

CANADA / JUDGMENT

United States v. Sari

2023 BCSC 1931

COURT

Supreme Court of British Columbia

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2023 BCSC 1931 United States v. Sari

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Sari,

2023 BCSC 1931

Date: 20231024

Docket: 27796-5

Registry: Vancouver

In the Matter of the Extradition Act, S.C. 1999, c. 18, as amended

Between:

The Attorney General of Canada on behalf of The United States of America

Respondent

And

Sayed Abood Sari

Applicant

Before: The Honourable Justice Winteringham

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

October 18-21,

November 14-15, 2022,

February 13-15, July 5-7,

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Place and Date of Judgment:

Vancouver, B.C.

October 24, 2023

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I. OVERVIEW

- [1] The applicant, Seyed Abood Sari, is sought for extradition by the United States of America. He brings an application to stay the extradition proceedings alleging an abuse of process under ss. 7 and 24(1) of the Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act, 1982 (UK), 1982, c. 11 [Charter] and at common law.
- [2] Mr. Sari arrived at Vancouver International Airport ("YVR") on January 17, 2019. His two adult sons were attending post-secondary school in the Lower Mainland and Mr. Sari wanted to celebrate his birthday with them. Prior to his arrival at YVR, Canada Border Services Agency ("CBSA") personnel learned some information about Mr. Sari that alerted the CBSA to consider his admissibility into Canada. The CBSA workers ultimately formed the belief that Mr. Sari was connected (in some way) to Mahan Air. Mahan Air is an Iranian airline listed and sanctioned under the Special Economic Measures (Iran) Regulations, SOR/2010-165 [SEMA], on the basis that it presents, as a result of its activities, "a grave breach

to international peace and security." Later in their investigation, CBSA personnel learned that Mr. Sari was the subject of outstanding criminal charges from the United States.

- [3] Though there is disagreement about the substance of the information received, "lookouts" were issued. The lookouts were intended to alert CBSA personnel at Canadian port of entries, including YVR, that Mr. Sari could be potentially inadmissible to Canada under the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA] on the basis of (1) national security; (2) serious criminality; and, (3) counter-proliferation concerns that he may be carrying materials or information related to the proliferation of weapons of mass destruction prohibited under the Customs Act, R.S.C., 1985 (2nd Supp.), c. 1.
- [4] When Mr. Sari's flight landed at YVR, he was required to go to the secondary inspections. This resulted in a secondary examination, searches of his luggage, including his electronic devices, and interrogations. Mr. Sari was ultimately subjected to a detention order and he spent some six months at a pre-trial custody facility in the Lower Mainland.
- [5] On January 22, 2021, I granted, in part, an application by Mr. Sari for disclosure of documents in the possession of the Attorney General of Canada ("AGC"). Pursuant to that order, documents were produced to the applicant.
- [6] Mr. Sari filed a notice of application on June 14, 2022 alleging that the conduct of the CBSA personnel who dealt with him constituted an abuse of process. Mr. Sari subsequently filed an amended notice of application on March 23, 2023 (the "ANOA").
- [7] In the ANOA, the applicant asserts that an abuse of process occurred when a representative of a foreign government requested that Canadian officials use their powers under IRPA to issue a lookout for Mr. Sari. The applicant asserts that the lookout was to facilitate a request by the foreign government to buy time for it to put together a criminal case and an extradition request against Mr. Sari. The applicant asserts further that the lookout was improperly placed by customs officials and was designed to detain Mr. Sari, to authorize searches of him and his luggage and to authorize an interrogation of him once he arrived in Canada. The applicant asserts that this misuse of governmental powers under IRPA was the crucial event in a chain of customs officials' actions in which misleading information about Mr. Sari and his employment resulted in a loss of freedom for him. Indeed, it led to his detention for six months. He was then released after his custodial status was reviewed pursuant to s. 525 of the Criminal Code, R.S.C. 1985, c. C-46. Even after his release from custody, there remains significant limitations on his liberty. It is of significance that Mr. Sari has been unable to see his spouse for over three years. Despite his release from custody, Mr. Sari is prohibited from leaving Canada. His spouse has been unable to enter Canada since her departure following a visit in 2020.
- [8] The impact of the overall delay is profound.
- [9] The AGC, on behalf of the U.S., the requesting party, takes the position that Mr. Sari has failed to establish an abuse of process and seeks an order dismissing the ANOA.

[10] In these reasons, I set out first the legal framework that governs an abuse of process application such as this one. I then set out the background and provide details of the evidence tendered. Finally, I provide the Court's analysis of the evidence in light of the governing legal principles.

II. GOVERNING LEGAL FRAMEWORK

A. Overriding Principles

[11] Mr. Sari contends that the conduct here amounts to an abuse of process such that the extradition proceedings should be stayed. Consideration of that question requires that I keep a number of legal principles in mind, including my role as the extradition judge and the law relating to abuse of process. Additionally, I am to consider the level of Charter violating state misconduct that must be present before the Court can grant a stay of proceedings.

B. Extradition Judge's Jurisdiction

[12] I address first the issue of jurisdiction. The statutory role of an extradition judge is limited to assessing the evidence to determine whether there is admissible evidence of conduct that, had it occurred in Canada, justifies committal for trial for the alleged offence, and that the person sought is the person before the Court.

[13] If both questions are answered in the affirmative, the extradition judge is required to commit the person sought to await surrender to the requesting state seeking their extradition.

[14] Unlike under the criminal law generally, my jurisdiction (in the extradition context) to consider Charter issues is statutory, not inherent, and it is limited. It flows from s. 25 of the Extradition Act, S.C. 1999, c. 18 [Act]. Supreme Court jurisprudence establishes that s. 25 gives the judge jurisdiction to consider Charter issues only where they "pertain directly to the circumscribed issues relevant at the committal stage of the extradition process": see *United States of America v. Kwok*, 2001 SCC 18 at para. 57; *M.M. v. United States of America*, 2015 SCC 62 at para. 55.

[15] In *United States v. Anekwu*, 2009 SCC 41 at para. 29, Justice Charron described that jurisdiction, emphasizing that it is circumscribed because extradition proceedings are not "criminal proceedings" that are concerned with issues of guilt or innocence. Since extradition is concerned only with questions of equivalent double criminality and the identification of the person sought, this Court's Charter jurisdiction extends only to breaches that pertain directly to those circumscribed issues that are relevant at the committal stage of the extradition process itself: *Kwok* at para. 57.

- [16] As well, it is clear that the burden to prove a Charter breach rests with the applicant (i.e., the person sought). The burden of proof does not shift to the AGC. Justice Charron described it this way in *Anekwu*:
- [29] ... I see no reason for reversing the usual rule which puts the onus of proving a Charter breach on the person who claims it. Since compliance with Canadian rules of evidence is mandatory in respect of Canadian-gathered evidence, it follows that the record of the case should contain sufficient information to enable the person sought and the extradition judge to ascertain whether any item of evidence has been gathered in Canada and, when that is the case, some information should also be provided on how it was obtained...: *Kwok*, at para. 100
- [17] Should committal be ordered, then the Minister has the statutory authority to decide whether to surrender the person sought. When making that decision, there are several considerations that the Minister is to assess under the Act, including, allegations of Charter violations that are not connected to the extradition committal proceeding. Notably, in the context of alleged Charter violations, the Minister must decline to surrender the person sought if he is satisfied that to do so would be "unjust or oppressive", having regard to all the relevant circumstances: Act, s. 44(1)(a).

C. Stay of Proceedings for Abuse of Process

- [18] In his ANOA, Mr. Sari seeks an order staying the proceedings because of the seriousness of the allegations of abuse of process. The parties agree that an order staying proceedings can be a "draconian" remedy: *R. v. Baltovich*, 73 O.R. (3d) 481, 2004 CanLII 45031 at paras. 181 and 185 (O.N.C.A.). The case law provides that a stay will be granted only in those rare and exceptional cases of state misconduct that amount to the clearest of cases, supported by a solid evidentiary foundation: *United States of America v. Cobb*, 2001 SCC 19 [Cobb] at para. 38; *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 59, 130 D.L.R. (4th) 235.
- [19] After referring to *O'Connor* and stating that even though the remedy will only rarely be granted, Justice Molloy noted in *United States of America v. Tollman*, 212 C.C.C. (3d), 2006 CanLII 31731 (O.N.S.C.) [Tollman], that a stay for abuse of process is a sufficiently flexible remedy to apply in circumstances that goes beyond conduct touching on the integrity of the judicial system and the fairness of the accused's trial. At para. 73 of *O'Connor*, Justice L'Heureux-Dube stated:

. . . In addition, there is a residual category of conduct caught by s. 7 of the Charter. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the Charter, but instead addresses the panoply of diverse and unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness to such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process.

- [20] The AGC reminds the Court that "courts must proceed with caution" where Charter issues arise in the extradition context. In *United States of America v. Dynar*, [1997] 2 S.C.R. 462 at para. 125, 147 D.L.R. (4th) 399, the Court instructed that "judicial intervention must be limited to cases of real substance", to ensure that we do not fail to abide by our international obligations, except in the most serious of cases and where the person sought has satisfied their burden to demonstrate a nexus between the conduct alleged to constitute an abuse of process and the committal hearing itself.
- [21] In *United States v. Whyte*, 2016 ONCA 624, Justice Watt described the scope and limitations on the authority and jurisdiction of the extradition hearing judge. He stated it this way:
- [42] The tests for which s. 29 provides do not permit the extradition hearing judge to consider aspects of the alleged criminal conduct on which an accused bears an evidential burden: *M. (M.)*, at para. 52; *Fischbacher*, at para. 52; *Schmidt*, at p. 515. This means that defences and other issues on which an accused bears an evidential burden occupy no place and exert no influence on the committal decision of the extradition hearing judge: *M. (M.)*, at paras. 53, 65-66.
- [22] Justice Watt said this about the authority of the extradition hearing judge to consider Charter issues:
- [44] The authority of an extradition hearing judge to consider Charter issues is not inherent, rather it emanates from s. 25 of the Extradition Act. That section gives the extradition hearing judge jurisdiction to consider Charter issues. This authority permits remedies for Charter breaches that pertain directly to the circumscribed issues relevant to the committal stage of the extradition process: *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532, at para. 57. Where the remedy requested is a stay of proceedings, the person sought must demonstrate a nexus between the conduct alleged to constitute an abuse of process and the committal hearing itself: *United States of America v. Khadr*, 2011 ONCA 358, 106 OR (3d) 449, at para. 45, leave to appeal refused, [2011] S.C.C.A. 316; *R. v. Larosa* (2002) 166 CCC (3d) 449 (Ont. C.A.), at para. 52.
- [45] A person sought in extradition proceedings may introduce evidence at the hearing if:
- i. the evidence is relevant to the tests in s. 29(1) of the Extradition Act; and
 - ii. the judge considers the evidence reliable.

These twin requirements -- relevance and reliability -- appear in s. 32(1)(c) of the Act: *M.(M.)*, at para. 74.

[46] The relevance requirement is linked directly to the committal test in s. 29 of the Act. In other words, the evidence must be relevant to the task of the extradition hearing judge. And that task is to determine whether the test for committal under ss. 29(1) has been met. This involves consideration of the proposed evidence in light of the limited weighing the extradition hearing judge must undertake in applying the standard set for committal: M. (M.), at para. 76.

[Emphasis in original.]

[23] In other words, a stay of proceedings is only to be granted where the applicant has established the nexus or connection of the alleged Charter breach to the scope and limited role of the committal hearing itself. Otherwise, a claim of abuse of process is for the Minister to consider at the surrender stage of the process.

[24] And even if the person sought overcomes this hurdle, to grant a stay it must be demonstrated that the state misconduct has caused prejudice to the applicant's right to a fair hearing or the integrity of the justice system, and where the prejudice will be manifested, perpetuated or aggravated through the conduct of the hearing or its outcome: R. v. Babos, 2014 SCC 16 at paras. 31-32, 34-35. The test for determining whether a stay of proceedings is warranted is the same for the two categories of abuse of process (i.e., conduct that compromises the fairness of an accused's trial, and the residual category where the conduct does not threaten trial fairness but risks undermining the integrity of the judicial process):

- a) there must be prejudice to the accused's right to a fair trial or to the integrity of the justice system that will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome;
- b) there must be no alternative remedy capable of redressing the prejudice; and
- c) where there is still uncertainty over whether a stay is warranted after steps one and two, the Court must balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits: Babos at para. 32.

