

**Date: 20080313**

**Docket: T-100-06**

**Citation: 2008 FC 338**

**Ottawa, Ontario, the 13th day of March 2008**

**Present: Mr. Justice Simon Noël**

**BETWEEN:**

**FATEH KAMEL**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] Fateh Kamel (the applicant or Mr. Kamel), a Canadian citizen of Algerian origin, is seeking judicial review of the decision of the Minister of Foreign Affairs (the Minister) which was delivered to him on December 14, 2005, refusing to issue him a passport under section 10.1 of the *Canadian Passport Order*, S.I./81-86 as amended by the *Order Amending the Canadian Passport Order*, S.I./2004-113 (the Order) because such action was necessary for the national security of Canada or another country.

[2] In this application, Mr. Kamel is seeking to have the Minister's decision set aside and a passport issued. Mr. Kamel's argument is that the principles of procedural fairness have been violated. Mr. Kamel further contends that sections 4 and 10.1 of the Order and the decision in issue are an unjustifiable infringement of the rights guaranteed by sections 6, 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (U.K.)*, 1982, c. 11 (the Charter).

[3] The Court finds that in this case the principles of procedural fairness were violated in the investigation that led to the Minister's decision. The court also finds that the passport is essential to the exercise of the mobility rights guaranteed by section 6 of the Charter and that section 1 can be of no assistance, given that section 10.1 of the Order is not a law. Accordingly, there has been an infringement of the rights guaranteed by section 6 of the Charter. Section 10.1 of the Order is therefore declared to be invalid and the Minister's decision is set aside. The Court gives the Governor in Council six months to rewrite section 10.1 of the Order. The request for a decision to issue a passport to be made in the place and stead of the Minister is denied.

[4] To assist in doing the analysis that led to the conclusions stated above, I have adopted the following outline:

- Relevant legislation, page 4;
- Selected facts relevant to this application, page 9;

- The Canadian passport: a brief history, page 17;
- Terrorism and use of the passport, page 20;
- Issues, page 24;
- Does the Court have jurisdiction to review an order made pursuant to the royal prerogative in an application for judicial review of a ministerial decision? page 26;
- What is the appropriate standard of review for a decision made under section 10.1 of the Order? page 31;
- Were the principles of procedural fairness violated in the administrative investigation carried out by the Canadian Passport Office (CPO) in response to Mr. Kamel's passport application and, if so, having regard to the applicable standard of judicial review, is intervention by this Court warranted? page 33;
- Do sections 4 and 10.1 of the Order infringe the rights associated with the mobility rights guaranteed by subsection 6(1) of the Charter? page 43;
- Is the infringement of subsection 6(1) of the Charter justified under section 1 of the Charter? page 53;
- Do sections 4 and 10.1 of the Order infringe the rights set out in sections 7 and 15 of the Charter and, if so, is the infringement justified under section 1? page 61;

- Should an order be made compelling the Minister to issue a passport to Mr. Kamel? page 65;
- Conclusions, page 67;
- Costs, page 68;
- Judgment, page 70;
- Report to the Minister by the CPO, page 72; and
- Letter from Ms. Thomas to Mr. Kamel dated December 14, 2005, page 82.

## **II. Relevant Legislation**

[5] Sections 9 and 10 of the Order set out the requirements for issuance and revocation of a passport:

### **REFUSAL OF PASSPORTS AND REVOCATION**

9. Passport Canada may refuse to issue a passport to an applicant who

(a) fails to provide the Passport Office with a duly completed application for a passport or with the information and material that is required or requested

(i) in the application for a passport, or

(ii) pursuant to section 8;

(b) stands charged in Canada with the commission of an indictable offence;

### **REFUS DE DÉLIVRANCE ET RÉVOCATION**

9. Passeport Canada peut refuser de délivrer un passeport au requérant qui :

a) ne lui présente pas une demande de passeport dûment remplie ou ne lui fournit pas les renseignements et les documents exigés ou demandés

(i) dans la demande de passeport, ou

(ii) selon l'article 8;

b) est accusé au Canada d'un acte criminel;

(c) stands charged outside Canada with the commission of any offence that would, if committed in Canada, constitute an indictable offence;

c) est accusé dans un pays étranger d'avoir commis une infraction qui constituerait un acte criminel si elle était commise au Canada;

(d) is subject to a term of imprisonment in Canada or is forbidden to leave Canada or the territorial jurisdiction of a Canadian court by conditions imposed with respect to

d) est assujetti à une peine d'emprisonnement au Canada ou est frappé d'une interdiction de quitter le Canada ou le ressort d'un tribunal canadien selon les conditions imposées :

(i) any temporary absence, work release, parole, statutory release or other similar regime of absence or release from a penitentiary or prison or any other place of confinement granted under the Corrections and Conditional Release Act, the Prisons and Reformatories Act or any law made in Canada that contains similar release provisions,

(i) à l'égard d'une permission de sortir, d'un placement à l'extérieur, d'une libération conditionnelle ou d'office, ou à l'égard de tout régime similaire d'absences ou de permissions, d'un pénitencier, d'une prison ou de tout autre lieu de détention, accordés sous le régime de la Loi sur le système correctionnel et la mise en liberté sous condition, de la Loi sur les prisons et les maisons de correction ou de toute loi édictée au Canada prévoyant des mesures semblables de mise en liberté,

(ii) any alternative measures, judicial interim release, release from custody, conditional sentence order or probation order granted under the Criminal Code or any law made in Canada that contains similar release provisions, or

(ii) à l'égard de toutes mesures de rechange, d'une mise en liberté provisoire par voie judiciaire, d'une mise en liberté ou à l'égard d'une ordonnance de sursis ou de probation établie sous le régime du Code criminel ou de toute loi édictée au Canada prévoyant des mesures semblables de mise en liberté,

(iii) any absence without escort from a penitentiary or prison granted under any law made in Canada;

(iii) dans le cadre d'une permission de sortir sans escorte d'une prison ou d'un pénitencier accordée en vertu de toute loi édictée au Canada;

(d.1) is subject to a term of imprisonment outside Canada or is forbidden to leave a foreign state or the territorial jurisdiction of a foreign court by conditions imposed with respect to any custodial release provisions that are comparable to those set out in subparagraphs (d)(i) to (iii);

d.1) est assujetti à une peine d'emprisonnement à l'étranger ou est frappé d'une interdiction de quitter un pays étranger ou le ressort d'un tribunal étranger selon les conditions imposées dans le cadre de dispositions privatives de liberté comparables à celles énumérées aux sous-alinéas d)(i) à (iii);

(e) has been convicted of an offence under section 57 of the Criminal Code or has been convicted in a foreign state of an offence that would, if committed in Canada, constitute an offence under section 57 of the Criminal Code;

e) a été déclaré coupable d'une infraction prévue à l'article 57 du Code criminel ou, à l'étranger, d'une infraction qui constituerait une telle infraction si elle avait été commise au Canada;

(f) is indebted to the Crown for expenses related to repatriation to Canada or for other consular financial assistance provided abroad at his request by the Government of Canada; or

f) est redevable envers la Couronne par suite des dépenses engagées en vue de son rapatriement au Canada ou d'une autre assistance financière consulaire qu'il a demandée et que le gouvernement du Canada lui a fournie à l'étranger; ou

(g) has been issued a passport that has not expired and has not been revoked.

g) détient un passeport qui n'est pas expiré et n'a pas été révoqué.

**REFUSAL OF PASSPORTS  
AND REVOCATION**

10. (1) Passport Canada may revoke a passport on the same grounds on which it may refuse to issue a passport.

(2) In addition, Passport Canada may revoke the passport of a person who

(a) being outside Canada, stands charged in a foreign country or state with the commission of any offence that would constitute an indictable offence if committed in Canada;

(b) uses the passport to assist him in committing an indictable offence in Canada or any offence in a foreign country or state that would constitute an indictable offence if committed in Canada;

(c) permits another person to use the passport;

(d) has obtained the passport by means of false or misleading information; or

(e) has ceased to be a Canadian citizen.

**REFUS DE DÉLIVRANCE  
ET RÉVOCATION**

10. (1) Passeport Canada peut révoquer un passeport pour les mêmes motifs que le refus d'en délivrer un.

(2) Il peut en outre révoquer le passeport de la personne qui :

a) étant en dehors du Canada, est accusée dans un pays ou un État étranger d'avoir commis une infraction qui constituerait un acte criminel si elle était commise au Canada;

b) utilise le passeport pour commettre un acte criminel au Canada, ou pour commettre, dans un pays ou État étranger, une infraction qui constituerait un acte criminel si elle était commise au Canada;

c) permet à une autre personne de se servir du passeport;

d) a obtenu le passeport au moyen de renseignements faux ou trompeurs;

e) n'est plus citoyen canadien.

[6] Section 10.1 of the Order provides:

**Canadian Passport Order**

**REFUSAL OF PASSPORTS  
AND REVOCATION**

10.1 Without limiting the generality of subsections 4(3) and (4) and for greater certainty, the Minister may refuse or revoke a passport if the Minister is of the opinion that such action is necessary for the national security of Canada or another country.

**Décret sur les passeports  
canadiens**

**REFUS DE DÉLIVRANCE  
ET RÉVOCATION**

10.1 Sans que soit limitée la généralité des paragraphes 4(3) et (4), il est entendu que le ministre peut refuser de délivrer un passeport ou en révoquer un s'il est d'avis que cela est nécessaire pour la sécurité nationale du Canada ou d'un autre pays.

[7] Subsections 4(3) and (4) deal with the royal prerogative in respect of passports. They provide:

**ISSUANCE OF PASSPORTS**

4. [ . . . ]

(3) Nothing in this Order in any manner limits or affects Her Majesty in right of Canada's royal prerogative over passports.

(4) The royal prerogative over passports can be exercised by the Governor in Council or the Minister on behalf of Her Majesty in right of Canada.

**DÉLIVRANCE DES  
PASSEPORTS**

4. [ . . . ]

(3) Le présent décret n'a pas pour effet de limiter, de quelque manière, la prérogative royale que possède Sa Majesté du chef du Canada en matière de passeport.

(4) La prérogative royale en matière de passeport peut être exercée par le gouverneur en conseil ou le ministre au nom de Sa Majesté du chef du Canada.



### **III. Selected Facts Relevant to this Application**

[8] Mr. Kamel was born in Algeria in 1960. He immigrated to Canada in 1988 and obtained Canadian citizenship on January 27, 1993.

