberation Tigers of Tamil Eelam (the LTTE), an organization alleged to be engaged in terrorist activity in Sri Lanka. The provisions in question under the former *Immigration Act* and the issues before the Supreme Court were substantially identical to those before me. Mr. Suresh's arguments to the Supreme Court were summarized at para. 100:

> Suresh argues that the Minister's issuance of the certificate under s. 40.1 of the *Immigration Act* and the order declaring him a danger to the security of Canada under s. 53(1)(b) on the ground that he was a member of the LTTE violate his *Charter* rights of free expression and free association and cannot be justified. He points out that he has not been involved in actual terrorist activity in Canada, but merely in fund-raising and support activities that may, in some part, contribute to the civil war efforts of Tamils in Sri Lanka. He also points out that it is not a criminal offence to belong to such an organization and that the government seeks to deport him for something that Canadian citizens may lawfully do without sanction. He suggests that inclusion of mere membership in an organization that has been or will be involved in acts of terrorism unjustifiably limits the freedom of Convention refugees to express their views on dissident movements outside the country, as well as their freedom to associate with other people in Canada who come from similar backgrounds. He points out that the alleged terrorist organizations he was found to have been a [page 57] member of are engaged in many positive endeavours to improve the lives of people in Canada and are not involved in violence here.

The Supreme Court rejected these arguments completely concluding that there was no breach of Mr. Suresh's rights under s. 2 of the *Charter*. At paras. 107-111, the reasons of the Supreme Court are set out:

[…]

In spite of Mr. Al Yamani's efforts, I can see nothing to distinguish the decision in *Suresh* from the facts before me. For example, Mr. Suresh's activities within the organization, like Mr. Al Yamani's, were administrative rather than directly involved in acts of terrorism. Mr. Suresh argued that his organization engaged in humanitarian activities as well as alleged terrorism; so does Mr. Al Yamani. The LTTE, like the PFLP, was described as "multi-faceted". In *Suresh*, the Supreme Court referred to the ministerial exemption as allowing a claimant to assert his innocent association with a terrorist organization. Similarly, ministerial exemption is available to Mr. Al Yamani pursuant to s. 34.2 of *IRPA*.

Thus, the Board's decision is consistent with the Supreme Court of Canada's findings in *Suresh* and is supported by the evidence. In my view, the Board correctly concluded that the provisions of s. 34(1)(f) of *IRPA* did not breach Mr. Al Yamani's rights under s. 2 of the *Charter*.

4. Is s. 34(1)(f) of IRPA in violation of s. 15 of the Charter?

Mr. Al Yamani also argues that s. 34(1)(f) results in discrimination as contemplated by s. 15 (1) of the *Charter*. In his view, s. 34(1)(f) proscribes associations and activities that are lawful for Canadian citizens but are not lawful for non-citizens. Mr. Al Yamani asserts that non-citizenship falls within an "analogous ground" to those set out in s. 15 of the *Charter*. He also submits that, as a non-citizen and a stateless Palestinian, he is already in a disadvantageous position within Canadian society and that the discriminatory treatment he receives under s. 34(1)(f) provides for substantially different treatment between him and Canadian citizens.

In my view, there are a number of reasons why the Board was correct in rejecting these arguments.

An analysis under s. 15(1) involves two steps (see, for example, *Law Society British Columbia v. Andrews*, [1989] 1 S.C.R. 143, and *R. v. Turpin*, [1989] 1 S.C.R. 1296). First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show that the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics.

It appears that Mr. Al Yamani, as a non-citizen, is not equally treated under the law. Accordingly, there may be some argument that he satisfies the first part of the s. 15 *Charter* analysis, since s. 34 does not apply to Canadian citizens. However, in that regard, I would note that the *Charter* recognizes the distinction between Canadian citizens and non-citizens. As stated by the Supreme Court of Canada in the leading case of *Canada* (*Minister of Employment and Immigration*) *v. Chiarelli*, [1992] S.C.J. No. 27 at para. 32:

> [Section] 6 of the *Charter* specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens. [Emphasis added.]

Even if I were to conclude that Mr. Al Yamani demonstrates a denial of equal treatment, the key to the second step of the analysis is in the nature of Mr. Al Yamani's membership. Was his membership in the PFLP one that is referred, directly or by analogy, to those interests protected under s. 15? If the answer to that is negative, s. 15 is not engaged.

In my view, no analogy can be made between the grounds of discrimination listed in s. 15(1) and membership in a terrorist organization. As discussed above, the case before me is not about membership in the governing PLO; rather, it is a case about membership in a terrorist organization.

Membership in the PFLP cannot be described as an immutable characteristic, such as race or sex (*Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241; *Miron v. Trudel*, [1995] 2 S.C.R. 418). Mr. Al Yamani's existence as a Palestinian is, I agree, a constant. The same cannot be said about his voluntary membership in the PFLP. The record demonstrates that, as Mr. Al Yamani found it expedient to do so, he ceased his PFLP activities or, as of 1992, resigned from the organization. The ability to opt in or out of a group is entirely inconsistent with the grounds -- both stated and analogous -- set out in s. 15. On this basis, Mr. Al Yamani's claim that s. 34(1)(f) violates his s. 15 rights is without merit. His right to belong to a terrorist organization do not fall within the rights protected by s. 15.