[25] In Canada (Minister of Justice) v. Cavan, 2015 ONCA 664, Watt J.A. commented on the remedy of abuse of process and why it is that it is only rarely granted in the extradition context. He stated:

[66] Two reasons persuade me that the Minister's decision to reject the applicant's claims that an order of surrender would be an abuse of process or unjust or oppressive falls within a range of reasonable outcomes and accordingly is not unreasonable.

[67] First, the applicant's invocation of the residual category of abuse of process requires a showing that the state conduct risks undermining the integrity of the extradition process. Such a showing would require evidence of conduct that is offensive to societal notions of fair play and decency. Cases warranting a stay of proceedings, and thus a refusal of surrender, on this ground are exceptional and rare. Nothing that occurred here amounts to an affront to

fair play and decency that is disproportionate to the societal interest in the effective discharge of our international obligations to those accused of serious crimes in the jurisdiction of our extradition partner.

- [68] Second, the claim of abuse of process, injustice or oppression ultimately reduces to a submission of undue delay in the initiation of extradition proceedings. A complaint of this kind comes uncomfortably close to an attempt to impose our standards on the timeliness of trial proceedings on foreign authorities or at least to gauge their conduct by such a standard. And this we cannot do. Not directly. And not indirectly.
- [26] Where it is the integrity of the justice system that is at issue, other factors play a role in the balancing exercise, including the nature and seriousness of the impugned conduct; whether the conduct is isolated or reflects a systemic and ongoing problem; the circumstances of the applicant; the charges he faces; and, the interests of society in having the charges disposed of on the merits.
- [27] The balance may be tipped in favour of proceeding with the committal process where the public interest in adjudicating the case on its merits is perceived to be compelling.
- [28] Repeating the words of Watt J.A. and others, those who seek a stay under the residual category must discharge "an onerous burden" and accept that the threshold will only be met in the "clearest of cases": Babos at paras. 40-41, 44.
- [29] The applicant relied on *U.S.A. v. Licht*, 2002 BCSC 1151 [Licht], where Justice Dillon stayed extradition proceedings because US authorities had been involved in unauthorized law enforcement activities on Canadian soil. The misconduct related to American law enforcement officers unlawfully entering Canada to conduct a reverse sting drug operation. Though the evidence collected was not relevant to the grounds for committal, the Court found a nexus sufficient to support her finding that there had been an abuse of process. Justice Dillon concluded:
- [56] This is one of those rare cases where an abuse of process is readily apparent. A United States police agent entered Canada without proper immigration status to carry out an illegal activity without the knowledge or consent of the RCMP and knowing that the RCMP had withdrawn consent to further involvement in the reverse sting operation. This conduct is clearly contrary to Canadian sovereign interests.
- [57] This was not a bona fide investigation being carried out in Canada. CS2 acted in defiance of known Canadian requirements to make his conduct legal in Canada and to be acceptable internationally. The failure to immediately advise the RCMP of this conduct is indicative of further bad faith on the part of the requesting state. No explanation has been offered by the requesting state. The illegality of this conduct is magnified by the fact that CS2 knew that his conduct was illegal and that the RCMP would not allow further investigation in Canada. CS2 chose to act outside Canadian law. The requesting state has not repudiated this conduct.

- [30] The applicant also reminds the Court about disguised extradition cases and referred to Attorney General (Canada) v. Bartoszewicz, 2012 ONSC 250 [Bartoszewicz], where Justice Backhouse wrote:
- [53] the rule of law is a foundational principle in our democracy. Everyone is required to obey the law. Government is required to execute its powers for the purpose for which these are granted. When a power is exercised for a purpose other than its intended one, an abuse of power results. An abuse of power by government is a very serious misconduct. It must be addressed to ensure as far as possible that it will not be repeated in the future. A stay of proceedings is the only practicable way to deliver the message that abuse of power will not be tolerated.
- [31] The applicant submits that it is an abuse of process for the Canadian authorities, at the urging of a US counterpart, to misuse the powers conferred on them by statute. In the extradition context, this arises where border officials use their powers under IRPA or other federal legislation for a purpose inconsistent with a good faith administration of those acts.

D. CBSA's Border Security Mandate

- [32] Here, the AGC contends that the abuse of process allegation must be considered in the context of an individual entering Canada and the legislative obligations imposed on those operating at Canada's borders.
- [33] CBSA is responsible for "providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods": Canada Border Services Agency Act, S.C. 2005, c. 38, s. 5. The CBSA's responsibilities include the administration and enforcement of numerous acts and regulations, including IRPA and the Customs Act.
- [34] The Supreme Court of Canada has repeatedly described border crossings as a unique context where Canada's national interests are directly engaged and in which constitutional issues must be examined differently than in other scenarios: R. v. Simmons, [1988] 2 S.C.R. 495 at 527-28, 55 D.L.R. (4th) 673.
- [35] The AGC points out that foreign nationals do not have an unqualified right to enter Canada: Medovarski v. Canada, 2005 SCC 51 at paras. 10, 46. They must present themselves for examination in seeking to enter, as well as satisfy an immigration officer that they will leave Canada by the end of the period authorized for their stay and that they are not inadmissible: Medovarski at para. 46.
- [36] The AGC also reminds the Court about the role criminality may play in assessing admissibility of foreign nationals. Under IRPA, the criminality of non-citizens is a major concern that may warrant removal from Canada: Cha v. Canada (Minister of Citizenship and Immigration), 2006 FCA 126 at para. 24. Under IRPA ss. 36(1)(c) and 36(2)(c), foreign nationals are inadmissible to Canada if there is a sufficient basis to believe they have

engaged in criminal conduct that, if committed in Canada, would be respectively, punishable by a term of imprisonment of at least ten years or would constitute an indictable offence. A foreign national becomes inadmissible to Canada where there are reasonable grounds to believe they have engaged in such conduct: IRPA, s. 33.

[37] In *United States of America v. Kissel*, 2006 CanLII 47314 (O.N.S.C.), Justice Beaulieu addressed the obligation of the CBSA to take action under IRPA upon receiving information raising inadmissibility concerns. He explained:

[153] Indeed, it is clear that, upon receipt of such information, Canadian authorities are obliged to act in the public interest. It is not plausible to claim that Canadian authorities should sit idly by, rather than to investigate and act upon such information, because of the "risk" of effectuating a disguised extradition. This type of situation engages the public interest in the Canadian context.

[38] In his reply submission, the applicant makes clear that he does not dispute the statutory powers as set out in the AGC's submission. Rather, the applicant simply asserts that those powers were abused here.

E. Vienna Convention on Consular Relations

[39] The applicant contends that the CBSA infringed his rights under the Vienna Convention on Consular Relations, Can. T.S. 1974 No. 25 [Vienna Convention]. Article 36 of the Vienna Convention provides:

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
 - (b) If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

[40] In *R. v. Partak*, 160 C.C.C. (3d) 553, 2001 CanLII 28411 (O.N.S.C.) (cited to CanLII), Justice Epstein was determining the admissibility of statements made by a US citizen to the police. In addition to issues engaging voluntariness and s. 10 of the Charter, Epstein J. examined the Vienna Convention, in the face of an allegation that the police failed to inform Mr. Partak of his rights to have the police contact the US consulate. On this point, Epstein J. started the analysis in the context of considering Canada's obligations under international law and cited Article 36(b) of the Vienna Convention. In terms of timing, Epstein J. stated:

- [28] In my view, a foreign national's entitlement to be advised of his or her consular rights arises at the time that the authorities know or reasonably ought to be aware that the detainee is a foreign national.
- [29] I draw this conclusion for a number of reasons. First, the words "without delay" in art. 36 para. 1(b) have to be given some meaning. They suggest an immediacy that would be consistent with a finding that the notification obligation arises upon the authorities having reasonably available to them information that the detained person is a foreign national .
- [32] This takes me to a consideration of the purpose of the international convention. To understand the purpose of consular rights, the defence provided me only with a "Guide for Canadians Imprisoned Abroad". This document is intended to inform Canadians about what to do if they are arrested in a foreign country. The document says that the criminal justice system in many countries is different from that in Canada and that consular notification will enable the Canadian government to make every effort to ensure that the detainee receives information about the local system and that the Canadian receives equitable treatment under the local law.
- [41] After reviewing some of the provisions in the Guide for Canadians Imprisoned Abroad, Epstein J. said this about the purpose of the Vienna Convention:
- [37] I find that the purpose of consular rights is to provide support and information to foreign nationals concerning local law to ensure equal treatment under that law. Accordingly, the reason the police are obliged to notify a detained foreign national of his right to have the consulate or embassy contacted, is to ensure that the detainee has access to the information and support their embassy can provide to them, as detailed above.
- [38] This finding provides further assistance in coming to the conclusion that Mr. Partak's entitlement to be advised of his right to have the police contact the U.S. consulate arose at the time of his arrest. For this purpose to be served in a meaningful fashion, in other words, for Mr. Partak's consular rights to be of full value to him, he was entitled to be notified of his consular right at the earliest opportunity, namely, when the authorities who detained him knew or ought reasonably to have known he was a foreign national. In the circumstances of this case, that point in time was, in the context of the utterances in dispute, when the arresting officers first detained and then arrested Mr. Partak.
- [42] In Partak, the issue was a failure to inform the detainee of their consular rights. That is not the issue before me. Rather, the issue is whether there was an infringement of Mr. Sari's consular rights by a failure to implement the right. However, Epstein J.'s overview is helpful in that she makes clear that the consular rights are meaningful and serve a purpose that imports a duty on the authorities to take steps to ensure those rights are protected, including in a timely manner.

III. CIRCUMSTANCES/FACTUAL FINDINGS

- [43] Mr. Sari takes the position that an abuse of process occurred when the US requested CBSA to use their powers under IRPA to issue a lookout. Mr. Sari asserts that the purpose of the lookout was to facilitate a request by the US to buy time for it to put together a criminal case and an extradition request against Mr. Sari. Mr. Sari alleges that the lookout was improperly placed by CBSA counter-proliferation lead, Intelligence Officer Michael Shaddock. It was designed to detain Mr. Sari, to authorize searches of him and his luggage and authorize interrogations of him.
- [44] Mr. Sari alleges that this was a misuse of the legislative powers. He says the impact on him has been immense, including stringent bail conditions significantly restricting his liberty and his access to his spouse. He submits that the abuse of process will be furthered if the extradition proceedings continue.
- [45] I turn then to review the evidence about the circumstances that culminated in Mr. Sari's detention.

A. Events Prior to Mr. Sari's Entry to Canada at YVR

- [46] Mr. Sari purchased a return ticket on British Airways from the United Arab Emirates (UAE) to Vancouver (YVR). Mr. Sari's two adult sons were attending post-secondary institutions in the Lower Mainland and he hoped to visit with them and to celebrate his own birthday. He is an Iranian citizen and had been living in the UAE for 30 years. Before January 2019, Mr. Sari had travelled to Canada and had obtained Visas authorizing such travel.
- [47] For several years leading up to the events of January 2019, Mr. Sari was employed by Jahan Air Destinations, a travel and tourism service. Jahan Air Destinations also acts as the general sales agent for an Iranian airline known as Mahan Air.
- [48] There is a dispute on the evidence about Mr. Sari's connection to Mahan Air. I will deal with this dispute shortly.
- [49] At this point, I simply note that the parties agree that at the relevant time, Mahan Air was an entity listed under SEMA. The parties also agree that at the relevant time, the Quds Force of the Iranian Revolutionary Guard Corps ("IRGC") is listed on the list of entities maintained by Public Safety Canada pursuant to s. 83.05 of the Criminal Code.[1]
- [50] I turn to review the evidence provided by the CBSA personnel and others. Their evidence essentially starts with two "lookouts" that were issued. One lookout was referred to as a counter-proliferation lookout ("CP Lookout") and the other, a national security lookout ("NS Lookout").