[9] On January 29, 1993, he applied for and was issued a Canadian passport, valid until January 1998. In October 1995, Mr. Kamel informed the authorities that it had been stolen and another passport was issued to him, that one valid until November 10, 2000. In July 1997, he again applied for a passport because he had found the passport that was stolen in 1995. On the condition that he return the “stolen” passport, which he did, the CPO issued him a new passport, valid until July 2002. That passport was not recovered when Mr. Kamel was arrested in May 1999, and a passport was issued by the CPO that was valid only for one trip, on January 29, 2005, to enable him to return to Canada after being incarcerated in France for four years.

[10] In addition, Mr. Kamel is not certain that he still holds Algerian citizenship. He says that in 1996 he applied for and obtained an Algerian passport at the Algerian Consulate in Montréal. Within a week after the passport was issued, the Consulate contacted him to have him reattend with his Algerian documents, which he did. At that interview, he was told that the passport had been issued in error and the Algerian passport was taken back, along with his national identity card.

[11] In May 1999, the applicant was arrested in Jordan and extradited to France. He retained a lawyer who had 30 years' experience in similar cases, Mourat Oussedik, who was assisted by Mr. Panier. On April 6, 2001, after a trial lasting several days and involving more than 20 accused, Mr. Kamel was found guilty by the Tribunal de Grande instance de Paris. In a 133-page judgment that related to each of the 24 accused, all of whom were tried on the same charges, of membership in a criminal organization for the purpose of preparing a terrorist act and complicity in forging an administrative document (passport), the court:

[TRANSLATION] FINDS Fateh Kamel guilty of membership in a criminal organization for the purpose of preparing a terrorist act (acts committed between 1996 and 1998, in Roubaix (Nord) and in French territory and also in Canada, Turkey, Bosnia, Belgium and Italy), complicity in forging an administrative document attesting to a right, identity or status (acts committed during 1996, in Roubaix (Nord) and in French territory and also in Canada, Turkey, Bosnia and Belgium) and complicity in uttering a forged administrative document attesting to a right, identity or status (acts committed during 1996, in Roubaix (Nord) and in French territory and also in Canada, Turkey, Bosnia and Belgium).

With the circumstance that the offence set out above was primarily in relation to or was connected with an individual or collective enterprise having as its purpose to cause a serious disturbance of public order by intimidation or terror.

Sentences him to a term of imprisonment for eight years.

ORDERS that he be held in detention.

Having regard to articles 422-4 and 131-30 of the Penal Code, orders that he be permanently excluded from France.

(Excerpt of the judgment of the Tribunal de Grande instance de Paris dated April 6, 2001, at page 128).

[12] Mr. Kamel was described as the [TRANSLATION] "... principal organizer of international networks determined to prepare attacks and procure weapons and passports for terrorists acting throughout the world". He received the harshest sentence of all the accused, imprisonment for eight years and permanent exclusion from France.

[13] Mr. Kamel was released after serving half his sentence and returned to Montréal, his place of residence in Canada, on January 29, 2005, with a special passport issued by the CPO as an exceptional case.

[14] On June 13, 2005, Mr. Kamel again applied for a passport, at the CPO in Montréal, because he planned to go to Thailand on June 25, 2005, to conduct import business with the assistance of a member of his family. However, in a telephone conversation with Michel Leduc (Mr. Leduc), the Acting Director General of the Security Bureau of the CPO, on June 22, 2005, the applicant informed Mr. Leduc that his travel plans had changed for personal reasons. In that conversation, Mr. Leduc informed the applicant that his file was being reviewed and that the passport would not be available in the immediate future. He was invited to submit comments or questions.

[15] On August 5, 2005, Mr. Leduc wrote to Mr. Kamel informing him that his eligibility for a passport was the subject of an administrative investigation because of the judgment of the Tribunal de Grande instance de Paris on April 6, 2001. The purpose of the investigation was to determine whether the applicant could be denied a passport under sections 9, 10 and 10.1 of the Order. In that

regard, the applicant was invited to submit certain information within 30 days, which would be taken into consideration when it was received.

[16] On August 18, 2005, Mr. Kamel replied as follows:

[TRANSLATION] This is to confirm that I have received your letter dated August 5 concerning my file, Reference A-9540.

I would like to know what document should be added to my file to meet the information needed for obtaining my Passport.

I am aware of the precautions your services wish to take and I would like to satisfy them to clarify the file regarding my passport, which has never been used in any offence whatsoever.

The judgment made against me in France on April 6, 2001, delivered against me by the Tribunal de grande instance de Paris, was never able to determine my role in any fraud whatsoever. I am therefore available to investigators in your services to answer all your supplementary questions in the above-mentioned file ...

I hope that this will be satisfactory and I am entirely at your disposal for further information. (Emphasis added.)

[17] In the course of its administrative investigation, the CPO collected various press articles, the judgment of the French authorities relating to Mr. Kamel, the case law and an eight-page “protected” summary relating to Mr. Kamel from the Counter-terrorism section of the Canadian Security Intelligence Service (CSIS) dated August 15, 2005.

[18] Briefly, the summary, which is based on publicly available information, is strongly incriminating in relation to Mr. Kamel. According to CSIS, he played a key role in European terrorist cells, and also under the direction of leaders in Bosnia and Afghanistan, and he had ties to

the Algerian Groupe islamique armée (the GIA). In Canada, he met with North Africans and Muslims to arrange for them to be sent to Afghanistan and Bosnia, using an import-export business as “cover”. The summary also refers to the French judgment to show the charges on which he was convicted. It adds that he was trained in a camp or camps in Afghanistan in 1991; that he travelled frequently in order to traffic in forged passports and to maintain “his terrorist networks”; and that he had personally seen combat, having fought “shoulder to shoulder with a number of colleagues”. His recruiting activities in Montréal are described, and it says that the primary activity of Mr. Kamel and his group was to engage in multiple thefts of money, credit cards and passports and traffic in the identity documents in order to support the Jihad.

[19] This summary was not disclosed to Mr. Kamel before the CPO made its recommendation to the Minister and he made his decision. In the CPO document that accompanied the recommendation to the Minister, there is no specific reference to the CSIS document. However, it is apparent from reading the CPO report to the Minister that it was a determining factor.

[20] On October 28, 2005, Ms. Thomas wrote to Mr. Kamel on behalf of the CPO and informed him that the investigation was continuing, that he had been convicted in France of a terrorism-related offence and passport fraud for the purposes of terrorist activities, and that the history of his case showed that he had had his passport replaced several times. The letter states that the CPO might recommend that the Minister refuse to issue the passport to him, relying on section 10.1 of the Order. The letter concludes by inviting him to submit any additional information that he considers to be relevant within 30 days.

[21] On November 9, 2005, Mr. Kamel sent the following letter:

[TRANSLATION] This is in relation to your letter of October 28, 2005. I realize that the passport branch is continuing to consider my case for issuing my passport. In fact, I was charged by the French authorities with terrorism and passport fraud, charges for which there is no basis and no evidence, and no testimony against me, unfortunately being of Algerian origin I was easily classified and convicted ...

At no time in my life have I committed fraud or used a passport that did not belong to me in my travel, or used any documents whatsoever, including for so-called terrorist activities, nor have I played any role in any alleged document frauds as the French police alleged, with no evidence whatsoever.

On the question of my Canadian passport history, my passport was in fact replaced on two occasions at my request, for the following reasons: as a result of a burglary at my home, 979 Rockland, Outremont, Que. I immediately called the police and reported all the missing property, including my Canadian passport. Shortly afterwards I found it and I went to the passport office to inform them and return it to them.

Because a passport had been issued to me to replace the first one reported stolen, with a notation on it that this passport replaced the stolen passport, the passport office employee recommended that they keep both and issue me a proper and normal one with no notations on it so that I could travel without problems, because the stolen passport replacement notation would cause me unnecessary complications.

I can assure you that I have never represented any threat to national or international security, and I am convinced that the Canadian authorities would never have admitted me to Canada to join my wife and child if that had been the case.

I need my passport to travel and work and see my family, whom I have not seen for over 16 years ...

I therefore ask that you consider this information and add it to my file so that the Minister can issue my passport as speedily as possible, please.

(Emphasis added – given the nature of what the applicant wrote, I have reproduced it in its original form)

[22] On or about November 22, 2005, the CPO sent the Minister a report in which it recommended that Mr. Kamel be denied the passport. The cover memorandum classified the information as “secret”. Given the importance of the report for the purposes of the Minister’s decision, a copy is attached to these reasons as Appendix “1”.

[23] It contains information about Mr. Kamel’s background, facts found in the judgment of the French authorities and about the process for replacing valid passports, the Minister’s powers and references to definitions in legislation and international conventions, and the first page sets out the recommendation of the CPO, the Associate Deputy Minister and the Deputy Minister that a passport not be issued to Mr. Kamel. The document includes the two letters from Mr. Kamel dated August 18 and November 9, 2005, but the CSIS summary concerning Mr. Kamel dated August 15, 2005, is not included; this is all subject to the comment set out in paragraph 19 of these reasons. On December 1, 2005, the Minister accepted the recommendation that a passport not be issued to Mr. Kamel.

[24] On December 14, 2005, Ms. Thomas informed Mr. Kamel that the CPO had recommended that the Minister not issue him a passport, and that the Minister had accepted that recommendation under section 10.1 of the Order. Appendix “2” to these reasons contains a copy of the letter. At the end of the letter, he is invited to submit any additional information that might justify a new recommendation to the Minister. It is that letter that is the subject of this application for judicial review.

**A. The Canadian Passport: A Brief History**

[25] The source of the law governing the Canadian passport is the royal prerogative, which comes to us from English law. The royal prerogative is exercised today by the Governor in Council, and takes the form of an Order (or *décret*, in French). The passport is therefore not the subject of any legislation but is governed by an Order, made by the executive.

[26] On May 13, 1893, the English Privy Council authorized the Government of Canada, by order, to issue Canadian passports modeled on the English passport. On June 21, 1909, the Privy Council, by order, transferred the administration of Canadian affairs and the issuance of passports from the Department of the Secretary of State to the Department of External Affairs.

[27] On January 9, 1973, on the advice of the Secretary of State for External Affairs, the Governor in Council made the Canadian Passport Regulations, establishing the new rules governing applications for Canadian passports. On June 4, 1981, the Governor in Council amended the title of that instrument to the Canadian Passport Order, in which the administrative procedures relating to passports were laid out. It provides that the CPO is the administrative branch of the Department of Foreign Affairs that has been charged with the issuing, revoking, withholding, recovery and use of passports, under the direction of the Minister.