> I do not disagree with Mr. Al Yamani that the Supreme Court, in *Andrews* above, determined that the distinction made on the basis of citizenship is an analogous ground under s. 15 of the *Charter*. This was affirmed by the Supreme Court in *Lavoie v. Canada*, [2002] 1 S.C.R. 769. However, these cases do not assist Mr. Al Yamani for the simple reason that s. 34(1)(f) is not about a person's citizenship; rather, it is about the rights of Canada to refuse admission to Canada of a person who belongs to an organization that engages, has engaged or will engage in terrorist acts.
>
> Moreover, Justices MacLachlin and l'Heureux-Dube in *Lavoie*, at para. 2, pointed out that "[a] discriminatory distinction is one that violates human dignity". Although the discriminatory distinction of citizenship has been found to violate human dignity, it is hard to imagine how discriminating against a non-citizen because of his association with a terrorist organization violates that person's human dignity. As pointed out by the Respondent, "terrorist activity is directly inimical to s. 15(1)'s purposes of ensuring the dignity of all persons".
>
> There is no need to carry out any further s. 15 *Charter* analysis. Mr. Al Yamani fails to meet the threshold requirement of s. 15 that membership in a terrorist organization is a right that is protected by s. 15.

[325] There are striking similarities between *Al Yamani* and this case. It is true that Canadian citizens are not subject to paragraph 34(1)(f) of the IRPA. Assuming that this constitutes differential treatment, Ms. Haj Khalil submits that the provision draws a distinction based on her "character as a stateless Palestinian working for the representative of her people". Notably, Ms. Haj Khalil's inadmissibility arose from her (albeit now disputed) membership in Fatah, an organization that was once a terrorist organization, but is no longer considered as such today.

[326] The fundamental flaw in Ms. Haj Khalil's position is her failure to appreciate that it was not her "character as a stateless Palestinian" or even her participation in the PLO that precipitated the distinction or differential treatment. Rather, it was Ms. Haj Khalil's declaration

on her PIF and her testimony at her refugee hearing that she was a member of Fatah. Mr. Taylor spoke of Fatah members being found inadmissible, but also stated that (depending on past involvement) they often made good candidates for ministerial relief. Indeed, one of the plaintiffs' witnesses was such a person.

[327] Further, not all Palestinians are deemed inadmissible when they seek permanent residence in Canada. This country is home to many people of Palestinian origin. While personal participation in the PLO may be contingent on membership in one of its constituent organizations, it does not follow that all constituent organizations are caught by paragraph 34(1)(f). I was not referred to a single example where a member of the Red Crescent Society (also a PLO member organization) working for the "representative of [the Palestinian] people" had been determined inadmissible. There were many student organizations and labour groups that were members of the PLO, but were not engaged in terrorism of any description. If the organization for which an individual was employed was not associated with terrorist activity, paragraphs 34(1)(c) and 34(1)(f) are not triggered.

[328] I therefore reject Ms. Haj Khalil's characterization of the applicable analogous ground. Consequently, my analysis of the section 15 claim need go no further because the claim fails at this stage. I concur with Justice Snider that membership in an organization that is or was affiliated with terrorism is not an analogous ground deserving of *Charter* protection.

[329] However, even if I were prepared to accept the characterization of the applicable analogous ground and the proposed comparator groups, there is a paucity of evidence to indicate

that Palestinians are treated any differently from other groups of foreign nationals applying for permanent residence in Canada. There is no evidence indicating how many Palestinians apply for status, how many are found inadmissible by virtue of paragraph 34(1)(f), and, if such evidence were available, how those numbers compare to other groups of foreign nationals. In short, there is an allegation here, but there is no evidence to support it. Moreover, in principle, denying status to those who may be or may have been members of terrorist organizations is a justifiable objective. Even if Ms. Haj Khalil had established a violation of section 15 (and she has not), I seriously doubt that her claim could survive a section 1 *Charter* analysis.

Subsection 34(2) of the IRPA is illusory

[330] Ms. Haj Khalil takes the position that "notwithstanding the [Supreme] Court's reasoning [in *Suresh*], the ministerial relief provision does not operate to save paragraph 34(1)(f) of the IRPA". She contends that the Supreme Court focussed "on the ministerial exemption discretion as the means to save the overly broad reach of the provision". However, the "application [of the exemption provision] was not before the Court". Ms. Haj Khalil maintains that the Minister's discretion to determine whether an inadmissible person's presence is detrimental to "national interest" is so broad that the remedy is largely illusory.