B. Issuance of Counter-Proliferation Lookout

- [51] Officer Shaddock, the team lead of the CBSA's Counter Proliferation Operational Services Division-Tactical Intelligence Section ("CPOS-TI"), testified. He has worked in the counter proliferation department for about 14 years and he explained counter-proliferation in the border security context. He testified that counter-proliferation refers to preventing the spread of weapons of mass destruction, including the equipment and technology used to develop such weapons and their delivery. In his role as team-lead, Officer Shaddock testified that his duties include identifying counter-proliferation targets.
- [52] Officer Shaddock testified that if a counter-proliferation tip or lead is substantiated by his unit, CPOS-TI, that is, it has a Canadian counter-proliferation nexus, then he can issue a "lookout" as a means to intercept and gather further information on the entity in question.
- [53] By way of definition, a lookout is an internal notification mechanism used by CBSA to disseminate information within the CBSA about incoming passengers and goods to Canada that according to risk indicators and intelligence, may pose a threat to the health, safety, security, economy or environment of Canada. The lookout is intended to prompt closer examination of persons or goods at the point of entry.
- [54] The CP Lookout was issued on January 17, 2019. It was issued following this sequence of events.
- [55] Officer Shaddock testified that he was heading home on the bus in the late afternoon on January 17, 2019 when he received an email from John Sgroi, the FBI's legal attaché located in Ottawa. Agent Sgroi's email stated:

Hi Mike,

I am under the gun on something. Actually I just phoned you.

Can you please call me? At desk?

Bottom line, bad guy in the air, landing in BC tonight. I am working with RCMP. We have charges but may not have a warrant in time. I want to see if we can get a secondary (no search) to find out where he is staying, etc and to be able to pass info to RCMP to help do surveillance. It is a CP case.

- [56] Officer Shaddock emailed Agent Sgroi advising that he was on a crowded bus but would call him in about 15 minutes. He did. However, before the call, Agent Sgroi, in response to Officer Shaddock's request, provided some information:

File Number: NY-2571363

Name: Seyed Abood SARI

Arriving this evening on British Air (BA 85) at YVR. Due to arrive 8:05pm PST.

Also, we do have his departure info:

Departing YVR to LHM (Heathrow) on 01/25/2019 on BA 84.

I will send an email to you, RCMP HQ and RCMP E division (Vancouver) shortly.

[57] Officer Shaddock testified about the telephone call he had with Agent Sgroi. The following information was provided:

- a) Mr. Sari was inbound to Canada and he was linked to Mahan Air; and
- b) could CBSA intercept Mr. Sari but not conduct a search of him, to find out where he was staying to assist the RCMP in conducting surveillance?

[58] Officer Shaddock thought this request was odd because the purpose of issuing a lookout to intercept Mr. Sari would be to conduct a progressive secondary examination where a search may be conducted.

[59] Nevertheless, Officer Shaddock testified that he knew Mahan Air was a sanctioned entity in the US but was uncertain if any Canadian sanctions were in place against Mahan Air. Officer Shaddock also stated that it was not unusual to have this sort of an exchange with Agent Sgroi and that he had had similar exchanges with him in the past.

[60] Officer Shaddock then testified about the steps he took to assess whether there was a sufficient Canadian counter-proliferation nexus to issue a lookout:

- a) He checked CBSA's internal system and determined that no enforcement and/or lookout history existed for Mr. Sari, though he testified that he did not have access to the Global Case Management System which holds immigration-related information and is accessible to some but not all CBSA employees; and
- b) He investigated Mr. Sari's alleged link with Mahan Air.

[61] Officer Shaddock learned that Mahan Air was a listed entity under Schedule I of SEMA for its ties to the IRGC, which is listed as a terrorist organization under the Criminal Code.

[62] Officer Shaddock testified that based on this information and given the supposed link between Mr. Sari and Mahan Air, he needed to know Mr. Sari's purpose to come to Canada and to confirm whether he had ties with Mahan Air.

[63] He characterized Mr. Sari's arrival in Canada to present a high-risk situation because "he was an individual potentially linked to an entity listed under Schedule I of SEMA, whose purpose for traveling to Canada was unknown."

[64] Officer Shaddock determined it was necessary to issue a CP Lookout given the counter-proliferation concerns raised. He stated that he wanted to confirm that Mr. Sari was not in possession of contraband and to learn about Mr. Sari, including his purpose for traveling to Canada and where he was staying and with whom.

[65] The CP Lookout synopsis was entered as an exhibit and it included the following information:

Type: Export Control

Narrative: *Do not divulge interest to subject*

Canadian and U.S. partners seeking CBSA assistance for incoming traveller [Mr. Sari]. It is imperative to obtain full details, including any addresses may be staying at during his visit to Canada. Please confirm all tombstone information (current documentation details, his current address, names and contact information or anyone he plans on visiting in Canada, telephone information if possible, stated employment, etc.).

It is believed [Mr. Sari] will leave Canada on 2019-01-25 on British Airways flight 84 from YVR to [Heathrow].

If any commercial documentation or samples of goods are found in his possession, please contact Mike Shaddock immediately at

[66] The CP Lookout was set to expire on January 30, 2019.

[67] After issuing the CP Lookout, Officer Shaddock described the steps he took to inform the frontline operators about it. As he was taking these steps, he learned that a lookout had already been issued for Mr. Sari. He testified that Lauren Johnson, a superintendent with the CBSA's National Targeting Centre ("NTC") informed him of the earlier lookout. He testified that he was surprised to learn about this because it hadn't been revealed during his earlier CBSA systems searches.

[68] He testified that had he been aware of the existing NS Lookout, he would not have issued the CP Lookout. Nonetheless, he decided that he would leave his lookout on the system, in part because it was time-limited.

[69] He testified that he informed Agent Sgroi that the CP Lookout had been issued and he gave him the number associated with it. He testified that he did not provide any further information to Agent Sgroi and testified in particular that he did not provide the substantive information contained in the CP Lookout.

[70] Officer Shaddock testified that he did not share any information regarding CBSA's secondary examination of Mr. Sari with either the RCMP or the FBI at anytime--either before Mr. Sari arrived at YVR or after he was detained.

[71] I will say more about this testimony shortly.

[72] The applicant contends that there were no grounds for a CP Lookout to be issued. He says that the grounds stated were purely speculative. As will be seen, the results of the examination indicated it was "non-resultant" in terms of any indication of contraband. In other words, the applicant says that the CP Lookout was always speculative and the

information shared as between Officer Shaddock and Agent Sgroi confirm the assertion that there were not reasonable grounds to impose a CP Lookout. Issuing the CP Lookout thus constituted a misuse by Officer Shaddock of his regulatory powers.

- [73] The applicant asserts that Officer Shaddock's involvement remained despite his claim that the "non-resultant" examination meant there did not exist counter-proliferation concerns. The applicant submits that it is incredibly suspicious that Officer Shaddock continued to make inquiries of the FBI LEGATT despite his purported lack of interest in Mr. Sari from a counter-proliferation perspective.
- [74] During cross-examination, Officer Shaddock agreed that it would have been improper to place the CP Lookout if the real intent was to detain Mr. Sari to allow the US to put its extradition request in place.

C. National Security Lookout

- [75] I turn to the NS Lookout, mentioned earlier, and its genesis.
- [76] On the morning of January 17, 2019, Analyst Daniel Marson learned about Mr. Sari in an email he received that morning from Sujitha Rajadurai, an intelligence analyst with the NTC. That communication provided (in addition to identification information) that Mr. Sari had a valid visa, approved in 2015 and that the "[n]otes on the file indicate that the subject has two sons in Vancouver on Study Permits." The email included details of Mr. Sari's earlier travel to Canada (in 2012, 2014, 2016 and, specifics about his last trip to Canada in 2017, indicating the date of his arrival and departure, where he arrived from and the fact he stayed in Canada for 13 days). The email indicated Mr. Sari had no history of intelligence records.
- [77] Within the hour of receiving the email from Sujitha Rajadurai, Analyst Marson responded. In his response, he included some open source links regarding the information referenced in his email wherein he wrote this:

I suspect the interest in this fellow stems from his employment as described in [Global Case Management System] - General Manager of Jahan Destinations. Jahan is the primary sales agent for Mahan Air .Mahan is well known for its IRGC-QF support activities Jahan is vaguely referenced in a book called "Khomenei's Warriors" and is described as being overseen by the QF

I think we can rely on the info in GCMS and above open source to issue an NTC Security target. It would provide the [point of entry] with much more direction than [redacted] would ever allow. If no target is issued, please include the above information in the pre-arrival [redacted] notification email that is sent to the [point of entry] so that they are informed enough to undertake a thorough exam.

- [78] Analyst Marson testified about Mr. Sari and his employer, Jahan Destinations. He testified that he was concerned Mr. Sari may be affiliated, as an actual employee or through an associated employer, with Mahan Air, a company he knew to be the subject of sanctions. If this were true, Mr. Sari may be deemed inadmissible to Canada under ss. 34 (inadmissibility

under IRPA relating to national security) and 35 (individuals, organizations and governments who are inadmissible to Canada due to their engagement in war crimes or crimes against humanity) of IRPA.

- [79] Analyst Marson testified that part of his job was to ensure the frontline workers were informed about the national security concerns he had identified.
- [80] After his initial investigation, Analyst Marson had some communication with his colleagues at the NTC about possible grounds of inadmissibility for Mr. Sari. He believed that s. 35 was not applicable because it required the subject to be specifically named under SEMA. On this point, Analyst Marson reached out to his colleague, Janis Lof, manager of CBSA's Pacific Region National Security Unit, and she agreed with his opinion about the application of s. 35 of IRPA.
- [81] Regarding s. 40, he believed it would apply only if Mr. Sari was in fact an employee of Mahan Air and had misrepresented this fact on his Visa application. In his exchange with Ms. Lof, Analyst Marson said that in his opinion, s. 40 of IRPA may be applicable to Mr. Sari but it would require border security officers ("BSO") to uncover evidence of Mr. Sari's direct employment with a Quds Force linked entity, such as Mahan Air.
- [82] Analyst Marson testified about an email that he received thereafter. This email included some of the information Analyst Marson had shared earlier. The email was from the NTC (Yannick Lamontagne) and stated, in part:

Please note that subject is not a US No Fly. [Redacted] record in IBAS indicates the subject is employed by Mahan Air, which is a company under US sanctions due to their affiliation to IRGC - Quds Force.

.

The subject may be inadmissible under s. 35(1)(d) as Mahan Air is listed in Schedule 1 of the Special Economic Measures (Iran) Regulations of the Special Economic Measures Act (SEMA).

[Emphasis in original.]

- [83] Analyst Marson circulated an email in response, stating:

Re: 35(1)(d), allegation will be hard to make as it requires that a specific person be listed in SEMA and the associated Regulations. This subject is not named. That said, would recommend examination for A40 as subject has only advised of his employment with Jahan Destinations. Failure to disclose employment with other entities may constitute misrep of material information. Through interview and exam of personal effects, you may be able to identify evidence that would support closer affiliation to Mahan Airlines and/or the IRGC Quds Force and an A34(1)(f) allegation. Subject appears to be GM for Jahan in Dubai so he's likely to have regular dealings with Mahan Air executives and, by proxy, IRGC and other regime members.

Subject has two kids studying in Canada who will likely be identified as his purpose for travelling to Canada.

[84] As an aside, Analyst Marson (and others) testified that this sort of internal information exchange was common and that Analyst Marson received similar notifications many times each day that generated similar discussion amongst he and his colleagues.

D. Analyst Marson Learns about US Criminal Warrant

[85] Analyst Marson testified that he later became aware of the CP Lookout through an email from his NTC colleague, Ms. Johnson. Analyst Marson testified that this was the first time that he read or received information pertaining to Mr. Sari from US authorities. Analyst Marson knew that Agent Sgroi was the assistant legal attaché for the FBI.

[86] Analyst Marson believed the CP Lookout referred to "export control". As a result, Analyst Marson conducted further queries of police data bases, including Canadian Police Information Centre ("CPIC") and the US national crime police information centre ("NCIC").

[87] When he reviewed NCIC, Analyst Marson discovered, for the first time, a criminal warrant had been issued for Mr. Sari in the US. There was also a notation indicating the US was interested in seeking Mr. Sari's extradition.