[28] The Order was amended on December 10, 2001: it became mandatory that a child under 16 years of age be issued an individual passport (before that, the child could be entered on the passport of one of the parents); in addition, birth certificates issued by religious, judicial or municipal



authorities before the *Civil Code of Québec*, S.Q. 1991, c. 64, came into force, on January 1, 1994, were no longer accepted as proof of citizenship.

[29] It was not until September 1, 2004, that the Governor in Council, by order, on the recommendation of the Minister of Foreign Affairs, amended the *Canadian Passport Order* to add subsections 4(3) and (4) and section 10.1. The explanatory notes make reference to the Minister's authority to refuse or revoke a passport in the interest of the national security of Canada or another country, and state that the security of Canada and foreign countries is a priority of the government in its fight against transnational crime and terrorism.

[30] The priority given to this is illustrated by the government's continuing support for various international organizations, such as the United Nations, the G8 and the International Civil Aviation Organization (ICAO) in their determination to combat threats to national security. The notes point out that subsections 4(3) and (4) specify that the Order does not abolish the Crown prerogative over passports or limit any discretionary authority of Her Majesty over passports, in respect of her power to refuse or revoke a passport on grounds other than national security (see sections 9 and 10 of the Order).

[31] Section 2 of the Order defines the word "passport" as follows:

**INTERPRETATION**

2. In this Order, "Act" means the Citizenship Act; (Loi)

...

"passport" means an official Canadian document that shows

**DÉFINITIONS**

2. Dans le présent décret, ...

« passeport » désigne un document officiel canadien qui

<p>the identity and nationality of a person for the purpose of facilitating travel by that person outside Canada; (passeport)          . . .</p>	<p>établit l'identité et la nationalité d'une personne afin de faciliter les déplacements de cette personne hors du Canada; (passport) . . .</p>
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A passport has two purposes: it identifies a Canadian citizen and facilitates travel by a Canadian citizen.

[32] The Minister alone may revoke or refuse a passport for a Canadian citizen, on the grounds of national security or the security of another country. That authority may not be delegated.

[33] The Order, and the passport itself, clearly state that a passport remains the property of Her Majesty in right of Canada at all times (see paragraph 3(c) of the Order).

<p><b>ISSUANCE OF PASSPORTS</b>          3. Every passport          . . .          (c) shall at all times remain the property of Her Majesty in right of Canada;</p>	<p><b>DÉLIVRANCE DES PASSEPORTS</b>          3. Chaque passeport          . . .          c) demeure en tout temps la propriété de Sa Majesté du chef du Canada;</p>
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[34] On the first page of a passport, the Minister of Foreign Affairs, on behalf of Canada, “requests” the countries where a Canadian citizen may be to allow him or her to pass freely and to afford such assistance and protection as may be necessary. A passport specifies that it is valid for all countries, unless otherwise indicated, and adds that the bearer must also comply with the formalities

for entry to those countries where he or she intends to travel. A passport also attests that the bearer is a Canadian citizen.

**B. Terrorism and Use of the Passport**

[35] The affidavit of Professor Emeritus Martin Rudner provides an objective, detailed description of terrorism today; among other things, he cites the fraudulent use of passports for hostile purposes. In his account, he explains the geopolitical context in which Canada finds itself. Professor Rudner was not cross-examined. The Minister did not have that expert opinion when he made his decision. I will summarize part of his testimony in the paragraphs that follow.

[36] Canada's response to international terrorism is set out in the policy statement issued by the government in April 2004, entitled "Securing an Open Society: Canada's National Security Policy" (the 2004 Canadian policy statement). The policy is a strategic framework and action plan designed to ensure that the government can respond to current and future threats. It focuses on addressing three core security interests:

1. Protecting Canada and Canadians at home and abroad;
2. Ensuring Canada is not a base for threats to our allies; and
3. Contributing to international security.

(We will see Canada's international commitments in this regard later.)

[37] As a reflection of the Canadian government's concern for border security, it will "deploy facial recognition biometric technology on the Canadian passport, in accordance with international standards" (again, we will see that Canada has signed an international agreement in this regard). Having stated the objective of protecting Canada and Canadians at home and abroad, the policy statement says: "The Government also has an obligation to offer assistance to Canadians working or travelling abroad."

[38] To provide for border security, the 2004 Canadian policy statement requires that Canadian passports use biometric facial recognition technology (digitized photograph). The international community is increasingly using this new technology to facilitate the flow of low-risk travellers and interrupt the flow of high-risk travellers. It was announced in May 2003 that under an agreement among participating ICAO countries, facial recognition would be the international biometric standard for travel documents. Since 2005, Canada has used this sophisticated technology for Canadian passports.

[39] The April 2004 Canadian policy statement explains that four key types of terrorism affect Canada:

- religious extremism;
- violent secessionist movements;
- state-sponsored terrorism; and
- domestic extremism.

It also notes that terrorism is global and calls for international collaboration to control or prevent it.

[40] Terrorist groups must be able to obtain passports in order to carry on their activities. They devote time and money to obtaining passports. They do this by stealing genuine passports and by borrowing, renting or purchasing passports. They also make forged passports. Those passports are as important to them as weapons are. They use them to travel abroad under false names, or otherwise, so as not to be detected at borders. Members of these groups must necessarily operate clandestinely. Passports enable them to travel without disclosing their real identities, so that they can organize, receive training, plan or identify objectives and put their plans into action. According to Professor Rudner, there is intense passport trafficking activity in Thailand.

[41] For Canada, it is essential that Canadian passports be managed in such a way as not to give the international community the impression that Canadian passports are easy for anyone to obtain and so that a passport is not given to people with dubious reputations. This is in Canada's interests. Otherwise, the international community will not have the necessary confidence in Canadian passports, and Canadian citizens will suffer the consequences when they travel outside the country. Canadians might be subject to questioning or preventive detention in other countries, or even to arrest until the authorities of the country where they are recognize that their travel documents are genuine. When dealing with passports, there are stringent standards approaching perfection that must be adhered to, in order to meet international requirements and thus ensure the unreserved confidence of the international community.

[42] In April 2005, Prime Minister Paul Martin signed “Canada’s International Policy Statement” (April 2005 international policy statement), which explained Canada’s international goals in the world and reiterated the government’s firm commitment to combating terrorism and protecting national and international security.

[43] Canada has signed United Nations conventions providing for ways of combating terrorism, and adheres to numerous Security Council resolutions on this subject. Some of those resolutions (1624 (2005)) call on states to cooperate to strengthen international borders, combat fraudulent travel documents and enhance terrorist screening. The Security Council (Resolution 1617 (2005)) welcomed the efforts of the ICAO to prevent travel documents being made available to terrorists, and has recognized its success in promoting biometric facial recognition capacity. Canada has also signed conventions and agreements among the countries of the Americas that are intended to strengthen border security and improve communications among those countries. In short, the 2004 and 2005 Canadian policy statements meet Canada’s international commitments and reflect the measures that have been taken to honour those commitments.

[44] Before identifying the issues and making the findings that are required, it must be noted that the problem in this case is an important one involving the royal prerogative enjoyed by the Governor in Council, Canada’s international commitments, concerns associated with national and international security, the principles of procedural fairness, and certain Charter rights enjoyed by Canadian citizens, including the applicant.

#### IV. Issues

[45] A number of questions have been put to the Court in this case, but, as we shall see, not all of them need to be answered in order to dispose of the application.

[46] The applicant served a notice of constitutional questions on the attorneys general of Canada and the provinces under section 57 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, am. S.C. 2002, c. 8, s. 57 (*Federal Courts Act*). The questions are as follows:

[TRANSLATION]

1. Does the Court have jurisdiction to review an order made pursuant to the royal prerogative in an application for judicial review of a ministerial decision?
2. What is the appropriate standard of review for a decision made under section 10.1 of the Order?
3. Were the principles of procedural fairness violated in the administrative investigation carried out by the CPO in response to Mr. Kamel's passport application and, if so, having regard to the applicable standard of judicial review, is the intervention of this Court warranted?
4. Do sections 4 and 10.1 of the Order infringe the rights associated with the mobility rights guaranteed by subsection 6(1) of the Charter?
5. Is the infringement of subsection 6(1) of the Charter justified under section 1 of the Charter?

6. Do sections 4 and 10.1 of the Order infringe the rights set out in sections 7 and 15 of the Charter and, if so, is the infringement justified under section 1?
7. Should an order be made compelling the Minister to issue a passport to Mr. Kamel?

1. **Does the Court have jurisdiction to review an order made under the royal prerogative in an application for judicial review of a ministerial decision?**

[47] Although the parties did not raise this point in their written submissions or in oral argument, I think it wise to do so.

[48] Section 2 of the *Federal Courts Act* defines “federal board, commission or other tribunal” as follows:

**INTERPRETATION**

*Definitions*

2. (1) In this Act, “federal board, commission or other tribunal” “office fédéral” “federal board, commission or other tribunal” means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than . . . . (Emphasis added)

**DÉFINITIONS**

*Définitions*

2. (1) Les définitions qui suivent s'appliquent à la présente loi. « office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de . . . .



[49] The subject of this application for judicial review is the Minister's decision, under section 10.1 of the Canadian Passport Order, not to issue a passport to Mr. Kamel, the source of that Order being the royal prerogative. For the same reasons as those cited by my colleague Mr. Justice Michael Phelan in *Khadr v. Canada (Attorney General)*, [2006] F.C.J. No. 888 (*Khadr*), at paragraph 42, I find that the Minister's decision is an "order" denying a passport. It is final and not subject to appeal. It is binding on the passport applicant, subject to the application for judicial review he has made.

[50] So that we can understand the royal prerogative clearly, I will quote the comments made by Mr. Justice Andrew MacKay (formerly of this Court) in *Vancouver Island Peace Society v. Canada* (T.D.), [1994] 1 F.C. 102, at paragraph 4, which I adopt in their entirety:

The royal prerogative is comprised of the residue of miscellaneous powers, rights, privileges, immunities and duties accepted under our law as vested in Her Majesty and under our Constitution exercised by the Governor in Council acting on advice of Ministers. Orders in Council may express the decisions of the Governor in Council in relation to matters within the discretionary authority of prerogative powers. Traditionally the courts have recognized that within the ambit of these powers the Governor in Council may act in relation to matters concerning the conduct of international affairs including the making of treaties, and the conduct of measures concerning national defence and security. The prerogative power is, of course, subject to the doctrine of parliamentary supremacy and Parliament, by statute, may withdraw or regulate the exercise of the prerogative power.