[331] The question, according to Ms. Haj Khalil, is whether the scope of the ministerial discretion is sufficiently precise and effective to provide the Minister with direction on its exercise. In this respect, she points to the reasoning of the courts in cases addressing the medical use of marijuana: *R. v. Parker* (2000), 49 O.R. (3d) 481; 188 D.L.R. (4th) 385 (Ont. C.A.) (*Parker*), *R. v. Long*, 2007 ONCJ 340, O.J. No. 2774 (Ont. Ct. Jus.), *R. v. Hitzig* (2003), 231

D.L.R. (4th) 104; 177 C.C.C. (3d) 449 (Ont. C.A.). There, the courts found that the ministerial exemption "amounted to unfettered discretion".

[332] Subsection 34(2) vests the Minister with discretion to grant an exemption from an inadmissibility finding where it would not be detrimental to national interest. Ms. Haj Khalil claims that the broad language used in subsection 34(2) is similar to the medical use of marijuana cases because the Minister may take into account factors unrelated to "the inadmissibility grounds and [she] only has the right to seek the exemption, not to be given it, even though the application of s. 34(1)(f) of the Act infringes her *Charter* rights".

[333] Alternatively, Ms. Haj Khalil argues that the discretion is currently "applied in a righteous and moralistic fashion and does not serve the purpose for which it was created". In response to my request for submissions on the applicability of the Supreme Court of Canada decision in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 (*Little Sisters*), she alleges that the evidence establishes that the exemption has not been applied constitutionally. The conduct here has been arbitrary and discriminatory. In circumstances "where the conduct of government officials is violative of a person's *Charter* rights, this cannot be characterized as authorized and therefore is not 'prescribed by law' even though the legislation itself may properly be considered as so prescribed": *Little Sisters*. In this respect, she relies primarily on the evidence of Mr. Louis Dumas.

[334] Mr. Dumas testified that the policy regarding the use of the ministerial exemption has changed and that the relief is being used in a "more prudent or restrictive fashion" (Transcript, p.

4214). Mr. Taylor's philosophy reflects an "older reality" that "probably existed ten years ago" (Transcript, p. 4231). Today, according to Mr. Dumas, ministerial relief will be used in "a more sparing fashion" (Transcript, p. 4232).

[335] Mr. Dumas takes credit for being one of the "key people" behind this change in policy (Transcript, p. 4235). He questions, as the Director of National Security, whether Canada should always be a point of finality for an individual who has been a member of a group that has committed terrorist activities for a number of years. If such person has sought and found refuge in Canada, perhaps the person "will on its (sic) own capacity, you know – and if we are dealing in the realm of hypothesis here, maybe the person in his own reality will make his way to another country and will be thankful for Canada to have provided refuge for this individual, but maybe this person will move on. But Canada, you know, we respect our international obligations and give protected status to this individual" (Transcript, p. 4233).

[336] When cross-examined, Mr. Dumas acknowledged that the change in policy is not articulated in the IP10 Manual and that the department is applying standards which are not set out in the guidelines. To this end, the guidelines will probably be redrafted in the future, to be "a bit tighter" and reflect the current reality (Transcript, p. 4249).

[337] While relying heavily on the evidence of Mr. Dumas, Ms. Haj Khalil omits reference to the department's efforts to ascertain the propriety of her request for ministerial exemption. This is consistent with Ms. Haj Khalil's assertion that she is a worthy candidate for ministerial exemption notwithstanding that various aspects of her evidence, from the defendant's

perspective, have been suspect. It is clear (although the record is not clear as to when) that the department retained archivists to search for the articles in FAT that Ms. Haj Khalil claimed to have written and had submitted at her refugee hearing to support her claim. After extensive searching of all FAT magazines and newspapers from 1978 until the publications ceased, witnesses Yaniv Berman and Rami Livni were not able to find any of those articles. Moreover, on the eve of trial, Ms. Haj Khalil claimed to have written articles under an alias that, over the past 12 years, she had not previously disclosed. Thus, the issue is not as straight-forward as Ms. Haj Khalil presents it.

[338] The first point to be made is that Ms. Haj Khalil argued the constitutionality of paragraph 34(1)(f) on the basis that it impinges her rights under sections 2 and 15 of the *Charter*. I have determined that those rights were not violated. *Parker* and its progeny, all concerned with criminal charges, were decided on the basis of a breach of section 7 *Charter* rights. Ms. Haj Khalil neither pleaded nor argued section 7 of the *Charter* in relation to the "constitutionality" issue. Consequently, those authorities do not assist her.

[339] The second point concerns the applicability of the Supreme Court of Canada decision in *Little Sisters*. There, the Supreme Court considered the constitutionality of a provision of the Customs Tariff which prohibited the importation of material deemed to be obscene, hateful, treasonous or seditious under the *Criminal Code*, R.S., c. C-34. Little Sisters Book and Art Emporium, a gay and lesbian bookstore in Vancouver, alleged that customs officials had targeted and harassed them by seizing and holding their imported goods at the border for months at a time. It argued that the Customs Tariff was unconstitutional on the basis of sections 2 and 15 of

the *Charter*. In upholding the constitutionality of the legislation with respect to section 2 of the *Charter*, a majority of the Supreme Court found at paragraphs 70-82:

> On this branch of the argument the appellants claim that the statutory Customs border review procedures achieve a level of unworkability comparable to the abortion provisions of the Criminal Code which the Court held to be unconstitutional in *Morgentaler*, supra. Similar arguments were considered in ***Hunter v. Southam Inc***., [1984] 2 S.C.R. 145, and ***R. v. Bain***, [1992] 1 S.C.R. 91. In those cases, the Court found that the source of unconstitutionality resided in the legislation itself. I therefore turn in the first instance to an examination of the *Customs Tariff* and the *Customs Act* in light of the appellants' complaints. I will then take a more detailed look at the relevant authorities.
>
> The appellants say a regulatory structure that is open to the level of maladministration described in the trial judgment is unconstitutionally underprotective [page 1168] of their constitutional rights and should be struck down in its entirety. In effect they argue that Parliament was required to proceed by way of legislation rather than the creation of a delegated power of regulation in s. 164(1)(j), which authorizes the Governor in Council to "make regulations ... generally, to carry out the purposes and provisions of this Act", or by ministerial directive. My colleague Iacobucci J. accepts the propositions that "[t]his Court's precedents demand sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights" (para. 204) and because "the legislation makes no reasonable effort to ensure that it will be applied constitutionally to expressive materials" (para. 211), Code 9956 should be struck from the *Customs Tariff*. I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation (as the appellants contend) rather than by way of regulation (as Parliament contemplated in s. 164(1)(j)) or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the basis that its enactments "will be applied constitutionally" by the public service.
>
> The authorities relied on by my colleague all deal with legislation that itself contained problematic provisions. In this case, the complaint is about the absence of affirmative provisions, per Iacobucci J., at para. 166: "The Customs legislation lacks the most basic procedures necessary for a fair and accurate determination of whether something is obscene." To put it another way, the

appellants' complaint is about what Parliament did not enact rather than what it did enact. The imposition on Parliament of a constitutional obligation to deal itself with *Charter*-sensitive matters rather than by permitting Parliament the option of enacting a delegated regulation-making power has serious [page 1169] ramifications for the machinery of government. I do not agree that Parliament's options are so limited.

The initial question, however, is whether the Customs legislation itself contains procedures that infringe *Charter* rights, as in *Morgentaler*, or whether the problem here is implementation, aggravated by administrative constraints such as limited budgets and lack of qualified personnel, as found by the trial judge.

[…]

While these complaints have some substance, they address the statutory scheme as operated by officials rather than the statutory scheme itself. The Constitution does not prohibit border inspections: *R. v. Simmons*, [1988] 2 S.C.R. 495. Any border inspection may involve detention and, because Customs officials are only human, erroneous determinations. Thus the trial judge found at para. 234 that:

> The deleterious effects of the legislation as opposed to the effects of its administration and application, are that admissible material is sometimes detained to be examined for compliance and that wrong decisions are sometimes made in the classification of materials. [Emphasis added.]

I regard such potential as inherent in any border surveillance scheme. Of themselves, they afford no reason to declare the legislation unconstitutional.

[…]

Iacobucci J. argues that Parliament was constitutionally required to spell out a more rights-protective regime in the Act itself, but in my view, for the reasons given below, it was open to Parliament in creating this type of government machinery to lay out the broad outline in the legislation and leave its implementation to regulation by the Governor in Council or departmental procedures established under the authority of the Minister. A failure at the implementation level, which clearly existed here, can be addressed at the implementation level.

[340] In relation to the section 15 allegation, the majority concluded at paragraphs 123-125:

> There was ample evidence to support the trial judge's conclusion that the adverse treatment meted out by Canada Customs to the appellants and through them to Vancouver's gay and lesbian community violated the appellants' legitimate sense of self-worth and human dignity. The Customs treatment was high-handed and dismissive of the appellants' right to receive lawful expressive [page 189] material which they had every right to import. When Customs officials prohibit and thereby censor lawful gay and lesbian erotica, they are making a statement about gay and lesbian culture, and the statement was reasonably interpreted by the appellants as demeaning gay and lesbian values. The message was that their concerns were less worthy of attention and respect than those of their heterosexual counterparts.
>
> While here it is the interests of the gay and lesbian community that were targeted, other vulnerable groups may similarly be at risk from overzealous censorship. Little Sisters was targeted because it was considered "different". On a more general level, it seems to me fundamentally unacceptable that expression which is free within the country can become stigmatized and harassed by government officials simply because it crosses an international boundary, and is thereby brought within the bailiwick of the Customs department. The appellants' constitutional right to receive perfectly lawful gay and lesbian erotica should not be diminished by the fact their suppliers are, for the most part, located in the United States. Their freedom of expression does not stop at the border.
>
> That having been said, there is nothing on the face of the Customs legislation, or in its necessary effects, which contemplates or encourages differential treatment based on sexual orientation. The definition of obscenity, as already discussed, operates without distinction between homosexual and heterosexual erotica. The differentiation was made here at the administrative level in the implementation of the Customs legislation.