[88] Analyst Marson testified this information was significant because it supported an additional category of inadmissibility under IRPA for criminality. He shared this information in an email to Ms. Johnson, NTC, Officer Shaddock and Superintendent Kamal Khella. The email stated:

Mike - I can see now that our friends might have a warrant out for this fellow and are willing to extradite. If there are crim charges in place, we would likely examine and detain for IRPA proceedings as he'd be inadmissible per s. 36(1)(c) [serious criminality]. Can you reach out to the LEGATT and see if there's an indictment in place for this subject? If we can get our hands on it, it would help our admissibility and immigration detention arguments and give time for the US DOJ to engage with our Justice Department re: extradition. I'll be reaching out to our Regional LEGATT in case she can assist.

Kam/IRT - Possible crim charges can be observed in NCIC. Please keep myself and NSU apprised of how the exam progresses and seek their counsel on whether there's enough evidence to Report per A36. Depending on how fast things move, RCMP may attend and take custody.

[Emphasis added.]

[89] At this point, Analyst Marson reached out to regional FBI legal attaché, Ann Miller. He wanted to know whether she had access to information on the US arrest warrant, including a copy of the indictment. Analyst Marson testified that these items may include information relevant to the other admissibility concerns, such as a potential employment relationship with Mahan Air.

- [90] Analyst Marson stated that this was his first direct contact with any US official regarding Mr. Sari.
- [91] Analyst Marson also testified about steps he took in the context of Mr. Sari's case now involving both immigration and extradition issues. It was in that context that he explained the sentence in his email about granting time to the DOJ to engage with the US. He testified that this was based on his experience involving dual IRPA and extradition concerns. He acknowledged the temporal association between how these two parallel processes unfold in circumstances, such as those like Mr. Sari's, where there were multiple inadmissibility concerns. He noted the associated immigration process would thus likely be a long one whereas, the extradition process may proceed "on a forthwith basis commencing with issuance of a provisional arrest warrant and subsequent arrest of Mr. Sari by the RCMP."
- [92] He also noted that timing was important because the extradition process would likely take priority over the immigration proceedings. That is, if Mr. Sari was arrested for extradition purposes, the CBSA's processing of his application to enter Canada would be paused until the extradition proceeding was concluded.
- [93] Analyst Marson denied that any of the steps he took regarding Mr. Sari were influenced by the potential extradition of Mr. Sari to the US. Or that he was engaged in some sort of a ruse to detain Mr. Sari to allow for the US to get their extradition tackle in order.

E. Arrival at YVR and Interaction with Frontline CBSA Workers

- [94] The inadmissibility issues filtered down to the frontline CBSA workers who ultimately dealt with Mr. Sari.
- [95] CBSA Superintendent Julia Prinja commenced her shift in the afternoon of January 17, 2019. She first learned of Mr. Sari when she received the NS Lookout by email. She noted the inadmissibility concerns described in the NS Lookout as well as the fact that he was a foreign national. She considered the NS Lookout to be a standard CBSA lookout that would necessitate a secondary exam.
- [96] Superintendent Prinja assigned the secondary exam to BSOs Sowmith Katragadda and BSO Hanry Truong.
- [97] BSO Katragadda testified about what he learned before and during the secondary examination. From his testimony, it seems he reviewed the CP Lookout after the secondary exam had commenced. He testified that he was aware of the IRGC Quds Force and knew of allegations connecting that entity with human rights violations and national security related issues. He also stated that the NS Lookout indicated Mahan Air was listed under Schedule 1 of SEMA. BSO Katragadda testified that he believed Mr. Sari, a foreign national, should receive a secondary examination. He set out the following to form the basis for this belief:
- a) in the NS Lookout, Mr. Sari was connected to Mahan Air, a sanctioned entity, and Mahan Air's links with the IRGC Quds Force;

- b) potential inadmissibility under IRPA ss. 34 and 35(1)(d); and
 - c) review of an email from Analyst Marson referring to an outstanding warrant raising potential s. 36 IRPA concerns for serious criminality.
- [98] CBSA officers decided that they would use Disembarkation and Roving Team ("DART") procedures so they could meet the flight at the gate and then follow Mr. Sari to customs.
- [99] At 8:04 p.m., BSOs Katragadda and Truong went to gate D65 to meet British Airways Flight 85 from London. They followed Mr. Sari to the customs hall. There, Mr. Sari used the primary inspection kiosk to make his customs and immigration declaration. The machine generated a receipt that Mr. Sari then presented to CBSA officers at the Primary Inspection Line. A code was printed on the receipt indicating that Mr. Sari was the subject of a lookout and a separate code alerting CBSA officers that Mr. Sari may be violent.

F. Secondary Examination

- [100] The officer at the primary inspection line referred Mr. Sari for a secondary exam. Mr. Sari's passport was transferred to BSO Katragadda.
- [101] After his baggage was retrieved, Mr. Sari was escorted to secondary examinations at approximately 8:49 p.m. He was interviewed at counter 23. He complied with the request to empty his pockets and place the contents on the counter.
- [102] BSO Katragadda asked Mr. Sari usual CBSA questions about the goods he was bringing to Canada and inquired about the contents in his luggage. During the examination, Mr. Sari told BSO Katragadda the following:
- a) He made his first trip to Canada in 2011. He had made three to four trips to Canada since and usually stayed between one to two weeks.
 - b) He was planning to enter London but was examined at the gate in Dubai and was examined at the gate in London.
 - c) He was a resident of the UAE for 30 years, since 1990 and travelled frequently to Iran.
 - d) He worked in the travel industry and was the general manager of Jahan Destinations since 2007.
 - e) He had travelled extensively, including to Iran, Indonesia, Russia, Armenia, Georgia and China.
 - f) He provided an address in Vancouver where his sons resided while they were studying in Canada.
 - g) He confirmed his wife worked for Bank Saderat Iran, in Dubai.

- [103] In the meantime, BSO Truong examined Mr. Sari's luggage to assess compliance with the Customs Act and to determine whether Mr. Sari was in possession of items that may assist in assessing his admissibility to Canada. He finished this search at about 9:30 p.m. and did not locate any items inadmissible to Canada or that were otherwise of interest to the CBSA.
- [104] At this point, BSO Katragadda instructed BSO Truong to conduct a media exam of Mr. Sari's two iPhones and one iPad. The search was conducted pursuant to s. 99 of the Customs Act and was for the purpose of determining whether Mr. Sari was carrying contraband and whether information available on his devices would provide more information on the ss. 34, 35 and 36 IRPA inadmissibilities under investigation.
- [105] BSO Katragadda said the following indicators supported his belief that warranted the media search:
- a) Mr. Sari is a resident of the UAE which is considered by the CBSA as a "source country" which is, based on prior experience or statistical information, a country that presents a higher volume of specific types of contraband or illicit activities. From his knowledge, proceeds of crime and terrorist financing funds frequently move through the UAE.
 - b) Mr. Sari had previously travelled to Canada indicating a potential for a greater understanding of the workings of customs and immigrations and the potential for connecting with criminal organizations in Canada.
 - c) Mr. Sari had been questioned by other entities on his way to Canada. Mr. Sari disclosed that he was examined at the gates in both Dubai and London, indicating he was of interest to others.
 - d) Mr. Sari was travelling on his own, typical of most individuals who were later found to be in possession of contraband.
 - e) Mr. Sari repeatedly asked BSO Katragadda if "everything was ok" during the examination, indicating to BSO Katragadda a greater level of nervousness than that to be expected from a traveler experiencing a secondary examination.
 - f) The existence of the NS Lookout which gave rise to ss. 34, 35 and 36 IRPA inadmissibility concerns. The NS Lookout was relevant to his decision to conduct a media exam.
- [106] BSO Katragadda obtained the passwords to the devices from Mr. Sari. At about 9:42 p.m., BSO Truong started the media exam and concluded it at about 10:50 p.m. Regarding the media examination, BSO Truong reported:
- a) He reviewed photos, texts and emails on the devices.
 - b) He obtained Information from a travel itinerary, a ticket issued by Mahan Air and passport information relating to other individuals [this information could be evidence of human trafficking or other suspicious activity].

[107] At the same time, BSO Katragadda continued with his examination. He conducted searches on CPIC, NCIC and the Integrated Customs Enforcement System. From these queries, BSO Katragadda confirmed the existence of the outstanding fraud charges against Mr. Sari. He also considered that both Mahan Air and Iran Saderat Bank were listed entities under Schedule I of SEMA. He testified, "[i]t was of interest because it was a listed entity, its ties to the Iranian government, and the possibility of proceeds of crime, terrorist financing, or funds that are being moved contrary to the SEMA sanctions."

[108] For BSO Katragadda, this information raised strong suspicions that Mr. Sari was inadmissible to Canada under ss. 34, 35 and 36 of IRPA.

G. First Interview

[109] At 10:49 p.m., BSO Katragadda returned to counter 23. At this point, he asked Mr. Sari whether he had any legal issues in the US. Mr. Sari responded that he did not. BSO Katragadda also inquired again about Mr. Sari's "issues in Dubai regarding US airspace." At this point, BSO Katragadda determined that he would conduct a formal examination interview of Mr. Sari to obtain evidence that might be relevant to an admissibility hearing.

[110] The interview commenced at 11:10 p.m., was conducted in a private room in the Immigration Operations area of YVR during which the following was learned:

- a) He is an Iranian national, residing in UAE for nearly 30 years.
- b) He is employed as the general manager of Jahan Destinations, a travel agency.
- c) Jahan Destinations is a general sales agency for Mahan Air and represents the airline.
- d) He dealt with ticketing, booking and financial transactions in the UAE on behalf of Mahan Air.
- e) He would make payments to the airport, to the fuel company and other people and companies but does not know where the money goes and does not ask questions about such matters. In BSO Katragadda's Solemn Declaration, he recorded this part of the exchange as follows:

Q: What kind of payments does your company do on behalf of Mahan?

A: To the airport, to the Fuel company. And sometimes they ask us to make payment to certain people or companies and we don't ask any questions.

Q: Have you made any payments like this outside of Dubai?

A: Most of the time in Dubai. All of the time in Dubai. I don't really ask any questions. I'm not the financial guy. I don't know where the money goes, I don't ask questions. Sometimes they ask us to make payments to fuel company in Bangkok but they have an account in Dubai. We have to provide a proof of origin in Dubai when we transfer money anyways.

- f) Jahan Destinations made payments in US dollars and Mahan Air is the subject of US sanctions.
- g) He believed his personal bank account had been closed because of his connection with Mahan Air.
- h) He denied knowing about the US fraud charges.
- i) He denied ever sending money to the US.

[111] BSO Katragadda testified that he believed the information learned during the interview provided greater support for his inadmissibility. He testified that this information justified further examination. This was based in part on the following, he stated:

[Mr. Sari] was directly involved with financial transactions with Mahan, and there - during the media exam, I recall there was certain information found of Chinese nationals that were traveling to Iran, and this was definitely of concern from a national security standpoint.

With Iran, one of the biggest national security concerns is with the counter-proliferation with their nuclear program. From an intelligence perspective, there are concerns that there are certain nations out there that are assisting Iran with their program, so all of a sudden seeing a significant number of individuals from a specific country traveling to Iran, it raised concerns that needed to be looked into further.

[112] Based on the information learned, BSO Katragadda determined that further examination was required.

[113] I pause to address the RCMP activities that had occurred earlier on January 17, 2019 and during the time Mr. Sari was dealing with BSOs Katragadda and Truong.

H. RCMP Surveillance

[114] There was some evidence tendered about RCMP involvement regarding Mr. Sari. In the ANOA, allegations of improper information sharing were raised, including information from the RCMP to US agencies.

[115] Sgt. Kevin Duggan, from the RCMP Federal Serious and Organized Crime Group, testified about his involvement. He was instructed by his superior to prepare a surveillance team before an Iranian national arrived at YVR. He was told that there was a US arrest warrant and the subject was being sought for extradition. He understood that his surveillance team was to watch Mr. Sari until an extradition warrant was in place.

[116] Surveillance was planned for inside and outside of YVR.

[117] Sgt. Duggan and other RCMP members arrived at YVR at about 7:15 p.m. on January 17, 2019. Sgt. Duggan testified that he expected his team would be able to obtain photos of Mr. Sari and distribute any pertinent descriptors to the Special Ops team situated outside of YVR. However, Sgt. Duggan was told that the RCMP would not be permitted in the

secondary examination area nor would they be allowed to take pictures. The surveillance team then set up outside of the secondary examination area. They also took steps to identify Mr. Sari's sons who were believed to be at YVR.