[51] As we saw earlier, regulation of passports has always been determined by the Governor in Council or one of her Ministers, and Parliament has at no time played a role in this respect. In this

case, the applicant has not challenged that authority; rather, he asserts Charter violations. For that reason, this legal analysis will deal with section 10.1 of the Order, and not section 4.

[52] There was a time when the royal prerogative, and the exercise of that prerogative, was not open to review by the courts. The maxim was: “The King can do no wrong” (or, in French, “*le roi ne peut faire aucun mal*”); accordingly, the validity of acts or decisions deriving from the royal prerogative could not be challenged. As time passed and the laws changed, judicial review of the royal prerogative and decisions stemming from it have come to be possible.

[53] An example is found in the decision of the Appeal Division of the Supreme Court of South Africa in *Sachs v. Donges N.O.*, 1950 (2) SA 265 (A), *per* the Chief Justice, writing for the majority, in which the Court set aside a decision by the Witwatersrand Local Division finding that revocation of a passport was an executive decision based on the royal prerogative and accordingly a court could not intervene. In his reasons, the Chief Justice did a complete review of the situation in England and South Africa, and concluded that the courts could rule as to the legality of decisions made in the exercise of the prerogative:

The question whether a purported exercise of the King’s prerogative power is lawful or not is always a matter for the Court to decide. This is trite law ... It seems clear, therefore, that there is no substance in the contention that the revocation of a passport is an Act of State which cannot be questioned in a Court of Law. (See pages 285 and 287).

[54] As well, in *Laker Airway Limited v. Department of Trade*, [1976] EWCA Civ 10, [1977] QB 643 at 705 B-C, Lord Denning defined the royal prerogative as follows:

The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as the war prerogative (of requisitioning property for the defence of the realm), or the treaty prerogative (of making treaties with foreign powers). The law does not interfere with the proper exercise of the discretion by the executive in those situations: but it can set limits by defining the bounds of the activity: and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution.

[55] In Canada, as in England, the courts have been increasingly willing to intervene; the principles enshrined in the Charter cannot be circumvented. Since the decision in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, it is undisputed that the exercise of the royal prerogative is governed by the Charter and the courts have jurisdiction. On that point, Chief Justice Brian Dickson explained the law as it relates to the royal prerogative and the Charter at paragraph 50 of that decision:

The respondents submit that at common law the authority to make international agreements (such as the one made with the United States to permit the testing) is a matter which falls within the prerogative power of the Crown and that both at common law and by s. 15 of the *Constitution Act, 1867* the same is true of decisions relating to national defence. They further submit that since by s. 32(1)(a) the *Charter* applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament", the *Charter's* application must, so far as the government is concerned, be restricted to the exercise of powers which derive directly from statute. It cannot, therefore, apply to an exercise of the royal prerogative which is a source of power existing independently of Parliament; otherwise, it is argued, the limiting phrase "within the authority of Parliament" would be deprived of any effect. The answer to this argument seems to me to be that those words of limitation, like the corresponding words "within the authority of the legislature of each province" in s. 32(1)(b), are merely a reference to the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*.

They describe the subject-matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive action. As Le Dain J. points out, the royal prerogative is "within the authority of Parliament" in the sense that Parliament is competent to legislate with respect to matters falling within its scope. Since there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also. (Emphasis added)

[56] As is plain from this explanation, there can be no doubt that the Federal Court has jurisdiction to hear an application for judicial review of a decision made in the exercise of the royal prerogative, and the exercise of that prerogative is governed by the Charter. I will now address the other issues raised.

2. **What is the appropriate standard of review for a decision made under section 10.1 of the Order?**

[57] I find without hesitation that in the case of a ministerial decision denying a passport I must apply the patent unreasonableness test, using the four criteria that the courts developed for the pragmatic and functional analysis (see *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 and *Voice Construction Ltd. v. Construction and General Workers Union, Local 92*, [2004] 1 S.C.R. 609).

[58] However, the patent unreasonableness standard was recently abolished by the Supreme Court of Canada, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, and replaced by the reasonableness standard of review. I have re-examined the facts in this case having regard to the new cards that

have been dealt, and find that the applicable test is unreasonableness. This does not change the analysis and conclusions that follow.

[59] The specialized expertise of the decision-maker in these cases, the subject matter of the Order and the decision-maker's concerns regarding national and international security are all factors that plainly suggest that the decision-maker should be given wide discretion and considerable deference. In these cases, the courts must exhibit restraint. In order to decide these questions, there must be specialized knowledge of the subject and of Canada's commitments in similar circumstances, both nationally and internationally, and of the national security situation.

[60] I would also note, on this point, that exercise of the royal prerogative involves elements of discretion. I observe that in the United States the courts exhibit deference for the decisions of the executive branch in relation to passport applications. Although the right to travel is recognized as an aspect of liberty that cannot simply be eliminated by due process or by applying the law according to the procedures it provides, that does not mean that there can be no restrictions; the executive need only demonstrate that the basis for the restriction is fair.

. . . the right to travel is a part of the liberty of which a citizen cannot be deprived without due process, but . . . "a liberty cannot be inhibited without due process of law does not mean it can under no circumstances be inhibited."

The Court will uphold these restrictions (to passports) whenever the executive department can reasonably argue that the restrictions are related to our foreign policy interest and there is no clear basis for finding that congress has restricted executive authority.

(See John E. Nowak and Ronald D. Rotunda, *Constitutional Law*, 7th ed., Hornbook Series, St. Paul, MN, Thomson-West, 2004, at Chapter 14:37, "The right to travel abroad," pages 1058 and 1061.)

[61] In this case, however, that standard of review applies to the facts on which the decision is based and the conclusions drawn from those facts.

[62] Thus we can see simply by reading the questions here that the Charter issues raised are matters which must be disposed of by applying the correctness standard. The same will be true of the question relating to the administrative investigation and the principles of procedural fairness (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 21 to 28 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at paragraphs 114 to 121).

3. **Were the principles of procedural fairness violated in the administrative investigation done by the CPO in response to Mr. Kamel's passport application and, if so, having regard to the applicable standard of judicial review, is intervention by this Court warranted?**

[63] The applicant argues that the procedure followed and the recommendation by the CPO disclose a patent violation of the principles of procedural fairness. Moreover, the way in which the facts and law were presented to the Minister demonstrates institutional bias. The respondent argues, in reply, that the degree of procedural fairness required is lower than what is required in refugee and immigration law and that the procedure followed by the COP complies with the procedural guarantees relating to passports.

[64] Although a passport can still be denied, the Canadian courts have held that this does not mean that the Minister is not required to observe certain procedural guarantees associated with the recognized principles of procedural fairness. As the respondent admits, that obligation applies even though the facts on which the passport application is based must be taken into account.

[65] What, then, are the procedural guarantees that must be met in this case?

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

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

[67] Having regard to factors 1 and 2, the Court finds first that the decision to refuse or revoke a passport is a discretionary decision. However, the nature of the procedures leading to that decision are in the nature of an investigative proceeding. In the case before us, the CPO carried out an investigation, and invited Mr. Kamel to make comments; it then made a recommendation to the Minister. Because the consequences of denying a passport are significant, the Court concludes that evaluating and weighing the national security of Canada and other countries, having regard to the applicant's rights and obligations, calls for the application of particularly stringent procedural guarantees, which must include real participation by the applicant in the investigative process.

[68] In this case, the Minister had to decide whether to issue a passport to a Canadian citizen, and an administrative investigation was conducted. As we shall see, denial of a passport application prevents a Canadian citizen from travelling throughout the world. Accordingly, the decision is an important one for the person who is denied a passport. As a result, the investigation leading to the recommendation to be made to the Minister must include full participation by the individual affected. Procedural guarantees are therefore necessary: a passport applicant must be able to know exactly what the allegations against him or her are and what the information collected in the course of the investigation is, and must be able to respond to it completely, so that the report submitted to the Minister includes his or her comments.

[69] The third factor requires that the importance of the right affected be considered. As noted earlier, Mr. Kamel's interest in obtaining his Canadian passport is an important one, not only because he needs it in order to travel, but also because a passport is an identity document that gives



its holder the protection of the other country, at Canada's request. Mobility rights are facilitated by this travel document. As the Supreme Court said in *Suresh, supra*, at paragraph 118: "The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*." Denial of a Canadian passport has major consequences both personally and financially. No elaboration on that point is needed. As a result, this factor calls for adherence to stronger procedural guarantees to be observed in applying section 10.1 of the Order.

[70] The fourth factor involves assessing the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed. In this case, it was reasonable for Mr. Kamel to expect that the CPO would inform him of their concerns and give him a real opportunity to respond to them. Given the history of passport renewals and the fact that the COP had issued him a special passport for him to return to Canada on January 19, 2005, on the one hand, and his offer to meet with CPO officers, on the other, it is reasonable that the applicant would have had certain legitimate expectations in respect of the investigative process.

[71] For the fifth factor, the Court has to examine the choice of procedure made by the agency. The Minister has to make a decision based on the information submitted by the investigator. In this case, the information consisted entirely of what was in the CPO's report, and the CPO has an obligation to guarantee that its investigation is likely to give the Minister all the information needed for making an informed decision. The procedure followed did not include real participation by the applicant, and that has an impact on the content of the report.

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

[73] Mr. Kamel submitted his passport application at the counter at the CPO in Montréal on June 13, 2005. Given that he was planning to travel on June 25, he made an expedited passport application and paid the applicable fee (\$97.00). After checking the files, the CPO officer informed him that he could not guarantee that a passport would be issued within a short time and that he would be contacted shortly regarding the anticipated timeframe. The officer said that this procedure was sometimes followed.

[74] As a result of the Minister's decision on December 1, 2005, to follow the CPO's recommendation not to issue a passport to Mr. Kamel, Ms. Thomas wrote to Mr. Kamel on December 14, 2005, to inform him that his passport application had been denied. The time from

when the initial passport application was made to when the decision not to issue a passport was communicated to him was therefore six months.

[75] During that period, the CPO sent Mr. Kamel three letters, including the letter dated December 14, 2005, informing him that the passport had been refused. There was also a telephone conversation on June 22, 2005, between Michel Leduc, Acting Director General of the CPO Security Bureau (he was subsequently replaced by Ms. Thomas) and Mr. Kamel. Apart from those three letters, Mr. Kamel received no documents or other information that may have come out of the administrative investigation underway.