[341] It seems to me that, as in *Little Sisters*, the complaint here is about “what Parliament did not enact rather than what it did enact*”: Little Sisters* at para. 72. If I were to accept, without reservation, Ms. Haj Khalil’s characterization of Mr. Dumas’s evidence, it does not follow that

the legislation is unconstitutional. Rather, the testimony relates to the statutory provision as administered by officials rather than the statutory provision itself. As articulated in *Little Sisters*, "Parliament is entitled to proceed on the basis that its enactments 'will be applied constitutionally' by the public service", para. 71.

[342] More importantly, the determination as to whether ministerial exemption will be granted is not Mr. Dumas's decision to make. Although public servants are charged with making a recommendation to the Minister, it is for the Minister alone to decide whether relief will be granted. The Minister's decision is subject to judicial oversight and this Court has not been hesitant to remit matters to the Minister for redetermination where the circumstances warranted such action. See: *Yamani v. Canada (Minister of Public Safety and Emergency Preparedness*), 2007 FC 381, F.C.J. No. 520, *Soe v. Canada (Minister of Public Safety and Emergency Preparedness*), 2007 FC 461, F.C.J. No. 620.

[343] I note that the minority in *Little Sisters* was especially critical of the inadequacies of the customs scheme because absolute discretion rested in a bureaucratic decision-maker who was charged with making a decision without any evidence or submissions, without any requirement to render reasons and without any guarantee that the decision-maker was aware of or understood the legal test that he or she was applying. That process is to be distinguished from one where the applicant has a full opportunity to make submissions and where the decision-maker is the Minister.

[344] Maladministration of legislation undoubtedly can infringe upon an individual's *Charter* rights but it does not afford a basis for striking down the underlying legislation. Put another way, legislation that is constitutionally valid should not be struck down because it is being applied in an unconstitutional manner.

[345] More significantly, Ms. Haj Khalil has not yet received a determination with respect to her request for ministerial exemption. If she receives a negative decision, it is then open to her to argue that the "maladministration" of the ministerial discretion infringed her *Charter* rights, or that the ministerial discretion was exercised in an unconstitutional manner. The propriety of seeking a remedy for an alleged infringement of her *Charter* rights, by attacking the constitutionality of paragraph 34(1)(f) on the basis of the evidence of Mr. Dumas is flawed, even where the remedy sought is a declaration.

[346] In my view, the reasoning of the majority in *Little Sisters* is a complete answer to Ms. Haj Khalil's argument. Mr. Justice Binnie noted that there were procedures in place to challenge the customs officer's decision: para. 80. Likewise, such procedures are in place in relation to Ms. Haj Khalil's application for a ministerial exemption. If a decision is not forthcoming, Ms. Haj Khalil can apply for leave for an order of mandamus. If the ministerial relief decision is negative, she can apply for leave and judicial review of the decision.

[347] This result may seem unduly harsh to Ms. Haj Khalil given that she has been waiting more than 12 years to learn whether she will be granted permanent resident status in Canada. As Mr. Justice LeBel opined in *Blencoe*, "unnecessary delay in judicial and administrative

proceedings has long been an enemy of a free and fair society…modern administrative law is deeply adverse to unreasonable delay". Rather than initiate an action, Ms. Haj Khalil ought to have sought the remedy of mandamus. If a decision on her application for permanent residence is not forthcoming, I see no reason why an application for leave and mandamus could not also include a request that the matter be addressed on an expedited basis.

Miscellaneous Issues

[348] Ms. Haj Khalil claimed damages for economic loss, specifically loss of past and future income. All three of the plaintiffs claimed punitive damages. Because the action in negligence fails and the plaintiffs have not established infringement of their *Charter* rights, it follows that they are not entitled to these remedies. However, for completeness, I will briefly address Ms. Haj Khalil's allegation of economic loss.

[349] Had she succeeded in her action, the evaluation of Ms. Haj Khalil's economic loss would require specific findings on my part. It may be helpful to delineate those determinations. I preferred the evidence of Mr. Ronald Smith over that of Mr. Jim Muccilli. Subject to one qualification, I agree with the economic loss calculations contained in the Smith report. The qualification is that Ms. Haj Khalil has not persuaded me that she would work on a full-time basis. Her commitment to her children coupled with her previous work history, as she related it, render full-time employment highly unlikely. I conclude that, at best, she would work half-time. Since the period of delay begins only at the end of July 2002, the calculation would proceed from August 1, 2002. However, Ms. Haj Khalil's duty to mitigate her damages was not satisfied because of her failure to seek leave and an order for mandamus. Thus, the assessment of damages would include

the period from August 1, 2002 to November 3, 2003, the latter being the date upon which she initiated this action. The calculated total would then be reduced by the amount of income that Ms. Haj Khalil earned at the accounting firm in Windsor during the identified time frame.

[350] The result of the Attorney General's application pursuant to section 38.04 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 has no effect on any of my determinations in this matter. Counsel appropriately declined to make further submissions regarding my order dated September 11, 2007 in *Attorney General v. Nawal Haj Khalil et al.*, Court file number DES-01-07.