- [118] I pause to address some evidence tendered by Mr. Sari's son, Seyed Ali Sari, in an affidavit affirmed on April 15, 2023. I will say more about this evidence but for now set out that Seyed Ali stated that he and his brother were not at YVR on January 17, 2019. He deposed that they did not know their father was coming to Vancouver and that his visit was to be a surprise. He attested that the first time he learned his father was in Vancouver was when Mr. Sari called him on January 18, 2019 from custody. He stated that he saw his father for the first time on January 21, 2019 at the immigration hearing.
- [119] At about 9:00 p.m., Sgt. Duggan saw a person who he believed to be Mr. Sari in the company of two CBSA officers. He was later told that Mr. Sari would not be released as he was being detained on grounds of national security. Sgt. Duggan sought some details about any his immigration hearing but Superintendent Prinja refused to provide that information.

I. Decision to suspend investigation

- [120] BSO Katragadda determined that they had spent about three hours with Mr. Sari and he decided that he would recommend Mr. Sari be detained for the purpose of conducting a further examination.
- [121] At 1:01 a.m. on January 18, 2019, BSO Katragadda sent a detention approval request email to Superintendent Prinja, recommending that Mr. Sari be detained pursuant to s. 55(3)(b) of IRPA. In his email, he confirmed that Mr. Sari had ties to Mahan Air, a listed entity under SEMA; had outstanding charges in the US, including for fraud and money laundering; and was being examined for national security (IRPA, s. 34) and criminal inadmissibility (IRPA, s. 36). In his email, he set out the justification for recommending detention:
- a) It is not in the subject's best interests to attend further interviews and be examined for national security and criminal inadmissibility. Here, he explained that because of the criminal charges, he believed Mr. Sari would seek to avoid jail in the US and further engagement with the CBSA relating to the outstanding US charges.
 - b) He admitted to ties with an entity that is currently under sanctions. This underscored the serious nature of the inadmissibilities for which Mr. Sari was being examined and Mr. Sari would thus have incentive to avoid further examination by the CBSA.
 - c) He has the means and ability to depart Canada through his ties to the travel sector.
 - d) He had an active warrant for arrest for fraud and money laundering in the US.

- [122] Regarding the last factor, BSO Katragadda testified that he believed the existence of serious criminal charges in the US provided Mr. Sari with even greater incentive to leave Canada to avoid dealing with those charges. Although he considered alternatives to detention, BSO Katragadda maintained that it was simply too early to release someone into the community considering all of the circumstances discovered during the investigation.
- [123] Superintendent Prinja, after reviewing BSO Katragadda's recommendation for detention, replied, confirming that she approved the recommendation to detain Mr. Sari.
- [124] At 1:14 a.m., on January 18, 2019, BSO Katragadda detained Mr. Sari for further examination.
- [125] He was informed of his detention, his right to counsel and given the standard CBSA caution. He was also advised, pursuant to the Vienna Convention, that upon his request a representative of his government would be informed of his detention.
- [126] BSO Katragadda placed a number of calls to Legal Services so Mr. Sari could speak to counsel. At 2:00 a.m., a private conversation between Mr. Sari and counsel was facilitated. The BSOs placed a call to the Iranian embassy at 2:08 a.m. but no one answered and the call went to voicemail. They therefore decided not to leave information about Mr. Sari's detention, citing privacy concerns.
- [127] In the ANOA, Mr. Sari raised the fact that he was never connected with a representative from Iran as required by the Vienna Convention. I will say more about this issue shortly.
- [128] Starting at 3:15 a.m., BSO Katragadda completed some of the required documents including an internal report where he listed the follow up action to be taken. He noted the following steps:
- a) contact the Iranian embassy and notify them of Mr. Sari's detention;
 - b) conduct further follow up on the US charges;
 - c) continue to investigate Mr. Sari's connections with Mahan Air and other security concerns; and
 - d) continue the examination of Mr. Sari's electronic devices.

J. Events of January 18, 2019

- [129] Analyst Marson learned about the examination on the morning of January 18, 2019, having reviewed BSO Katragadda's email indicating that Mr. Sari had been detained for further examination. Analyst Marson sought information from BSO Katragadda including examination materials, such as any statutory declarations, to determine if any imminent national security concerns were raised that should be shared with CBSA's domestic national security partners.

- [130] Once he received the materials sought, Analyst Marson said he reviewed it but did not share the contents of the documents with anyone with the CBSA, the RCMP or any foreign law enforcement partner, including the FBI.
- [131] He testified that he did, however, share the fact of Mr. Sari's detention to his RCMP INSET colleagues by way of email. He informed RCMP Cpl. Amberia Sovdi to see if the RCMP had any information that might be relevant to the inadmissibility investigation. He learned they did not have any relevant information.
- [132] On the morning of January 18, 2019, Officer Shaddock told Agent Sgroi that Mr. Sari had been detained. Agent Sgroi had requested an update. I reproduce Officer Shaddock's response[2], delivered on January 18, 2019 at 5:41 a.m.:

What has he been detained under (legislatively)? IRPA S.55(2)(a) [arrest without warrant] and (3) (a)/(b) [detention required for examination to continue/reasonable grounds to believe] at moment; when taken to 48 hr. detention review on Monday, we'll argue 58(1)(b) and (c).

What is the anticipated process / next steps? Further exam ongoing today. Our POE is attempting to acquire docs in support of continued immigration detention and IRPA admissibility proceedings. Right now, looks like we have a case for criminal inadmissibility, and possible case for security inadmissibility. If we're unable to obtain materials to support admissibility proceedings and continued detention, then there is a risk that the subject will be released by the Immigration Division judge on Tuesday, be allowed to voluntarily withdraw his application to enter Canada and leave for his home country. I think the case for continued detention is probably strong enough to keep him in custody until at least next Thursday, but no guarantees. Our arguments will be buttressed by any additional information our neighbours are able to share. If you could impress that upon the LEGATT it would be appreciated. I understand the POE contacted him directly yesterday and he advised that no materials (i.e. indictment, copy of extradition application, charge sheet, etc.) would be forthcoming.

How long is it anticipated that he will be detained for? Likely until next Thursday, but possibility of release on Monday if we don't have a strong evidentiary case to maintain detention under 58(1) (b) or (c) - "the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality"; if we can make the argument for continued detention on Monday, DOJ will likely have a warrant by the time his 7 day detention hearing occurs (Thurs/Fri next week);

Is it possible he will be turned around/denied entry? Yes still possible but most likely scenario is continued detention until next Thursday/Friday. Again, any supporting evidence from partners supports continued detention arguments. If arrest warrant is going to take longer than a week, I think we would definitely need more info from our neighbours to keep him detained for IRPA purposes.

[Emphasis added.]

[133] I will say more about this communication shortly.

[134] Officer Shaddock also reported to his superior, J. Parent, to update him about what had transpired. In that report, there was communication about the accuracy of the information contained on the CP Lookout and, in particular, whether that information was misleading. Officer Shaddock agreed during cross-examination that his wording on the CP Lookout could have been better. He agreed with the suggestion that the reasons for the CP Lookout could give the impression "that the only reason the individual was intercepted by the CBSA under that export control (i.e., customs) lookout was to assist the FBI and the RCMP by gathering information that they need."

[135] Again, Officer Shaddock agreed that his wording could have been better. However, he reiterated that he issued the CP Lookout for counter-proliferation purposes and not to aid the US.

[136] I wish to pause here to address challenges to this evidence from the applicant.

[137] Despite Officer Shaddock's denial to the contrary, the applicant asks the Court to draw inferences from some of the communications that were exchanged between Officer Shaddock, Analyst Marson and Agent Sgroi. The applicant provided two such instances where he says the Court should infer that information was shared that should not have been.

[138] The first instance arose from Officer Shaddock's explanation about information he provided to Mr. Parent. The applicant states that Shaddock misled Mr. Parent when he reported to him. The applicant stated it this way in his written argument:

in reporting to Mr. Parent [Officer Shaddock] misleads his supervisor on the issues of whether he shared information with Sgroi regarding the results of the CP exam (i.e., that Sari was further detained) and on the issue of Sari's employment (i.e., stating that Sari was employed by a sanctioned entity) which went well beyond the facts established in BSO Katragadda's interview of Sari, and beyond the somewhat stretched assertion in Katragadda's detention report that Sari had "ties" to a sanctioned entity.

[139] The applicant submits that the second instance of obvious information sharing arose from Analyst Marson's evidence. The applicant stated it this way:

It is clear that Marson's interest is to further in the detention of Mr. Sari on some basis so that the USA would have time to coordinate with Canada and perfect its extradition request. This is borne out by the plain content and obvious meaning of his various emails with colleagues, BSOs, US FBI representatives, RCMP and CBSA hearing officers...

[140] In part, the applicant relies on the following exchange of communication in support of his allegation that great effort was undertaken to stall the process so the extradition process could be perfected. In his written submission, the applicant stated the allegation this way:

Marson had access to the email chain beginning with Srgoi and was aware that Shaddock had issued the ICES lookout. Before Mr. Sari had even arrived in Canada, he writing to this CBSA colleagues and Shaddock speculating that they could get their hands on a charging document, "It would help out admissibility and detention arguments and give time for the US DOJ to engage with our Justice Department re extradition."

This communication is responded to by Supervisor Kamal Khela who writes: "10-4. I will take care of it."

Marson confidently writes to FBI Liaison Ann Miller, "No rush, Ann. Indications are that we will have him under exam for a few days."

[Emphasis in original.]

[141] There is some evidence that supports Mr. Sari's assertion that he asked BSO Katragadda if he could withdraw his request to enter Canada and simply leave the country. Superintendent Prinja was cross-examined about this assertion but she did not recall it. The applicant asserts that BSO Katragadda ignored this request and simply undertook further questioning of Mr. Sari that was dedicated to developing evidence that might support the American case. The applicant added that, it was a reasonable inference to conclude that BSO Katragadda knew that he should not admit he was doing " anything to further the US initiative which was being assisted by Mr. Shaddock's Counter Proliferation Lookout..." As such, his denial should be assessed in that context.

K. Second Interview

[142] After the decision was made to detain Mr. Sari, the BSOs continued their investigation regarding the issues raised from the secondary examination and interview. This included a second media examination and a second interview of Mr. Sari.

[143] BSO Ridgley conducted a second interview of Mr. Sari at or about 10:20 a.m. on January 18, 2019. During this interview, BSO Ridgely explored:

- a) the relationship between Mahan Air and Jahan Destinations;
- b) the reasons Mahan Air is a sanctioned entity;
- c) details about the nature of the financial transactions Mr. Sari made on behalf of Mahan Air; and
- d) the outstanding charges in the US.

[144] Also, that morning, Investigations and Removals Team ("IRT") and Superintendent Khella asked BSO Michael Christopoulos, a member of the IRT, to assist with the investigation. He was asked to contact US law enforcement to obtain documents regarding the criminal charges and to conduct a media examination of the electronic devices.

[145] BSO Christopoulos reviewed the file and learned about the outstanding criminal charges in the US, including fraud and money laundering. He testified that the following information raised both criminality and national security inadmissibility concerns for him:

- a) He was connected to Mahan Air, a listed entity under SEMA.
- b) Based on his own experience, he knew of Mahan Air and that Mahan Air had been involved in transporting weapons and fighters on behalf of the IRGC Quds Force.
- c) That he had an active warrant for criminal charges of fraud and money laundering and conspiracy to commit fraud and money laundering.

[146] At 11:10 a.m., BSO Christopoulos attempted to contact the FBI to obtain evidence, including charges, warrants or indictments regarding the criminal matters in the US. He was asked to send his request by email and he did. After Agent Sgroi was brought into the loop, BSO Christopoulos received, later that day, an email attaching a document confirming the charges and Mr. Sari's connection to Mahan Air, stating:

- (i) The FBI has an ongoing investigation involving employees of Mahan Air, a commercial airline in Iran sanctioned for providing service to terrorist organizations. [Mr. Sari] an employee of Mahan Air, is amongst the subjects under investigation;
- (ii) This FBI investigation revealed [Mr. Sari] was complicit in a conspiracy to defraud the United States and to obstruct the lawful and legitimate governmental functions and operations of the U.S. Department of treasury in the enforcements of economic sanctions laws and regulations administered by that agency;
- (iii) The United States Government has pending charges on [Mr. Sari] which are under seal by a U.S. District Court. Among those charges, [Mr. Sari], along with other co-conspirators, is charged with Bank Fraud, Conspiracy to Commit Bank Fraud, Money Laundering, and Conspiracy to Commit Money Laundering.