[76] Mr. Kamel himself sent two letters in reply to the letters from the CPO dated August 5, 2005 (further to the telephone conversation on June 22), and October 28, 2005. In those letters, the CPO informed him that the application was the subject of an administrative investigation because of the French judgment dated April 6, 2001, and that Mr. Kamel's passport history indicated that he had had his Canadian passport replaced several times. The letters explained the Order and the role of the CPO in relation to security, and the letter of October 28, 2005, stated that a recommendation could be made to the Minister that the passport application be denied. Mr. Kamel was invited, in the two letters, to submit any information that he considered to be relevant.

[77] In reply, in his letters of August 18 and November 9, 2005 (see paragraphs 16 and 21 of these reasons), Mr. Kamel offered to make himself available to the CPO investigators and to answer

any questions considered to be relevant. He explained his interpretation of the French judgment and gave a detailed explanation of his Canadian passport application history.

[78] In the letter of December 14, 2005, informing him of the decision to deny a passport,

Ms. Thomas stated that the information that had attracted the Minister's attention was as follows:

- the French judgment convicting Mr. Kamel of terrorist offences and passport fraud in support of terrorist activity; and
- a previous passport record relating to numerous replacements of valid passports.

After explaining the legal reasons for the decision, Ms. Thomas explained that the decision was final, subject to any application for judicial review. Lastly, Mr. Kamel was invited to produce additional "missing" information that might justify a favourable recommendation to the Minister.

[79] The CPO's investigation file contains a CSIS report dated August 15, 2005 (in response to the CPO request dated June 27, 2005), entitled [TRANSLATION] "summary relating to Fatah (Fateh) Kamel for use of the Passport Office, updated on July 28, 2005", a "protected" document (for the content, see paragraphs 17, 18 and 19 of these reasons). I would recall that the document was not disclosed to Mr. Kamel for his comments. There was no security reason for not providing him with that document.

[80] The document had a definite influence on the content of the CPO's report to the Minister, dated November 22, 2005 (for the content of that report, see Appendix "1" to these reasons). The letters from Mr. Kamel were appended to the CPO's report.

[81] The report seems to insinuate that Mr. Kamel had engaged in wrongdoing in relation to his passport application history:

25. Kamel's passport history shows that, prior to his arraignment and conviction, he has repeatedly applied for and has been issued replacement passports. He was convicted in France of a terrorist offence and passport fraud in support of terrorist activity. The policy and international obligations of the Government of Canada demand that Canada does it utmost to prevent threats to international security.

It will be recalled that the letter from Ms. Thomas dated December 14, 2005, stated that Mr. Kamel's passport application record was a basis for the recommendation to the Minister. Mr. Kamel's reply, by letter dated November 9, 2005, contained an explanation in that regard. That is not reflected in the body of the report.

[82] That is not all, however. On cross-examination, Ms. Thomas stated that the CPO had not identified any irregularities in Mr. Kamel's passport applications and that the Bureau had not seen fit to say this in the report to the Minister.

[83] In terms of procedural fairness, the investigation file does not show that Mr. Kamel's position was reflected objectively in the report submitted to the Minister. On the contrary: the report sets out the CPO's position, simply and virtually unilaterally. The report did not explain the

respective positions of the parties to the decision-maker; it explained the CPO's position. A report of this nature must present the parties' positions in a factual and balanced way. The report does not do that.

[84] This is just one example: Mr. Kamel's passport application record is described in negative terms in the report, and in terms that are contrary to reality, even though, as Ms. Thomas testified, there had been no irregularities. In addition, the letter of December 14, 2005, stating that the history of passport applications showed numerous replacements of valid passports, without saying any more, again reflects this unfavourable perception.

[85] I would add that the failure to disclose the CSIS report dated August 15, 2005, and the failure to provide a meaningful overview of the CPO's report to the Minister, along with the recommendation made, do not meet the requirements of procedural fairness in cases of this nature. Disclosure of that information would have let Mr. Kamel know the real nature of the problem he was facing and enabled him to reply accordingly, had he wished. The Minister would then have been able to get an objective picture of the situation before making his decision.

[86] In his two replies, Mr. Kamel was unable to state his position fully, given that he was not aware of all the facts that were relevant to the investigation and that were alleged against him. His explanation regarding his passport application history did not prompt the CPO to include his position in the report to the Minister, when this was information favourable to him.

[87] To summarize, I conclude that the principles of procedural fairness were not observed. Mr. Kamel was not adequately informed of the allegations against him, and as a result he was not able to state his position, and so the Minister had only the results of the investigation that reflected the CPO's opinion. In the circumstances, the Minister did not have all of the information that would have enabled him to make an informed decision.

[88] I would just recall that Mr. Kamel was entitled to know the allegations against him, to be kept informed of developments in the investigation and to know all of the information collected in the course of that investigation. He also had the right to reply, on receipt of the information, and his position had to be reflected objectively both during the investigation and in the report to the Minister. I note that Mr. Kamel proposed a meeting to the CPO. That offer was not taken up and no reason was given.

[89] Having regard to the applicable standard of review, the correctness standard, in analyzing the principle of procedural fairness in this application for judicial review, the Minister's decision must be set aside in view of the breaches identified above.

**4. Do sections 4 and 10.1 of the Order infringe the rights associated with the mobility rights guaranteed by subsection 6(1) of the Charter?**

[90] Subsection 6(1) of the Charter guarantees Canadian citizens the right to enter and leave Canada, but also to remain in Canada:

6(1)

6(1)

Every citizen of Canada has the right to enter, remain in and leave Canada.

...

Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

...

As we will see, a passport is particularly important for travelling outside Canada.

[91] The respondent submits that subsection 6(1) is limited to guaranteeing citizens the right to enter and leave, and that it is intended, for example, to prohibit banishment or exile, or preventing citizens from leaving Canada. In the Attorney General's submission, this provision does not require that the Government of Canada facilitate foreign travel by Canadians. That would be to give too broad a meaning to subsection 6(1) of the Charter. He points out that on leaving or entering Canada it is not mandatory that a passport be presented, because mere proof of citizenship would be sufficient.

[92] The Attorney General adds that the Charter has no extraterritorial application and does not apply to foreign jurisdictions that choose to require a passport or other travel document. He summarizes this by saying that the right to enter and remain are attributes of citizenship and are not dependent on holding a passport.

[93] He adds that after Mr. Kamel had his Algerian passport and national identity card confiscated he did not apply for an Algerian passport at any time since then, and that even if he had a valid passport he would probably be denied entry into a number of countries in view of his criminal record in France.



[94] In the alternative, the Attorney General submits that if the Court were to conclude that section 10.1 of the Order infringes mobility rights, the infringement is justified under section 1 of the Charter.

[95] In Mr. Kamel's submission, subsection 6(1) of the Charter guarantees Canadian citizens the right to travel outside Canada and the right to be issued a passport. If a person is denied a passport, he or she is being prevented from travelling, given that a majority of countries require that a passport be presented at the border.

[96] With respect to the argument that section 1 of the Charter justifies the infringement of the rights guaranteed by subsection 6(1), the argument is that the Order does not impose any restriction and the person affected does not have an opportunity to be heard. It was noted that the Order contains no definition of national security.

[97] Before determining the meaning of the rights guaranteed by subsection 6(1), certain principles that have been stated by the Supreme Court, when the courts have been asked to interpret the Charter, should be recalled:

- there is a need for a broad perspective when approaching the Charter; and
- it must be given a liberal interpretation in order to achieve the objective of the right in issue:

In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and

freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

*R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295.

Let us see what subsection 6(1) means, having regard to these principles of interpretation.

[98] The purpose of subsection 6(1) of the Charter as a whole is to guarantee Canadian citizens mobility rights within Canada while living here and the right to leave and enter Canada, to go outside the country or return here. It is worded in general language. It guarantees the right to travel both within Canada and outside Canada, with the right to enter and leave. It clearly states that a citizen has the right to mobility within Canada, but also that a citizen may go to another country and has a guaranteed right to return. The purpose is to ensure and guarantee the mobility rights of every Canadian citizen within Canada and the right of every citizen to enter and leave Canada, where it applies.

[99] In *United States of America v. Cotroni*; *United States of America v. El Zein*, [1989] 1 S.C.R. 1469 (*Cotroni*), in which the majority held that extradition of a Canadian citizen to a foreign country was a violation of subsection 6(1) of the Charter (the right to remain in Canada) but was a reasonable limit on the exercise of that right, within the meaning of section 1, Madam Justice Wilson dissented on a separate aspect of that section but stated a clear and plain opinion regarding the language of that subsection. With respect to the principles stated by the Supreme Court when it has been called upon to interpret the Charter, she made the following comments regarding subsection 6(1) of the Charter, at pages 1504-05:

Applying these guidelines, it is my view that s. 6(1) of the *Charter* was designed to protect a Canadian citizen's freedom of movement in and out of the country according to his own choice. He may come and go as he pleases. He may elect to remain. Although only Canadian citizens can take advantage of s. 6(1) the right protected is not that of Canadian citizenship. Rather, the right protected focuses on the liberty of a Canadian citizen to choose of his own volition whether he would like to enter, remain in or leave Canada. Support for this interpretation is found in the language of the other subsections of s. 6 and in the heading of s. 6 "Mobility Rights".

[100] Is a right to a passport the corollary of the exercise of this freedom to enter and leave Canada? We will recall that the Attorney General says it is not: it is not dependent on presentation of a passport.

[101] Although that reasoning seems to stand up in theory, the reality is that a passport is needed for leaving the country and entering most countries. Certainly there is no legal obligation to present a passport when a Canadian citizen enters and leaves Canada. Another piece of identification is

sufficient. In concrete terms, however, a Canadian passport must be presented to airline companies when leaving on a flight abroad. That requirement is a matter of common knowledge, but it also reflects the guidelines issued by the ICAO, the organization that oversees international flights.

Article 13 of the *Convention on International Civil Aviation*, 9th ed. (entitled “Entry and clearance regulations”) provides:

**Article 13**  
**Entry and clearance**  
**regulations**

The laws and regulations of a contracting State as to the admission to or departure from its territory of passengers, crew or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from, or while within the territory of that State.