Costs

[351] While success has been somewhat divided, the defendant has prevailed on most issues. Counsel are encouraged to resolve the issue of costs by agreement. The defendant should recall that Ms. Haj Khalil is a recipient of legal aid. Absent resolution on the issue of costs, counsel are to serve and file written submissions, not to exceed five pages double-spaced, within 35 days of the date of judgment. Responses to those submissions are to be served and filed within 10 days of service of the first submissions, or within 45 days of the date of judgment, at the election of counsel. I remain seized of this matter with respect to the determination of costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT the action is dismissed. The issue of costs is reserved.

"Carolyn Layden-Stevenson"
Judge

SCHEDULE "A"
to the
Reasons for Judgment and Judgment
dated September 18, 2007
in
NAWAL HAJ KHALIL,
ANMAR EL HASSEN, and ACIL EL HASSEN,
by her Litigation Guardian, NAWAL HAJ KHALIL
and
HER MAJESTY THE QUEEN
T-2066-03

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act, 1982*, c. 11 (U.K.) [R.S.C., 1985, Appendix II No. 44]	*Charte canadienne des droits et libertés,* Partie I de la Loi constitutionnelle de 1982, annexe B de la *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.), [L.R.C., 1985, Appendice II n° 44]
2. Everyone has the following fundamental freedoms: … (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; … (d) freedom of association	**2.** Chacun a les libertés fondamentales suivantes : […] *b*) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication; […] *d*) liberté d'association.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability	**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as	**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation

the court considers appropriate and just in the circumstances.

que le tribunal estime convenable et juste eu égard aux circonstances.

Constitution Act, 1982

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Loi constitutionnelle de 1982

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

3. The Crown is liable for the damages for which, if it were a person, it would be liable
(a) in the Province of Quebec, in respect of
(i) the damage caused by the fault of a servant of the Crown, or
(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and
(b) in any other province, in respect of
(i) a tort committed by a servant of the Crown, or (ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

Loi sur la responsabilité civile de l'État et le contentieux administratif, L.R., 1985, ch. C-50

3. En matière de responsabilité, l'État est assimilé à une personne pour :
a) dans la province de Québec :
(i) le dommage causé par la faute de ses préposés,
(ii) le dommage causé par le fait des biens qu'il a sous sa garde ou dont il est propriétaire ou par sa faute à l'un ou l'autre de ces titres;
b) dans les autres provinces :
(i) les délits civils commis par ses préposés,
(ii) les manquements aux obligations liées à la propriété, à l'occupation, à la possession ou à la garde de biens.

10. No proceedings lie against the Crown by virtue of subparagraph 3(a)(i) or (b)(i) in respect of any act or omission of a servant of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action for liability against that servant or the servant's personal representative or succession.

10. L'État ne peut être poursuivi, sur le fondement des sous-alinéas 3a)(i) ou b)(i), pour les actes ou omissions de ses préposés que lorsqu'il y a lieu en l'occurrence, compte non tenu de la présente loi, à une action en responsabilité contre leur auteur, ses représentants personnels ou sa succession.

Federal Courts Act,
R.S.C. 1985, c. F-7

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(3) On an application for judicial review, the Federal Court may
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Loi sur les Cours fédérales,
L.R. (1985), ch. F-7

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;
b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Federal Courts Rules, SOR/98-106

369. (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

399. (2) On motion, the Court may set aside or vary an order
(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or
…

Immigration Act,
R.S.C. 1985, c. I-2

19. (1) No person shall be granted admission who is a member of any of the following classes:
…
(*f*) persons who there are reasonable grounds to believe
…
(iii) are or were members of an organization that there are reasonable grounds to

Règles de la Cour fédérale, DORS/98-106

369. (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites**.**

(2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

399. (2) La Cour peut, sur requête, annuler ou modifier une ordonnance dans l'un ou l'autre des cas suivants :
a) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;
[…]

Loi sur l'immigration,
L.R. (1985), ch. I-2,

19. (1) Les personnes suivantes appartiennent à une catégorie non admissible :
[…]
f) celles dont il y a des motifs raisonnables de croire qu'elles :
[…]
(iii) soit sont ou ont été membres d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est

believe is or was engaged in
…
(B) terrorism,

livrée :
[…]
(B) soit à des actes de terrorisme,

Immigration and Refugee Protection Act, S.C. 2001, c. 27

3. (1) The objectives of this Act with respect to immigration are
(a) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;
(b) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;
(b.1) to support and assist the development of minority official languages communities in Canada;
(c) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;
(d) to see that families are reunited in Canada;
(e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;
(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;
(g) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;
(h) to protect the health and safety of Canadians and to maintain the security of Canadian society;
(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and
(j) to work in cooperation with the provinces to secure better recognition of the foreign