[147] BSO Christopoulos conducted a second media exam of one of Mr. Sari's devices. He testified that he had grounds to do so based on the information he had received from Agent Sgroi about the US charges and the information linking Mr. Sari to Mahan Air. He took 69 photos of the information discovered on the device. He testified that the images confirmed Mr. Sari's ties to Mahan Air; travel documents of other individuals; and images of what appeared to be an Iranian Chinese trade-related meeting.

[148] The applicant takes the position that there were no grounds authorizing this second search of Mr. Sari's media devices. He submitted that this was done without any reference to the media examination and copying of documents undertaking by BSO Truong. The applicant submits that the second interview and second search of the media devices were undertaken "with a view to gain evidence for the USA and to continue the detention of Mr. Sari until the extradition request could be made and the provisional warrant issued."

L. Attempts to Implement Vienna Convention Rights

- [149] BSO Christopoulos also attempted to inform the Iranian embassy about Mr. Sari's detention. He testified that he tried to contact the Interest Section of the Islamic Republic of Iran at the Embassy of Pakistan in Washington DC. However, he stated there was no one available to answer the call and no option to leave a message. He testified that he later contacted the embassy of Pakistan and left a message stating that Mr. Sari was under examination and that he had requested to speak to a representative of the Iranian government.
- [150] Superintendent Prinja also tried to contact the Iranian embassy on January 18, 2019. She contacted the Pakistani embassy in the US which she understood provided consular services to Iranians. When she could not make contact, BSO Rosana Ma contacted the Iranian consulate in the UK. She explained to the Iranian consulate that Mr. Sari was under detention and that he had requested consular assistance. The Iranian consular agent advised BSO Ma that he had no jurisdiction over matters arising in Canada. She was provided with an email address to try. BSO Ma wrote to the address provided by the Iranian consular official, explaining that the CBSA had an Iranian national in custody who was seeking consular services. Despite his request, Mr. Sari was not provided access to the Iranian consulate.

M. Detention Hearing before the Immigration and Refugee Board

- [151] Pursuant to s. 57 of IRPA, on January 18, 2019, BSO Christopoulos completed a Request for Admissibility Hearing/Detention Review. He was seeking a 48-hour detention review hearing before the Immigration and Refugee Board ("IRB"). He recorded that the basis for detention was an allegation of inadmissibility under s. 36(1) (i.e., criminality). He testified that although CBSA was still interested in the other grounds initially identified, at this point, the CBSA had confirmed the existence and the nature of the US criminal charges.
- [152] Mr. Sari's 48-hour detention review was held before the IRB on January 21, 2019. At the hearing, the Minister's counsel took the position that Mr. Sari's detention should be extended under s. 58(1)(c) of IRPA to allow for further investigation for inadmissibility on the basis of criminality. National security was also raised.
- [153] Mr. Sari was represented by counsel at the hearing. He sought his release. The IRB member was satisfied that the CBSA was engaging in a "reasonable investigation that could conclude the very serious allegations respecting [Mr. Sari's] admissibility".
- [154] On this basis, Mr. Sari was detained.
- [155] The parties referred to email communication that was exchanged immediately before the IRB hearing. In particular, the CBSA inquired of Agent Sgroi about the use to be made of the information set out in BSO Christopoulos' email about the US charges. Agent Sgroi provided this response, on January 18, 2019:

Yes, this can be used for an immigration hearing. I request if the information is used that the document itself not be submitted, however, the use of the information is authorized. While some of the information is still under seal (the paragraph detailing the charges), the US District Court provided a limited use order to allow for the use of said information .

[156] It is also useful to consider the communications exchanged after the 48-hour detention review. The hearings officer noted in her report that Mr. Sari was detained pursuant to s. 58(1)(c) of the IRPA (regarding outstanding charges in the United States). In her summary, the hearings officer wrote:

Alternative was presented, 2 sons in Canada and 5k bond. [Minister] opposed and although Member hesitated, ultimately found it was too soon in the investigation to release. [Minister] relied on serious crim[inality] for the 58(1)(c) but advised that the investigation may also reveal security admissibility issues.

After the hearing, we were advised that the provisional arrest warrant for extradition was issued and RCMP are en route to arrest.

[157] In my view, this summary captures the dispute I must resolve. That is, did the CBSA personnel operate within their statutory mandate or were they operating for an improper purpose? One of the difficulties here is trying to disentangle the streams of inquiry at play.

N. Provisional Extradition Warrant

[158] After the IRB hearing, Mr. Sari was arrested on January 21, 2019 on a provisional warrant issued under the Act.

[159] Mr. Sari remained in custody until a bail hearing was held on February 14, 2019. Justice Kelleher ordered Mr. Sari's detention on the primary ground, basing his decision on the fact Mr. Sari was not a resident of Canada, stated that he had minimal ties to Canada and had proposed an insufficient cash deposit to secure his release.

[160] I note as well that there were, at this point, some inquiries made regarding Mr. Sari's two sons. It is clear that there is no information whatsoever to suggest any adverse information regarding his sons.

[161] There is little evidence before me about what occurred after the detention order. Emails from April 25, 2019 state that there was an internal request for CBSA to follow up on the US proceedings. For example, an email was circulated from Sharon Sandhu as follows:

I asked the team last night to set a BF date for May 29th [Mr. Sari's next court appearance] but we should be looking into the inadmissibilities right now, as the documents have presumably been unsealed. Can you please ensure that someone reaches out to the US Authorities to request evidence for our 34 investigation? Janis also mentioned that France banned the operation of Mahan Airlines.

- [162] In my view, I can fairly infer from the April 2019 communications that CBSA knew they needed further information to support their national security allegation against Mr. Sari. Based on the evidence tendered, I have also inferred that the national security allegations against Mr. Sari were the same in April as they were at the time of his initial detention. That is, further investigation was required.
- [163] For reasons I will set out more fully below, it was understandable that there was work that needed to be done in January 2019 when the frontline workers were trying to manage quickly the information that was coming in. Indeed, they requested that they be granted further time to carry out the investigation in light of the information they had and the leads that needed to be pursued.
- [164] On July 26, 2019 following a s. 525 bail review as mandated by the Criminal Code, Mr. Sari was released from custody. Justice Skolrood ordered Mr. Sari's release on the basis of a surety, a recognizance in the amount of \$50,000 and stringent conditions, including a curfew and electronic monitoring.
- [165] The same day, following Mr. Sari's release in the extradition proceedings, he was also released in the immigration proceedings and placed on conditions. Again, it seems the CBSA did not uncover any additional information that would support a position that Mr. Sari be detained in the immigration proceedings in light of his release in the extradition proceedings.

O. Applicant's Circumstances

- [166] Mr. Sari's son, Seyed Ali, described Mr. Sari's circumstances since his release in July 2019. I have reviewed this affidavit and it was entered as an exhibit in this hearing. He was not cross-examined on his affidavit.
- [167] Seyed Ali Sari described the following information relevant to the issues raised on the ANOA:
- a) His parents were married on March 25, 1993 and have been married for over 30 years.
 - b) Seyed Ali has been in Vancouver since December 26, 2012. He has completed a Bachelor of Arts ("BA") from SFU and is currently working as a visual designer at a design firm in downtown Vancouver.
 - c) Mr. Sari's younger son, Seyed Hussain Sari, is 23 years old and is completing his final semester at SFU for his BA.
 - d) Mr. Sari was to attend Seyed Ali's convocation in June 2019 but he did not attend because he was in custody.
 - e) His mother had been residing in the UAE but had to move back to Iran, on her own, when Mr. Sari was detained.

- f) Mr. Sari has no status in Canada--his Iranian passports were given to the RCMP and his only identification document is an expired UAE residency card.
 - g) Mr. Sari applied for a work permit so he could try to earn some income to support himself--this application was refused.
 - h) Mr. Sari has health issues, including heart and prostrate conditions. He had a major by-pass surgery in May 2008 and is on heart medication, having been hospitalized twice while at North Fraser Pretrial Centre. Because he does not have status in Canada, he has to pay for all of his hospital and medical visits, and his medications.
 - i) Mr. Sari's spouse no longer has any status in Dubai because of Mr. Sari's expired work permit--due to the extradition proceedings. Despite having lived in the UAE for over 30 years, his status has expired and his spouse had to relocate to Iran. She came to Vancouver once between November 19, 2019 and July 25, 2020. When her visitor Visa expired, she left Canada but she has been unable to obtain another Visa to enter Canada. Her application for a visitor's Visa has been denied twice stating concerns that she would not leave the country when her authorization expired.
- [168] Mr. Sari's son has tried to help his mother apply for a visitor's Visa so that she can see Mr. Sari. This has not been successful. Ms. Sari has not seen her spouse since her departure from Canada in July 2020. It has been over three years since they have been together.
- [169] Mr. Sari's son also attested to a notice he received from Apple and Google. The notice advised that on August 1, 2019, Apple received a legal request from the US Attorney's office requesting information about his Apple account. Similarly, on October 3, 2022, he received a notice from Google that Google received and responded to legal process issued by the US Attorney's office compelling the release of information related to his Google account. The Google notice did not disclose the date the request was received from the US Attorney's office. The Apple notice referenced file number 19MAG7135 and the Google notice referenced file number 19MAG7134.
- [170] Mr. Sari asks the Court to draw an inference that the timing of these searches is consistent with information being shared by Canada to the US "shortly after" Mr. Sari's detention, despite the denials from the various witnesses on this topic.

IV. ANALYSIS

- [171] I start the analysis by identifying the conduct that the applicant contends constitute an abuse of process. He identified the following as forming a pattern of conduct that amounts to an abuse of process:

- a) The request "by a foreign government agent that CBSA statutory powers be utilized for the purpose of creating a [CP Lookout]" that would cause Mr. Sari "to be detained for a secondary inspection, examination" and searches, including personal and luggage and the search of electronic devices.
- b) Issuing a CP Lookout by Shaddock "solely for the purpose of facilitating the United States' desire to have Mr. Sari detained so that it could gain time to prepare an extradition request" in circumstances where there could not have been a serious belief by Officer Shaddock that Mr. Sari:

given the information on his visa, his previous travel to Canada, the fact that his sons were in Canada, the fact that he was not employed by Mahan Airlines the fact that he was a UAE resident for thirty years--all these circumstances militate against any reasonable basis for issuing a counter proliferation

- c) Complete disregard by Superintendent Prinja and BSO Katragadda about facts that:

would indicate the counter proliferation lookout was not properly based and should not have been granted. BSO Katragadda had access to the exchanges between Mr. Sgroi and Mr. Shaddock, and had access to the visa information of Mr. Sari to inform him that the CP Lookout was not properly being utilized.

- d) BSO Katragadda understood fully that:

the purpose for which he was designated to be the examining officer at secondary, evidenced by focused questioning of Mr. Sari with regard to the circumstances of his employment, with obvious aim of eliciting evidence that may assist the USA. He also authorized a media exam in circumstances where the purposes were obviously to benefit any potential USA investigation and extradition request.

- e) "Notwithstanding clear evidence that Mr. Sari was not an employee of Mahan Air, and an understanding of his role in Dubai in his employment with Jahan Destinations," BSO Katragadda wrote a report:

alleging that continuation of the examination and detention were justified on the basis of possible 'ties' with Mahan Air. This was done solely for the purpose of advancing the USA aim of keeping Mr. Sari in custody until they could perfect an extradition request.

[172] The substance of the Mr. Sari's submission is that the evidence supports a finding that the entire course of conduct, starting with Agent Sgroi's request and which was acceded to by Officer Shaddock, leads irrevocably to the conclusion that the Canadian immigration powers were used for an improper purpose. That is, those powers were used to detain Mr. Sari so the US could perfect an extradition request. This purpose was extraneous to the legitimate purposes of immigration powers. And this constituted a misuse of statutory power which amounted to an abuse of process.