**Article 13**  
**Règlements d'entrée et de**  
**congé**

Les lois et règlements d'un État contractant concernant l'entrée ou la sortie de son territoire des passagers, équipages ou marchandises des aéronefs, tels que les règlements relatifs à l'entrée, au congé, à l'immigration, aux passeports, à la douane et à la santé, doivent être observés à l'entrée, à la sortie ou à l'intérieur du territoire de cet État, par lesdits passagers ou équipages, ou en leur nom, et pour les marchandises.

[102] For returning, a passport is required by the airline companies for international take-off when the final destination is Canada. This aspect of travelling is an unavoidable reality. Canadian citizens must present their passport. In fact, this case provides the best illustration of this. When Mr. Kamel returned to Canada on January 29, 2005, he was issued a special passport valid for one trip only, on Air France flight 344 from Paris to Montréal; without it, returning would have been impossible.

[103] In order for mobility rights respecting travel outside Canada to be truly meaningful, it seems to me that more is needed than the right to enter or leave, because entering means coming back from somewhere, and leaving means going to a foreign destination. In both cases, returning and leaving imply a foreign destination where a passport is required. This mobility right cannot be exercised without a passport.

[104] That is not all, however. By its own actions, the Canadian government recognizes and encourages the use of passports for travel abroad.

[105] For example, the Order itself illustrates that recognition. The term “passport” is defined as “an official Canadian document that shows the identity and nationality of a person for the purpose of facilitating travel by that person outside Canada”. The purpose of a passport is to establish identity and nationality, for the purpose of “facilitating” travel by a Canadian citizen outside Canada. The right to enter and leave guaranteed by subsection 6(1) of the Charter is the right of a Canadian citizen to travel outside Canada. The Order expressly recognizes that one of the purposes of a passport is “facilitating” such travel. It seems to me that this is a practical demonstration of the recognition by the Governor in Council, in originating and drafting the Order, of a passport for “facilitating” travel.

[106] In addition, a passport contains unambiguous statements. The destination country is asked to allow the passport holder to pass freely and to afford such assistance and protection as may be necessary. It states that the passport is valid for all countries, unless otherwise indicated, and adds

that the bearer must also comply with the formalities for entry to those countries where he or she intends to travel. The bearer of the passport is informed about Canadian services, and that if none exist, he or she may apply to a British consulate. Bearers who have dual nationality are cautioned and informed that they may be subject to the laws and obligations of the other country, including military service.

[107] On cross-examination, Ms. Thomas, Director of Security at Passport Canada, acknowledged that most countries require that a passport be presented at the point of entry and exit. In *Khadr*, *supra*, at paragraph 63, Mr. Justice Phelan stated that more than 201 countries required a passport on arrival. He said:

63 The right to leave Canada is a hollow right if it cannot be exercised in a meaningful way due to the actions of the Canadian government directed against an individual or group of individual citizens. At the time of the hearing, 201 countries required Canadians to carry passports to enter their country: these include some of the countries with whom Canadians have the closest personal and business relations such as France, England, Australia and New Zealand.

Ms. Thomas also acknowledged that Passport Canada recommended that Canadian citizens travel with a Canadian passport when they go outside Canada.

[108] I would add that the 2004 Canadian policy statement, the April 2005 international policy statement, the United Nations conventions and the ICAO conventions (which Canada has signed, in both cases) provide for improving the passport system at the international level (biometric facial recognition capacity) and invite states to use that technology. Canada wants to set exemplary standards in the management of passports, approaching perfection, and thus meeting international

requirements. In its 2004 policy statement, the Canadian government recognized its obligation to offer assistance to Canadians working or travelling abroad. This is an expression of the importance that the Canadian government places on passports; it recognizes that they are essential for international travel. The government's commitments at the national and international levels convey the same understanding.

[109] In this era of globalization, Canadian citizens are travelling more all the time, both for personal reasons and for business, and a passport is a crucial and in fact necessary travel document. This fact is undeniable. Without a passport, a Canadian traveller will not have access to at least 200 countries in the world.

[110] The Canadian courts acknowledge the crucial role played by the passport in the modern world. In *Black v. Canada (Prime Minister)*, [2001] O.J. No. 1853, in which the issue was the granting of honours by the Crown, the Ontario Court of Appeal, in *obiter, per* Mr. Justice John Laskin, at paragraph 54, made the following comments regarding the purpose of the passport:

In today's world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or a luxury but a necessity. Possession of a passport offers citizens the freedom to travel and to earn a livelihood in the global economy. In Canada, the refusal to issue a passport brings into play Charter considerations; the guarantee of mobility under s. 6 and perhaps even the right to liberty under s. 7. In my view, the improper refusal of a passport should, as the English courts have held, be judicially reviewable. (As quoted in *Khadr, supra*, at paragraph 34)

[111] In *Khadr, supra*, Phelan J. (although he did not have to rule in relation to subsection 6(1) of the Charter) expressed the same view and approved those comments, stating, at paragraph 62, that the Ontario Court of Appeal had correctly understood “the modern approach to passports”.

[112] I share that view. I find that a passport is necessary to guarantee the mobility rights of Canadians at the beginning of and during their travel outside the country and on their final return trip back to Canada. It is therefore an essential tool to which Canadian citizens must have access in order to exercise their mobility rights outside Canada as guaranteed by the Charter.

[113] Refusal to issue a passport to a Canadian citizen like Mr. Kamel is therefore an interference in the exercise of the mobility rights guaranteed by subsection 6(1) of the Charter. I would therefore answer “yes” to the fourth question: section 10.1 of the Order infringes subsection 6(1) of the Charter. Certainly he can theoretically leave and enter Canada, but he cannot do so in practice. Without this document, which is controlled by the Governor in Council, the right to travel outside Canada cannot be exercised. My conclusion is consistent with what the Supreme Court has said in respect of interpreting Charter rights.

[114] Infringement of the rights associated with the mobility rights guaranteed by subsection 6(1) of the Charter having been found, is this a reasonable limit on those rights within the meaning of section 1?

5. **Is the infringement of subsection 6(1) of the Charter justified under section 1 of the Charter?**



[115] My answer to the question is “no”, for the following reasons.

[116] In a nutshell, section 10.1 of the Order has a valid state objective; however, it is not sufficiently clear in respect of the need to refuse to issue or revoke a passport to protect the national security of Canada or another country, and it does not afford a Canadian citizen who applies for a passport a concrete opportunity to understand what is wanted and to provide an informed response, where necessary. The Order is also silent as to any alternatives that might be available in such circumstances.

[117] Professor Forcese described the problem in *National Security Law Canadian Practice in International Perspective Essential of Canadian Law*, 2008, at pages 517 and 518 (“*National Security Law*”). He observed that there was very probably an infringement of the rights guaranteed by section 6 and that the only way to justify it was section 1, as long as the government could show that the refusal to issue a passport was based on a sufficiently valid national security concern. He commented on the decision in *Khadr, supra*, as follows, at page 518:

In light of this holding, the court did not reach the issue of whether the government had a constitutional obligation to issue a passport. It did observe, however, that the mobility rights found in section 6 of the *Canadian Charter of Rights and Freedoms* would be hollow if a citizen’s international mobility could be *de facto* restricted by a refusal to issue a passport. This reasoning suggests strongly that passport denials and revocations may be sustained only on section 1 grounds. As this book has noted in several places, a significant enough national security concern seems a likely candidate for a section 1 justification, although the government would obviously need to show that rejection of a passport application is sufficiently connected to this preoccupation.

[118] The Order does not do this.

[119] For the purposes of this part, I quote section 1 of the Charter:

**Rights and freedoms in  
Canada**

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**Droits et libertés au Canada**

1. *La Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

And for ease of reference, I will reproduce section 10.1 of the Order:

**Canadian Passport Order**

**REFUSAL OF PASSPORTS  
AND REVOCATION**

10.1 Without limiting the generality of subsections 4(3) and (4) and for greater certainty, the Minister may refuse or revoke a passport if the Minister is of the opinion that such action is necessary for the national security of Canada or another country.

**Décret sur les passeports  
canadiens**

**REFUS DE DÉLIVRANCE  
ET RÉVOCATION**

10.1 Sans que soit limitée la généralité des paragraphes 4(3) et (4), il est entendu que le ministre peut refuser de délivrer un passeport ou en révoquer un s'il est d'avis que cela est nécessaire pour la sécurité nationale du Canada ou d'un autre pays.

[120] The applicant contends that the Order is not law. I agree. Its source lies in the royal prerogative; it is public, but it is vague and it is ultimately overbroad.

[121] A true law, within the meaning of section 1 of the Charter, must meet certain criteria, which are clearly described by Peter Hogg in *Constitutional Law of Canada*, loose-leaf ed. Toronto, Carswell, 2005, at paragraphs 35.11 to 35.15:

The words “prescribed by law” make clear that an act that is not legally authorized can never be justified under s.1, no matter how reasonable or demonstrably justified it may appear to be.

...

Both these values are satisfied by a law that fulfils two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law.

...

As to precision, the Supreme Court of Canada has held that a limit on a right need not be express, but can result “by necessity from the terms of a statute or regulation or from its operating requirements. For example, a statutory requirement that a roadside breath test be administered “forthwith”, which in practice precluded contact by the suspected motorist with counsel, although the statute was silent on the right to counsel.

[122] When we talk about a law, the law has to be known – it has to be accessible to the general public. The Order is a regulatory enactment that is scrutinized and then published in Part II of the *Canada Gazette*, in accordance with the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, subparagraph 2(1)(a) (“statutory instrument”) (ii) and sections 3 and 6.

[123] The Order, whose source lies in the royal prerogative and which enables the executive to manage national affairs (in our case, foreign affairs), therefore meets the accessibility criterion: it has been published and it is readily accessible to the general public.

[124] In addition, the law must be sufficiently precise to be understood both by the person affected and by the decision-maker, and it must not be overbroad. In the unanimous decision of the Supreme Court of Canada in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, Mr. Justice Gonthier referred to a decision of the Ontario Court of Appeal and commented on vagueness and overbreadth as follows, at paragraph 36:

36 The relationship between vagueness and “overbreadth” was well expounded by the Ontario Court of Appeal in this oft-quoted passage from *R. v. Zundel* (1987), 58 O.R. (2d) 129, at pp. 157-58:

Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.

I agree. A vague law may also constitute an excessive impairment of *Charter* rights under the *Oakes* test. This Court recognized this, when it mentioned the two aspects of vagueness under s. 1 of the *Charter*, in *Osborne and Butler*.

[125] The Order in issue here is vague in several respects. It is general in its wording and it refers to a “necessity” criterion that is neither defined nor explained in any way.