Loi sur l'immigration et la protection des réfugiés. L.C. 2001, ch. 27

3. (1) En matière d'immigration, la présente loi a pour objet :
a) de permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques;
b) d'enrichir et de renforcer le tissu social et culturel du Canada dans le respect de son caractère fédéral, bilingue et multiculturel;
b.1) de favoriser le développement des collectivités de langues officielles minoritaires au Canada;
c) de favoriser le développement économique et la prospérité du Canada et de faire en sorte que toutes les régions puissent bénéficier des avantages économiques découlant de l'immigration;
d) de veiller à la réunification des familles au Canada;
e) de promouvoir l'intégration des résidents permanents au Canada, compte tenu du fait que cette intégration suppose des obligations pour les nouveaux arrivants et pour la société canadienne;
f) d'atteindre, par la prise de normes uniformes et l'application d'un traitement efficace, les objectifs fixés pour l'immigration par le gouvernement fédéral après consultation des provinces;
g) de faciliter l'entrée des visiteurs, étudiants et travailleurs temporaires qui viennent au Canada dans le cadre d'activités commerciales, touristiques, culturelles, éducatives, scientifiques ou autres, ou pour favoriser la bonne entente à l'échelle internationale;
h) de protéger la santé des Canadiens et de garantir leur sécurité;
i) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de

credentials of permanent residents and their more rapid integration into society.

(2) The objectives of this Act with respect to refugees are
(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
(c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
(e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;
(f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;
(g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and
(h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals

(3) This Act is to be construed and applied in a manner that
(a) furthers the domestic and international interests of Canada;

la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;
j) de veiller, de concert avec les provinces, à aider les résidents permanents à mieux faire reconnaître leurs titres de compétence et à s'intégrer plus rapidement à la société.

(2) S'agissant des réfugiés, la présente loi a pour objet :
a) de reconnaître que le programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;
b) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;
c) de faire bénéficier ceux qui fuient la persécution d'une procédure équitable reflétant les idéaux humanitaires du Canada;
d) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;
e) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;
f) d'encourager l'autonomie et le bien-être socioéconomique des réfugiés en facilitant la réunification de leurs familles au Canada;
g) de protéger la santé des Canadiens et de garantir leur sécurité;
h) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

(3) L'interprétation et la mise en oeuvre de la

4. (2) The Minister as defined in section 2 of the Canada Border Services Agency Act is responsible for the administration of this Act as it relates to
(a) examinations at ports of entry;
(b) the enforcement of this Act, including arrest, detention and removal;
(c) the establishment of policies respecting the enforcement of this Act and inadmissibility on grounds of security, organized criminality or violating human or international rights; or
(d) determinations under any of subsections 34(2), 35(2) and 37(2).

4. (2) Le ministre, au sens de l'article 2 de la Loi sur l'Agence des services frontaliers du Canada, est chargé de l'application de la présente loi relativement :
a) au contrôle des personnes aux points d'entrée;
b) aux mesures d'exécution de la présente loi, notamment en matière d'arrestation, de détention et de renvoi;
c) à l'établissement des orientations en matière d'exécution de la présente loi et d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou pour activités de criminalité organisée;
d) à la prise des décisions au titre des paragraphes 34(2), 35(2) ou 37(2).

21. (2) Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, subject to any federal-provincial agreement referred to in subsection 9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38.

21. (2) Sous réserve d'un accord fédéro-provincial visé au paragraphe 9(1), devient résident permanent la personne à laquelle la qualité de réfugié ou celle de personne à protéger a été reconnue en dernier ressort par la Commission ou celle dont la demande de protection a été acceptée par le ministre — sauf dans le cas d'une personne visée au paragraphe 112(3) ou qui fait partie d'une catégorie réglementaire — dont l'agent constate qu'elle a présenté sa demande en conformité avec les règlements et qu'elle n'est pas interdite de territoire pour l'un des motifs visés aux articles 34 ou 35, au paragraphe 36(1) ou aux articles 37 ou 38.

34. (1) A permanent resident or a foreign national is inadmissible on security grounds for
…
(c) engaging in terrorism;
…
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c).

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
[…]
c) se livrer au terrorisme;
[…]
f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

35. (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for
(a) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act;
(b) being a prescribed senior official in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the Crimes Against Humanity and War Crimes Act; or
(c) being a person, other than a permanent resident, whose entry into or stay in Canada is restricted pursuant to a decision, resolution or measure of an international organization of states or association of states, of which Canada is a member, that imposes sanctions on a country against which Canada has imposed or has agreed to impose sanctions in concert with that organization or association.

35. (1) Emportent interdiction de territoire pour atteinte aux droits humains ou internationaux les faits suivants :
a) commettre, hors du Canada, une des infractions visées aux articles 4 à 7 de la Loi sur les crimes contre l'humanité et les crimes de guerre;
b) occuper un poste de rang supérieur — au sens du règlement — au sein d'un gouvernement qui, de l'avis du ministre, se livre ou s'est livré au terrorisme, à des violations graves ou répétées des droits de la personne ou commet ou a commis un génocide, un crime contre l'humanité ou un crime de guerre au sens des paragraphes 6(3) à (5) de la Loi sur les crimes contre l'humanité et les crimes de guerre;
c) être, sauf s'agissant du résident permanent, une personne dont l'entrée ou le séjour au Canada est limité au titre d'une décision, d'une résolution ou d'une mesure d'une organisation internationale d'États ou une association d'États dont le Canada est membre et qui impose des sanctions à l'égard d'un pays contre lequel le Canada a imposé — ou s'est engagé à imposer — des sanctions de concert avec cette organisation ou association.