[173] Mr. Sari states that this abuse of process was compounded by the delay in providing counsel to Mr. Sari until after he was already interrogated on one occasion by BSO Katragadda. It was aggravated by the failure to provide Mr. Sari with access to his consular, as required by the Vienna Convention. And it was further aggravated by the obvious transmission of information to the US by other Canadian officials, resulting in new searches of an email account in the US.

[174] In his submission, the applicant focuses on the CP Lookout. He put it this way in his written submission:

The consequences to Mr. Sari, both immediate and over the entire period of time this matter has been pending, have been extreme. He has suffered as a result of the misuse of statutory powers, the consistent deliberate mis-description of his employment to the point of extreme distortion in order to portray a non-existent employment link between him and Mahan Airlines. The evidence overall was clear that he was an employee in Dubai of Jahan Destinations. The purpose of his travel to Canada was most clear. It was an egregious and unreasonable act to issue the Counter Proliferation Lookout in the circumstances of this case, an abuse which was compounded by the chain of events it triggered...

[175] I turn to each incident identified by Mr. Sari as constituting a part of the pattern of abuse of process:

- a) Was the CP Lookout based on genuine counter-proliferation concerns?
- b) Did Analyst Marson act at the behest of US authorities?
- c) Has the applicant established foreign misconduct?
- d) Was the secondary examination motivated by an improper purpose?
- e) Was Mr. Sari's detention lawful?
- f) Did CBSA officials improperly share information with the RCMP or US authorities, including sharing passwords to Mr. Sari's electronic devices?
- g) Did the CBSA violate the Vienna Convention?

A. Was the CP Lookout Based on Genuine Counter-Proliferation Concerns?

[176] Officer Shaddock explained the information he received from Agent Sgroi via email and phone on January 17, 2019. He explained that, in his view, a potential association between Mr. Sari and Mahan Air constituted a tip which, if left unsubstantiated, could not have formed the basis for issuing the CP Lookout because of the absence of a Canadian counter-proliferation nexus. However, Officer Shaddock testified that following his own research, he discovered information that caused him to conclude that there was a Canadian counter-proliferation nexus. That is, he discovered that Mahan Air was an entity listed in Canada under SEMA for its ties to the IRGC. This potential link between Mr. Sari and Mahan Air raised concerns for him. In his view, based on this information, it was necessary to issue

the CP Lookout to assess the risk presented by Mr. Sari's travel to Canada, including determining whether he had ties to Mahan Air. I accept that he conducted his own research to establish the Canadian counter-proliferation concerns. On this basis, he testified that the purpose of the secondary examination compelled by the issuance of the CP Lookout was twofold:

- a) first, to either confirm and further investigate the counter-proliferation concerns; or
- b) second, to negate and dismiss the intelligence received.

[177] Officer Shaddock made clear that his communication with Agent Sgroi was not unique to Mr. Sari. Indeed, he testified that he regularly communicated with Agent Sgroi on files such as these.

[178] I agree with the applicant that the issuance of a CP Lookout would certainly be a compelling piece of information for those conducting a secondary examination. And indeed, such a lookout should not be issued in the absence of compelling information. I will deal with the role of the CP Lookout in the secondary examination shortly.

[179] Officer Shaddock was challenged repeatedly about his conduct and the suggestion he entered the CP Lookout solely because he was told to do so by the US authorities. Each time it was suggested, Officer Shaddock denied that he did so. He explained several times that he did his own research to substantiate whether the CP Lookout should be issued. I accept his testimony that he issued the CP Lookout on his own behalf after he had substantiated grounds for counter-proliferation concerns in Canada that were tied to Mr. Sari's arrival. This was not Officer Shaddock's first time dealing with regimes where Canada had sanctions. He described existing bookmarks on his computer confirming his earlier research on this subject matter and how his knowledge enabled him to quickly determine that Mahan Air was listed on Schedule I of SEMA. I accept that he drew on his many years of working in counter-proliferation cases to substantiate his view that the CP Lookout was warranted in the circumstances.

[180] I accept that the CP Lookout was issued on genuine counter-proliferation concerns. I also note that Officer Shaddock agreed that the secondary examination was "non-resultant" and that he intended to let the CP Lookout expire. It was treated accordingly at the IRB detention review on January 21, 2019.

B. Did Analyst Marson Act at the Behest of US authorities?

[181] Analyst Marson described his role as an intelligence analyst and why he took the steps he did regarding the NS Lookout.

- [182] Firstly, once notified about the NS Lookout, he took steps to ensure that the frontline operators had the information they required to conduct an appropriate secondary examination. For Mr. Sari's case, Analyst Marson testified that he had dealt with many other similar lookouts and did so on an almost daily basis. As part of his responsibilities, he carefully described the steps he took:
- a) He discovered an association between Jahan Destinations and Mahan Air, and knew that Mahan Air was a listed entity under SEMA.
 - b) He knew that Mahan Air had significant ties to the IRGC and the Quds Force, entities listed by Public Safety Canada.
 - c) He located a reference to Jahan Destinations being overseen by the IRGC's Quds Force in a book, "Khomeini's Warriors".
- [183] Analyst Marson shared this information in a pre-arrival notification intended for use by the frontline BSOs. I accept that this is similar to how he typically informs those working at the point of entry about information that may be necessary for them to carry out their duties. In particular, I accept that he believed this information was necessary for an examination regarding national security concerns pursuant to s. 34.
- [184] In my view, it is significant that Analyst Marson learned about the interest in extradition when he was conducting his NCIC inquiries. Here, there was an explicit reference to the US interest in extradition. He conducted this inquiry after he learned of the CP Lookout. I find that the evidence establishes that Analyst Marson only learned about the extradition interest after he completed his counter-proliferation research. In other words, the counter-proliferation research was completed prior to learning about the extradition request and could not have been motivated by any pressure from outside agencies as alleged.
- [185] Analyst Marson was adamant that he did not tell the BSOs what to do or that he, in effect, caused Mr. Sari's detention. He testified that the decision whether detention was warranted was left to the BSO's judgment.
- [186] Based in part on the timing of the email communications, I find that Analyst Marson was performing his research about counter-proliferation concerns even before he learned about US interests. In taking the steps that he did, I do not find based on the totality of the evidence presented, that he was acting at the behest of the US authorities.

C. Has the Applicant Established Foreign Misconduct?

- [187] The applicant alleges that Agent Sgroi encouraged Officer Shaddock to issue a CP Lookout and that pressure was placed on Officer Shaddock to comply.
- [188] I agree with the AGC's submission that this is distinct from the Tollman case, where there was evidence the CBSA was asked (and agreed) to deliver Mr. Tollman to the border for immediate conveyance to US authorities.

- [189] I accept Officer Shaddock's testimony that he issued the CP Lookout because of his interest in Mr. Sari's connection to Mahan Air and the potential counter-proliferation issues raised by that association. His testimony on this point was not contradicted. I am asked to draw an inference that in my view requires the Court to impermissibly speculate about Officer Shaddock's intentions. In addition, the inference I am asked to draw invites the Court to ignore evidence, in part, based on the timing of the communications between Officer Shaddock and Agent Sgroi.
- [190] I agree with the AGC's submission that there is not evidence of improper conduct, statements or requests on the part of foreign officials, as there was in Tollman, Bartoszewicz, Cobb and Licht. In each of those cases, there was such evidence. I accept that I must presume that the US acted in good faith in its dealings with the CBSA and the RCMP: *United States v. Freimuth*, 2004 BCSC 154 at paras. 56-57; *Korea v. Jung*, 2020 BCSC 1978 at paras. 93-96.
- [191] The claim that CBSA worked as agents of US authorities to detain him and to collect evidence to support the criminal case against him requires direct evidence that such a request was made or evidence from which such an inference can reasonably be drawn. In this case, there is not direct evidence of such a request. Rather, the applicant asks the Court to draw inferences based on some of the communication that was presented during the hearing.
- [192] Here, the witnesses testified about the impugned communications and characterized those communications as routine. In particular, they stated that the US authorities alerted CBSA to an individual that could be of interest to Canada for customs and immigration reasons. The communications between the frontline CBSA officers and US authorities were routine in nature as the officers sought additional information about the criminal charges. I accept that these sorts of communications are important to the CBSA to fulfill its border security mandate.
- [193] As I have said, the applicant invites the Court to draw inferences that are contrary to some of the uncontroversial evidence (i.e., timing of learning about the extradition interest).
- [194] I do not find that the applicant has established misconduct on the part of US authorities with respect to the events leading up to Mr. Sari's initial detention and the January 21, 2019 decision by the IRB to detain him.
- [195] I pause to make a comment about allegations of misconduct that I am troubled by. That is with respect to the evidence referred to by the applicant in his reply submissions, and which was tendered in support of the disclosure order I granted. I will have more to say about this aspect of the application record towards the end of my reasons.

D. Was the Secondary Examination Motivated for an Improper Purpose?

- [196] I accept BSO Katragadda's testimony that the secondary examination was prompted by the NS Lookout. I find that there was a basis for BSO Katragadda to conduct the inquiry into Mr. Sari's presence in Canada for both customs and immigration purposes. The relevant factors initially were:
- a) he was a foreign national;
 - b) he had a connection (though unknown at this point) to an entity sanctioned under SEMA;
 - c) Mahan's Air connection to an entity that has perpetrated international terrorism and human rights abuses;
 - d) information suggesting Mr. Sari had outstanding US criminal charges; and
 - e) the NS Lookout.
- [197] I agree that these factors raised concerns under ss. 34, 35 and 36 of IRPA and that the secondary examination was reasonable in the circumstances.
- [198] There was not any direct evidence that BSO Katragadda interacted with other CBSA officers or the US authorities during the secondary examination. BSO Katragadda conducted the inquiry and testified about his observations that raised concerns in his mind, including:
- a) being based in and traveling from a source country;
 - b) the fact he had been questioned by foreign authorities on his way to Canada; and
 - c) he exhibited nervous demeanour and repeatedly asked "is everything ok?"
- [199] I do not find on the evidence before me that the US authorities directed BSO Katragadda in the manner of his examination, including in the interview that was conducted.
- [200] As for the media examination, the applicant does not disagree that asking for a password did not engage Charter rights: *R. v. Al Askari*, 2021 ABCA 204 at para. 105.
- [201] Here, BSO Katragadda articulated his grounds under s. 99(1)(a) of the Customs Act, justifying his belief that Mr. Sari's devices contained goods or information relating to goods prohibited or controlled under the Customs Act.
- [202] The next day, BSO Christopoulos articulated his grounds under s. 16(3) of IRPA to seek further information regarding criminal inadmissibility given the following:
- a) He had received further information from the US confirming the criminal charges.
 - b) Based on information provided by BSO Katragadda, he was aware of the connection to Mahan Air.
 - c) He knew Mahan Air had been involved in transporting weapons and soldiers on behalf of an organization considered to be a national security threat to Canada.

[203] Based on the evidence before me, I cannot conclude that the searches of the media devices were conducted at the direction of other CBSA personnel or by the US authorities. The BSOs denied that they ever took instruction from anyone on forming their grounds to search and/or pursue the secondary examination. Though I am asked to disbelieve their evidence on this point, I do not. Again, they were not shaken on this aspect of their testimony.

[204] The applicant has not established that any of the frontline CBSA officers made decisions or took steps as part of the secondary examination for an improper purpose, including to assist US authorities.

E. Was Mr. Sari's Detention Lawful and Justified?

[205] I start with my findings regarding Mr. Sari's detention on the evening of January 17 and into January 18, 2019. I will then examine what occurred thereafter.

[206] I have found BSO Katragadda's testimony on this point to be credible. That is, he adamantly rejected that his decision to conduct the secondary examination and to perform it the way he did was driven in any way by anyone else. He was the person responsible for the decision to conduct the secondary examination and he testified that he did so without influence. His evidence on this point is revealing and answers this allegation. He stated:

Interest by another country's government is outside the mandate of the CBSA. The CBSA is focussed on the admissibility of people and goods. That was my interest on that day, solely assessing the admissibility of Mr. Sari and his goods. The other process regarding his extradition is the responsibility of other people in the CBSA and other law enforcement partners, but it wasn't an interest to me.

[207] Superintendent Prinja approved BSO Katragadda's decision to detain Mr. Sari. As stated previously, he had grounds to recommend detention for further investigations regarding inadmissibilities. During his examination, he had learned the additional information about the US charges and developed grounds, which I find to be reasonable, to suspect Mr. Sari was also inadmissible because of criminality.