[126] Although the expression “national security of Canada or another country” need not necessarily be expressly defined, it must nonetheless be given some context from which the

intended meaning can be understood. In his most recent publication, *National Security Law, supra*, Professor Forcese noted the multiple situations to which that concept may refer and the definitions that are applied to national security, but proposed, for the purposes of his book, to delineate the concept by applying the approach taken by the Supreme Court in *Suresh, supra*, and Canada's 2004 policy statement (on this point, see pages 4, 5 and 6).

[127] At this stage, the general nature of the wording of section 10.1 of the Order suggests that the terms used may mean many things to many people. Nonetheless, what we have learned in this case is that there is some connection between passports and terrorism (on this point, see the 2004 policy statement, the April 2005 policy statement and the affidavit of Professor Rudner). That finding is not reflected in the Order.

[128] It is interesting to note that the CPO's report submitted to the Minister for decision-making in fact invites the Minister to define what national security means himself:

13. "Passport" is defined under Section 2 of the CPO ... but National Security as it relates to Canada or another Country is not defined. You must, therefore, in exercising your authority to refuse a passport under Section 10.1 CPO decide "what" National Security means. (Emphasis added)

This is unacceptable. How can anyone know what the rules of the game are when the basic concept on which the decision rests exists only in the mind of the decision-maker? It seems to me that we have entered the realm of the arbitrary. National security would at least have to be placed in some context, so that the problem in issue and the remedy sought when associating the issuance and

revocation of a passport with terrorism, the security of Canada and the security of other countries, could be understood.

[129] As well, section 10.1 does not explain the context in which the security of another country could be grounds for refusing or revoking a passport. Canada's policy statements and the international conventions, however, contain principles derived from political science on which the Order relating to the issuance or refusal of a Canadian passport could be modeled. It is not necessary to have a precise definition of "the security of another country", but the concept must be circumscribed in some way so that the person affected can understand the restriction in issue.

[130] There is also the reference to the "necessity" criterion in section 10.1 of the Order. The Minister must be of the opinion that refusal or revocation of a passport "is necessary for the national security of Canada or another country". The necessity criterion is vague to the point of being nebulous, and the Order provides no benchmark to assist the reader in understanding it. In fact, the concept of necessity for the national security of Canada or another country, in its entirety, calls for serious examination if the provision as it is worded is to be capable of application.

Professor Rudner's affidavit could be useful on this point. Having regard to all of its vague elements, the Order is overbroad. The decision-maker is given a completely free hand in these circumstances.

[131] From another perspective, the Order is also flawed in that it does not provide a procedure for examining cases; for one thing, it is silent as to participation by a passport applicant in terms of both

knowledge of the allegations against him or her and the documents used to justify a recommendation (in so far as there is no information to be protected); as well, there is nothing that would provide an applicant with a concrete opportunity to reply and to make representations to the Minister before the decision is made. We saw earlier that the procedure followed for examining the case involved only insignificant participation by Mr. Kamel, with the result that the Minister had only the information from the CPO (except for the two letters from Mr. Kamel appended to the report).

[132] Having regard to all of these findings, I find it difficult to see the Order as containing any law on the basis of which it could ultimately be concluded that the infringement of the rights associated with the mobility rights guaranteed in subsection 6(1) of the Charter is justified under section 1 of the Charter. It will therefore not be necessary to apply the tests for the section 1 analysis developed by the Supreme Court, in particular in *R. v. Oakes*, [1986] 1 S.C.R. 103. There is quite simply no law to which we could refer in order for section 1 to operate. In the circumstances, section 1 is of no assistance. The mobility rights guaranteed by subsection 6(1) of the Charter have been infringed and section 1 cannot be used to justify the infringement. Section 10.1 of the Order is therefore declared to be invalid and the Minister's decision is accordingly set aside.

**6. Do sections 4 and 10.1 of the Order infringe the rights set out in sections 7 and 15 of the Charter and, if so, is the infringement justified under section 1?**

[133] Having regard to my conclusions, there is no need to answer the questions relating to sections 7 and 15 of the Charter. The Court would note, merely as an observation, that in order for

there to have been an infringement of the rights guaranteed in sections 7 and 15 of the Charter there would have had to be evidence establishing precisely how those rights were affected. At the hearing, I indicated to counsel for the parties that some of the evidence relating to infringements in that regard seemed to be vague.

[134] A law might, simply because of how it is worded, raise enough legislative facts that it would be possible to address Charter issues. In this case, however, specific facts would have to be cited if infringement of some Charter right or other were to be argued. In other words, some tangible situation must be cited; an enactment cannot be challenged in the abstract. It seems to me that this case was prepared with the rights guaranteed by subsection 6 of the Charter clearly in mind. The Supreme Court has said on several occasions that specific facts must be cited if the courts are to be asked to consider Charter issues:

38 This Court has often stressed the importance of a factual basis in *Charter* cases. See, for example, *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 762 and 767-68, *per* Dickson C.J.; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 83; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099; *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 452; *DeSousa, supra*, at p. 954; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 15. These facts have been broken into two categories: legislative and adjudicative. In *Danson, supra*, at p. 1099, Sopinka J., for the Court, outlined these categories as follows:

These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis' words, "who did what, where, when, how, and with what motive or intent ...." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are



subject to less stringent admissibility requirements: see e.g., *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, *per* Laskin C.J., at p. 391; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, *per* Dickson J. (as he then was), at p. 723; and *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, *per* McIntyre J., at p. 318.

*R. v. Mills*, [1999] 3 S.C.R. 668, at paragraph 38.

[135] As well, in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, Mr. Justice Peter Cory pointed out that absence of a factual basis is not a mere formality. At paragraph 20, Cory J. explained:

20 A factual foundation is of fundamental importance on this appeal. It is not the purpose of the legislation which is said to infringe the *Charter* but its effects. If the deleterious effects are not established there can be no *Charter* violation and no case has been made out. Thus the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position.

[136] For the purposes of section 7 of the Charter and the parties' arguments in this case, the legislative facts are insufficient. The affidavit in support of the motion says that the intention of Mr. Kamel (the deponent) was to go to Thailand to conduct import business with the help of a member of his family living in that country. The evidence is that the trip was subsequently cancelled for personal reasons. We do not know where the applicant is employed, what need he has to travel for the purposes of his work, or anything else. In addition, paragraphs 43 to 53 of the applicant's memorandum are not based on any fact relating to Mr. Kamel. In order to make an effective argument under section 7 of the Charter, there must be a factual basis. It seems to me that the right to life, liberty and security of the person is easily demonstrated in everyday life. The applicant's case says nothing in this regard. The Court would have had to have more information in order to do

an informed analysis of any alleged infringement of the rights guaranteed by section 7 of the Charter.

[137] Nor did the applicant offer sufficient facts on the question of section 15 of the Charter. His memorandum states that the Order provides for different treatment of naturalized citizens and/or citizens of Arab origin or the Muslim faith. In support of that argument we have the assertion that the evidence shows that the only two cases in which a passport has been refused based on national security involve people of Arab origin or the Muslim faith, and there are references to certain passages from the report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar and the literature.

[138] It seems to me that in order to establish that the right to equality before the law has been infringed, the basis of the inequality must be identified by comparison with another group. This is what the Supreme Court said in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at paragraphs 4 to 6:

Purpose

(4) In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

(5) The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.

### Comparative Approach

(6) The equality guarantee is a comparative concept, which ultimately requires a court to establish one or more relevant comparators. The claimant generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. However, where the claimant's characterization of the comparison is insufficient, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant where warranted. Locating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context. (Emphasis added)

There is nothing in the evidence presented to indicate the person, group or groups with which the comparison is to be done.

[139] The evidence in the record relating to infringements of the rights guaranteed by sections 7 and 15 of the Charter is very general and I am unable to do a satisfactory analysis on the basis of it. The Court would simply note, without intending any criticism of anyone, that a case involving the Charter is complex and calls for detailed and scrupulous examination.

[140] What remains is to consider the application for the Court to order the Minister to issue a passport to Mr. Kamel.

### 7. Should an order be made compelling the Minister to issue a passport to Mr. Kamel?

[141] In the applicant's notice of motion and memorandum, he seeks the following remedy:

[TRANSLATION] "Order that a passport be issued to the applicant within 10 days of the date of this

Order”. This is an “application”, although the term was not used, under subsection 18.1(3) of the

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

**(3) POWER OF FEDERAL COURT** – On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

**(3) POUVOIRS DE LA COUR FÉDÉRALE** – Sur présentation d’une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l’office fédéral en cause d’accomplir tout acte qu’il a illégalement omis ou refusé d’accomplir ou dont il a retardé l’exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu’elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l’offre fédéral.

[142] The applicant did not address this relief in his written submissions. Having regard to the unique nature of this case, I am of the opinion that it would assist the Court to have relevant evidence and submissions. This issue was simply not argued, whether in the parties’ written submission or at the hearing. At this stage, the Court simply does not have the basis it needs for making an informed decision. Accordingly, this application will not be granted.

[143] I would add that the relief consisting of a declaration that section 10.1 of the Order is invalid creates a legal vacuum that will have to be filled very quickly (see paragraph 147). As the case now stands, the Court notes that there simply is not enough information to make an informed decision.

[144] I would also make two observations in passing. First, there is nothing in the record to suggest any urgency in terms of Mr. Kamel obtaining a passport for his work; however, he says that he would like to visit family members he has not seen in 16 years. Second, I note that the CPO's policy provides for issuing a passport for a specific trip. I also note in the letter of December 14, 2005, that the CPO offered to reconsider the case if [TRANSLATION] "noteworthy" additional information is submitted. In the circumstances, therefore, this could provide Mr. Kamel with a solution, if need be.

### **Conclusions**

[145] After a careful study of the investigative process, the documents collected during that investigation, the report and recommendation to the Minister and the Minister's decision, and having regard to the principles of procedural fairness, I find that the applicant's rights were not respected, that he was not adequately apprised of the information used against him and that he did not have a real opportunity to be heard, and that the Minister therefore did not have the information he needed in order to make an informed decision. Accordingly, for this reason, the Minister's decision is set aside.

[146] For the reasons explained above, I find that the mobility rights guaranteed by subsection 6(1) of the Charter have been infringed, because a passport is an essential tool for the exercise of those rights; section 10.1 of the Order is therefore invalid because it is vague to the point of being nebulous in its wording, it does not provide for a procedure by which a passport applicant could be adequately heard, and it is therefore overbroad, and I find that section 1 of the Charter can be of no assistance in this regard. Accordingly, the Minister's decision to deny Mr. Kamel's application is set aside.