(2) Paragraphs (1)(b) and (c) do not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

(2) Les faits visés aux alinéas (1)b) et c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de

setting out the relevant facts, which report shall be transmitted to the Minister.
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

74. Judicial review is subject to the following provisions:
…
(d) an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question.

74. Les règles suivantes s'appliquent à la demande de contrôle judiciaire **:**
[…].

d) le jugement consécutif au contrôle judiciaire n'est susceptible d'appel en Cour d'appel fédérale que si le juge certifie que l'affaire soulève une question grave de portée générale et énonce celle-ci.

95. (2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or

95. (2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et

political opinion or at risk of torture or cruel and unusual treatment or punishment.

(2) Subsection (1) does not apply in the case of a person
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

(3) A person, after a determination under paragraph 101(1)(e) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.

inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)e), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle est arrivée au Canada.

Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, Can. T.S. 1969 No. 6 (entered into force 22 April 1954

34. The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

International Covenant on Civil and Political

Convention relative au statut des réfugiés, 28 juillet 1951, 189 UNTS 137, R.T. Can. 1969 n^{o} 6 (entrée en vigueur : 22 avril 1954)

34. Les Etats contractants faciliteront, dans toute la mesure possible, l'assimilation et la naturalisation des réfugiés. Ils s'efforceront notamment d'accélérer la procédure de naturalisation et de réduire, dans toute la mesure possible, les taxes et les frais de cette procédure.

Pacte international relatif aux droits civils et politiques, 999 R.T.N.U. 171, art. 9-14, R.T.

Rights, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976)

12. (4). No one shall be arbitrarily deprived of the right to enter his own country.

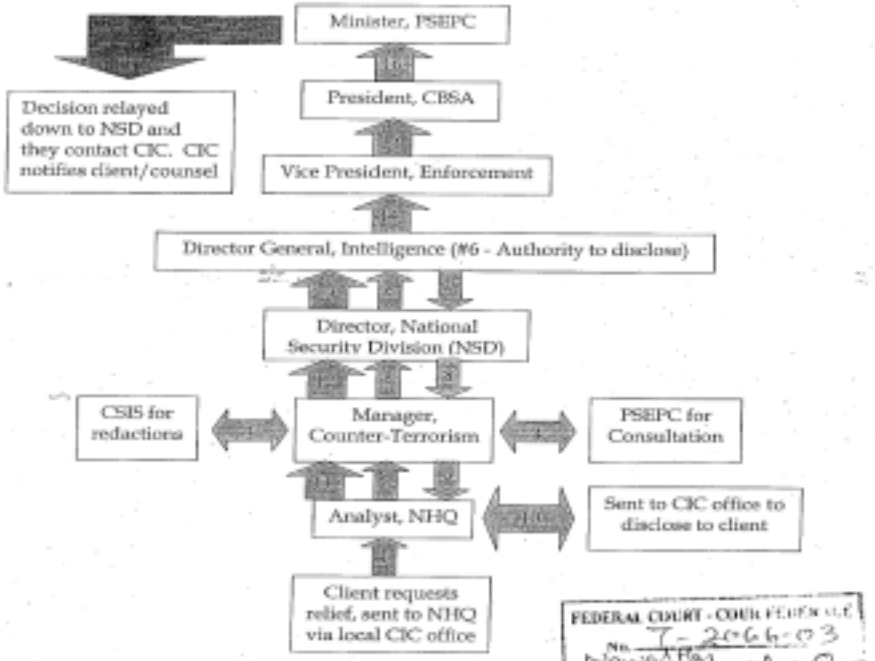
Can. 1976 n^{o} 47, 6 I.L.M. 368 (entrée en vigueur : 23 mars 1976)

12. (4) Nul ne peut être arbitrairement privé du droit d'entrer dans son propre pays.

SCHEDULE "B"
to the
Reasons for Judgment and Judgment
dated September 18, 2007
in
NAWAL HAJ KHALIL,
ANMAR EL HASSEN, and ACIL EL HASSEN,
by her Litigation Guardian, NAWAL HAJ KHALIL
and
HER MAJESTY THE QUEEN
T-2066-03

Exh D-113

Ministerial Relief Flow Chart



FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2066-03
STYLE OF CAUSE:	NAWAL HAJ KHALIL, ANMAR EL HASSEN, and ACIL EL HASSEN, by her Litigation Guardian, NAWAL HAJ KHALIL and Her Majesty The Queen
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	April 16-19, 23-27, 30, 2007 May 1-4, 7-11, 14, 18, 22-24, 28-30, 2007 June 5-8, 13, 14, 27-29, 2007 Further submissions: July 31, 2007 August 9, 24, 31, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	Layden-Stevenson J.
DATED:	September 18, 2007

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