[208] I agree with the applicant that there are serious questions about his actual connection to Mahan Air. However, at the time BSO Katragadda formed his belief, there was information that could reasonably warrant further investigation and, importantly, there remained national security concerns. Those included:

- a) Mr. Sari admitted during the interview that he moved money on behalf of Mahan Air, a SEMA listed entity and that his own personal bank accounts had been closed because of this connection.
- b) That he did not know where the money goes and did not ask questions about such matters.

[209] The BSOs also discovered a photograph showing a Mahan Air identification card with Mr. Sari's name and a description of him as "management" and which had the following notation:

Date of joining: 22/02/2009

Date of Expiry: 22/12/2020

[210] I accept BSO Katragadda's testimony refuting that he was operating with an ulterior motive. During cross-examination, he stated it thus:

Q: I'm going to suggest to you again that you understood from reading this email that it was desirable to put together a detention argument for Sari, so that the USA would have more time to put together an extradition request.

A: People can suggest a lot of things during the course of an examination. But ultimately the decision that were taken by me were mine alone. So regarding the detention, I would again point you to the grounds that I stated that I used for my detention, and I would also state that those grounds were developed over the course of the examination.

[211] I accept that there were reasonable grounds supporting BSO Katragadda's concerns about both criminal and national security inadmissibility that could not be resolved at YVR that night. After spending about four hours, including the preliminary examination, baggage check, media exam and interview, I conclude that it was reasonable and appropriate to suspend the examination until later that morning.

[212] In my view, the hearings officer's summary of the 48-hour detention review captures well the dispute I must resolve on this issue. That is, did the CBSA personnel operate within their statutory mandate or were they operating for an improper purpose?

[213] One of the difficulties here is trying to disentangle the two streams of inquiry. If the CBSA were operating at the behest of the US authorities and simply conjuring up a theory intended to frustrate Mr. Sari's release, then this conduct would be abusive--and the parties agree on this point.

[214] However, there is a body of evidence before me that establishes the CBSA personnel did not have a nefarious motive in taking the steps they did. That is, there were national security concerns that had been raised, not as a ruse but as a legitimate, at least initially, issue of concern that required further investigation. In my view, there was nothing unreasonable for the CBSA personnel to take the position they did, at least in the first few days of Mr. Sari's arrival at YVR. Not only had they learned about the criminal charges in the US--before the decision was made to detain--they also had other concerns that were percolating. As I examine the communications and the totality of the evidence, I cannot criticize BSO Katragadda's decision, and the timing of it, to recommend detention. I am not satisfied that the evidence establishes this was some sort of a ruse instigated by the US and carried out by the Canadians. BSO Katragadda was not shaken on this part of his evidence. As I review his

reports and his testimony, in my view, he articulated his grounds for recommending Mr. Sari's detention and his grounds as articulated were reasonable and based on the information before him at the time.

[215] That does not mean that he was correct about the national security or counter-proliferation grounds he was researching. However, the statutory provisions do not require him to be correct. He needed to have reasonable grounds for believing in a state of affairs and to have a subjective believe in those grounds. I accept he had both at the time he made the decision to detain Mr. Sari for the secondary examination.

[216] I have found that Mr. Sari's initial detention was lawful and justified.

[217] That said, I am required to address a submission raised by the AGC regarding Mr. Sari's detention thereafter. The AGC takes the position that BSO Katragadda's decision to detain was supported by the IRB member's decision and later in February, 2019 by Kelleher J.

[218] I do not agree. By that I mean, I do not conclude that I can use those decisions to bolster BSO Katragadda's grounds on January 17 and 18, 2019.

[219] The applicant has raised an issue that causes this Court concern about submissions that may have been advanced at the early stages of this proceeding, at the original bail hearing before Kelleher J., but were later dialled back. The applicant has advanced a submission, in response to the AGC's written submission, that leads me to question what occurred in February and then later in July 2019 at the s. 525 review. There are two issues in particular raised by the applicant--again in response to this submission by the AGC--that require, in my view, further submissions from counsel. That is:

- a) First, at para. 36 of the applicant's reply submissions, reference is made to a letter from the Assistant US Attorney dated the same date as the bail hearing before Kelleher J. That letter is not before me but the applicant advances emphatically a submission that the letter was at odds with information now known by CBSA officers.
- b) Second, at para. 38, reference is made regarding the fact that Mr. Sari would be serving up to 105 years in jail if he was convicted of being in effect the general manager of "Mahan [Air]."

[220] Those materials are not before me on this abuse of process application and the AGC did not provide a surreply to these allegations.

[221] However, in my view, this is an allegation that requires further submissions and evidence if the applicant wishes to advance it. On that note, I am granting leave to the applicant to pursue this submission on this point. If the applicant choses to do so, the AGC can respond.

F. Did the CBSA Breach Mr. Sari's Consular Rights?

[222] At 1:14 a.m. on January 18, 2019, Mr. Sari was informed of his rights under the Vienna Convention. Mr. Sari requested access to his consulate pursuant to his rights under the convention.

[223] At 2:08 a.m., BSO Katragadda attempted to reach the Iranian embassy but the call went to an unidentified voicemail. BSO Katragadda testified that he did not leave a message citing privacy concerns.

[224] Superintendent Prinja also tried to contact the Iranian embassy on January 18, 2019. She contacted the Pakistani embassy in the US which she understood provided consular services to Iranians. When she could not make contact, BSO Ma contacted the Iranian consulate in the UK. She explained to the Iranian consulate that Mr. Sari was under detention and that he had requested consular assistance. The Iranian consular agent advised BSO Ma that he had no jurisdiction over matters arising in Canada. She was provided with an email address to try. BSO Ma wrote to the address provided by the Iranian consular official, explaining that the CBSA had an Iranian national in custody who was seeking consular services.

[225] BSO Christopoulos also tried to contact someone. At 3:19 p.m. on January 18, he sent an email to BSO Ma describing his efforts in this regard:

At 14:45 hours I made an attempt to speak to someone at the Interest Section of the Islamic Republic of Iran [redacted] at the Embassy of Pakistan in Washington, DC. There was no one available to answer the call and there was no option to leave a messages.

At 14:50 hours, I contacted the Embassy of Pakistan in Washington DC [redacted]. There was no one available to take the call and a message was left indicating that the individual under examination had requested to speak to a representative of his government.

[226] BSOs Ma and Christopoulos were cross-examined about their attempts to connect Mr. Sari with a representative from the Iranian consulate. Neither were able to say whether he was ever granted access. As I understood their evidence, they did not receive a response to their inquiries as described above.

[227] Based on the evidence before me, I find that Mr. Sari was not granted access to a representative from the Iranian consulate.

[228] I appreciate that the BSOs attempted to facilitate access, but they were unsuccessful. As I examine the evidence and the number of individuals involved in Mr. Sari's examination, from the frontline workers to those operating in the background, someone needed to figure this out. The CBSA were advised well in advance that Mr. Sari was coming. They knew of his Iranian citizenship. No one would have been surprised that this foreign national may well invoke his rights under the Vienna Convention. A number of the witnesses testified about their experience with and knowledge of the SEMA sanctions involving Iran. Officer Shaddock testified about bookmarking the sanctions on his computer. It was not explained in the evidence how it was that there was not a protocol in place about compliance with the Vienna Convention.

- [229] In Partak, Epstein J.'s concluded that consular rights have some meaning. In my view, this required someone to figure out how to implement his access to a representative from the Iranian consulate.
- [230] As Epstein J. stated, the purpose of consular rights is to provide support and information to foreign nationals concerning local law to ensure equal treatment under that law.
- [231] This may very well have included information to be provided to Mr. Sari about how he could withdraw his request to enter Canada.
- [232] There is no dispute that he requested access to a representative from the Iranian consulate. The BSOs attempted to implement those rights, but they failed to do so. I am not satisfied that an email sent constituted compliance with the Vienna Convention. More was required; the jeopardy here was significant. Though the Vienna Convention may not be a constitutional right, there are some parallels to s. 10 of the Charter. For example, s. 10 jurisprudence informs that it is an attempt to level the playing field between the state and the detainee. From the jurisprudence, the purpose of the right is so that the detainee understands the jeopardy, and includes an informational component so the detainee has an opportunity to learn how to deal with the process that is unfolding.
- [233] In this case, Mr. Sari was not provided with that opportunity to obtain the support and information to which he was entitled pursuant to his consular rights. He was therefore unable to gain access to information about local law to "ensure equal treatment under that law."
- [234] I am satisfied that Mr. Sari has established an infringement of his consular rights.

G. Was there Improper Sharing of Passwords for the Electronic Devices?

- [235] The applicant asks the Court to find that his passwords were shared with the US counterparts. This submission was framed as follows:

That there has obviously been communication with the US counterparts of information gleaned in the CBSA searches and examination of Mr. Sari. This has included communication with regard to the content of Mr. Sari's electronic devices and his email addresses, since it appears US searches were undertaken at Apple and Google for communications of the Sari family members shortly after the Vancouver detention where passwords were provided to Mr. Sari's electronic devices.

- [236] I have reviewed the evidence tendered in support of this submission, including the affidavit of Mr. Sari's son. Based on the evidence before me, I am unable to conclude that the Google and/or Apple searches were conducted "shortly after the Vancouver detention." The Google correspondence does not reveal when the authorization was delivered to that company. The Apple communication suggests the authorization was August 1, 2019. In my view, the evidence tendered does not establish an improper sharing of Mr. Sari's password. Had the search been conducted immediately after Mr. Sari's detention then it may have been an

irresistible inference that the password had been shared. However, the evidentiary record does not allow for the inference that the applicant seeks. Indeed, the record is silent on what was occurring in the US after Mr. Sari's detention and August 1, 2019, when the request was delivered.

V. CONCLUSION/ORDERS

[237] In sum, I have made the following findings:

- a) BSO Katragadda had the requisite grounds to detain Mr. Sari for secondary examination.
- b) Mr. Sari's detention on January 17-18, 2019 was lawful and justified.
- c) Prior to January 21, 2019, the applicant has not established that there was improper sharing of information between the Canadian and US authorities.
- d) The applicant has not established on the evidence the US authorities exerted improper influence over the BSOs to detain Mr. Sari so that they could perfect their extradition request.
- e) The applicant has not established on this evidentiary record that the passwords were improperly shared with US authorities culminating in the Google and Apple searches.
- f) There was an infringement of Mr. Sari's consular rights under the Vienna Convention.
- g) The applicant is granted leave to seek a further hearing relating to paras. 36-40 of the applicant's reply submissions.

[238] The applicant presented the abuse of process application as one demonstrating a pattern of conduct that was alleged to constitute an abuse of process. In particular, he asserts that the abuse of process arises from the entire circumstances of the detention and examination and continued detention of Mr. Sari.

[239] I have not made findings of fact consistent with the applicant's allegations of misconduct. However, I have found an infringement of Mr. Sari's consular rights. Mr. Sari was detained for six months thereafter. His consular rights mattered. Connected to this finding is the issue about the bail hearing in February 2019 and, in particular, the reference to the correspondence advanced by the US authorities. I have granted leave to the applicant to address this issue further, with evidence and submissions, on the abuse of process application, if he indicates his intention to do so.

[240] In light of the Court's findings, I have decided that it would be unfair to the parties to consider remedy now and I have not done so. Rather, I am inviting the parties to consider these reasons. Once they have had a chance to do so, I would ask that they schedule a case management conference before me to address:

- a) the applicant's intention regarding the issues raised in paras. 36-40 of the applicant's reply submissions and if further hearing days are required, to schedule it accordingly; and

b) schedule a hearing to address remedy, taking into account the Court's findings.

[241] The Court will make itself available to deal with this case as expeditiously as possible. I appreciate that the disclosure order the Court granted caused considerable delay. However, even though Mr. Sari is no longer in custody, the impact on he and his family is immense. We are coming on five years since Mr. Sari's arrival in Canada. He has not seen his spouse of some 30 years in over three years. In my view, time is of the essence and the parties should be prepared to proceed accordingly.

"Winteringham J."

[1] By correspondence dated October 20, 2023, counsel set out these admissions in writing.

[2] Agent Sgroi's questions are reproduced in bold. Officer Shaddock's response follows.

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