[147] The Attorney General will have six months to draft new provisions to replace section 10.1 of the Order, which I grant pursuant to the discretion given to the Court by subsection 18.1(3) of the *Federal Courts Act, supra*.

### **Costs**

[148] In the relief sought by Mr. Kamel as stated in his memorandum, he seeks only [TRANSLATION] "costs on a solicitor and client basis". No explanation is given for that claim. The Attorney General replies that there is no justification or even reason given for the costs sought.

[149] Rules 400 *et seq.* of the Court, and more specifically paragraph 400(6)(c), provide for such costs to be awarded. If that is to be done, the request must be justified. The decisions of this Court indicate that such requests are granted in exceptional cases, where it is established that the conduct of the opposing party was reprehensible. On this point, Mr. Justice Gonthier said, in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, at paragraph 86:

86 At trial, the respondents were awarded party-and-party costs. In the Court of Appeal, this decision was reversed and it was decided that the government's conduct justified the award of solicitor-client costs. It is established that the question of costs is left to the discretion of the trial judge. The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 134). Reasons of public interest may also justify the making of such an order (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 80).

[150] Accordingly, and having regard to the issues in this case, costs are awarded to the applicant under Column IV of Tariff B of the *Federal Courts Rules*, *supra*.

## **JUDGMENT**

### **THE COURT**

- Allows the application for judicial review in part;
- Declares that the principles of procedural fairness were not followed in the administrative investigation carried out by the CPO;
- Declares that section 10.1 of the Order infringes the mobility rights guaranteed by subsection 6(1) of the Charter and that the infringement is not justified under section 1 of the Charter;
- Declares that section 10.1 of the Order is invalid;
- Allows the Governor in Council six months to redraft section 10.1 of the Order and make a new Order;
- Sets aside the decision of the Minister dated December 1, 2005, refusing Mr. Kamel's passport application;
- Reserves the applicant's other remedies;
- Awards costs under Column IV of Tariff B of the *Federal Courts Rules*, *supra*.

**“Simon Noël”**

---

**J.**

Certified true translation

Brian McCordick, Translator



## **APPENDICES**

1. Report to the Minister by the CPO dated November 22, 2005
2. Letter to Mr. Kamel from Ms. Thomas of the CPO dated December 14, 2005

25-02-2000 15:17 COURS FEDERALES

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TRANSMITTAL SLIP - NOTE  
D'ENVOI

T O / A USS (via D C E

FROM / DE PPTC

SUBJECT I Application of Fateh Kama, for a Canadian  
OBJET passport

ATTACHMENT Action Memorandum for the Minister of Foreign  
Affairs  
PIECE JOINTE

SECURITY/ SECURITE	SECRET
FILE / DOSSIER	DCB-02576- 2005 PPTC-31-05
DATE	November 22, 2005

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COMMENTS / COMMENTAIRES

The attached document is for your approval and signature.



Doreen Steidle  
Chief Executive Officer  
Passport Canada •

DCB Nov.29 pm 1:56

Date required - Demande pour le: December 6,  
2005

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DOSSIER

Doreen Steidle  
Chief Executive Officer  
Passport Canada  
997-6002

NOV 30 2005

DCB-02576-2005  
PPTC-31-05

[TRANSLATION] December 1, 2005  
Recommendation approved  
by the Minister

Action Memorandum for:  
The Minister of Foreign Affairs

ISSUE:            Application of Patch Kamel for a Canadian passport


**RECOMMENDATION:**

1.                    That you refuse to issue a passport to Fateh Kamel under section 10.1 of the Canadian Passport Order in light of the information contained in the unclassified background material available to you in this memorandum.



Marie-Lucie Morin  
Associate Deputy Minister

V. Peter Harder  
Deputy Minister of Foreign Affairs



BACKGROUND:

2. Fateh Kamel is a Canadian citizen who was found guilty of terrorist crimes in France in 2001 involving the manufacture and use of false passports. He applied for a Canadian passport on June 13, 2005.<sup>1</sup>
3. Kamel was born in Algeria on March 14, 1960 and arrived in Canada in 1987. The following year he married a Canadian. He became a Canadian citizen on January 27, 1993. He signed his Canadian passport application that day, and submitted his application in Montreal on January 29, 1993. He was issued a passport valid until January 29, 1998, which he declared stolen two years later, in 1995, and was issued a second passport valid until 2000. That passport was replaced at Kamel's request less than two years later, in 1997, with another passport valid until July 29, 2002)
4. In May 1999, Kamel was arrested in Jordan and extradited to France where he was convicted in 2001 of terrorist offences and sentenced to eight years imprisonment as the leader of an international network whose purpose was to plot terrorist attacks and procure arms and passports for terrorists throughout the world.<sup>1</sup>
5. The Tribunal de Grande Instance de Paris' convicted Kamel with 21 other co-accused for his activities in 1996, 1997 and 1998 in a conspiracy to prepare terrorist acts, specifically, a plot to commit bomb attacks in Paris metro stations and a series of attacks in Roubaix in northern France.<sup>6</sup> In its decision the French Court indicated that Kamel travelled extensively in 1994 and 1995 in Bosnia, to Zagreb, in Slovenia, to Montreal, in Austria and in

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See Tab 1- Kamel's passport history.

<sup>2</sup> The passport issued to Kamel in 1997 was coded 18 which means that the passport was issued to replace a valid passport submitted with an application for cancellation or destruction. In his letter to the Acting Director of Security, Passport Canada, dated November 9, 2005, Kamel explains that he found the passport in 1997 that *he* had reported stolen to Passport Canada in 1995 and which was replaced with a new passport. When he reported that he had found the stolen passport, the Passport Canada agent told him to keep both the found and replacement passports, and because the original replacement passport indicated on it that it replaced a stolen passport, a new passport with no indication that the previous had been stolen was issued. See Tab 4.

Where a passport is still valid, it must be submitted with an application for a new passport, however, when cancelled, it may be returned at the applicant's request.

<sup>4</sup> See Tab 2 at p. 86 of the Jugement du Tribunal de Grande Instance de Paris.

<sup>5</sup> The Tribunal de Grande Instance de Paris is hereinafter referred to as "the French Court".

See Tab 3 - "Terrorist returns: Tory urges Ottawa to consider revoking citizenship," Stewart Bell, National Post, February 26, 2005.

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the Netherlands to solidify his position in the terrorist network. His part in falsifying and supplying passports to terrorists occurred in 1996.<sup>7</sup>

6. The evidence before the French Court did not reveal that Kamel used Canadian passports in the commission of the passport-related offences of forgery to assist terrorism. However, the French Court found that Kamel was involved in a conspiracy to forge and use forged passports while he was in Canada as well as in Turkey, Bosnia, Belgium and France. In reviewing the evidence before the Court, including the testimony of Kamel's co-accused, the French court mentions that Canada and, particularly an apartment in Montreal where contact between several of the co-accused and Kamel occurred, appeared to be one of the fundamental places involved in the conveying of passports to Islamic extremists in Turkey.<sup>8</sup> Kamel denies that the French Court's decision ever determined his role in any fraudulent activity.<sup>9</sup> He also denies having forged or used a passport not belonging to him in his travels, or used any documents for terrorist activities, or played any role in the document fraud alleged by the French police.<sup>7</sup>

7. As part of Kamel's sentence, the French court ordered his indefinite ban from French territory, the most severe sentence affecting civil rights that may be imposed on non-French citizens according to the Penal Code.<sup>8</sup>

8. In December 2001, after Kamel had been convicted, the Canadian Embassy in Paris attempted without success to locate Kamel's Canadian passport valid until July 29, 2002. The officials at the French prison where Kamel was incarcerated confirmed that they were in possession of Kamel's certificate of citizenship and his driver's licence but not his passport.<sup>9</sup>

9. While in custody, Kamel applied for transfer to Canada under the European Convention on the Transfer of Sentenced Persons but his request *was* refused by French authorities in December 2003.<sup>7</sup>

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See Tab 2 at page 79.

See Tab 2 at page 80.

See Tab 4 - Kamers letter of August 18, 2005 to the Acting Director of Security. Passport

See Tab 4 - Kamel's letter of November 9, 2005 to the Acting Director of Security, Passport

See Tab 5 - Case Note from Canadian Embassy in Paris dated 11-May-2001.

7 See Tab 5 - Case Note from Canadian Embassy in Paris dated 14-Dec-2001.

See Tab 5 - Case Note from Canadian Embassy in Paris dated 12- Jan-2003.

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Canada.

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Canada.

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10. Kamel was released from prison on January 29, 2005, in accordance with the statutory remission and parole provisions of French criminal law, after serving four years of his sentence but having been in custody since his arrest in May 1999<sup>14</sup>. 'Kamel applied for a Canadian passport from prison in December 2004 including a declaration that his previous passport was lost, stolen or destroyed. Because Kamel is a Canadian citizen, the Canadian Embassy in Paris issued him an Emergency Passport expiring on January 30, 2005 allowing him to return to Montreal on January 28, 2005. On June 13, 2005, Kamel applied for a passport in Montreal.

CONSIDERATIONS:

Minister's Authority under the Canadian Passport Order (CPO)

11. Under section 10.1 of the CPO, you, as the Minister of Foreign Affairs, have the discretion to refuse or revoke a passport where you are of the opinion that such action is necessary for the national security of Canada or another country.

12. Since your decision can be appealed to the Federal Court of Canada, administrative law and fairness demand that you provide reasons for your decision. In order to successfully challenge your decision under the CPO, an applicant would have to establish that you acted arbitrarily, in bad faith, that you were motivated by an improper purpose or that you based your decision on irrelevant considerations." A minister's statutory decision may also take into account current public policy."

13. "Passport" is 'defined under section 2 of the CPO as a Canadian travel document that shows identity and nationality and facilitates travel outside Canada, but "national security" as it relates to Canada or another country is not defined. You must, therefore, in exercising your authority to refuse a passport under section 10.1 CPO, decide what "national security" means.

14. Kamel was convicted in France in 2001 for being part of a criminal organization whose purpose *was* to prepare for acts of terrorism contrary to articles 421-2-1 and 450-1 of the Penal Code of France.<sup>17</sup> Two equivalent indictable offences in Canada are section 83.03 of the Criminal Code (CC) under which no one may provide, make available, etc., property or services

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<sup>14</sup> Kamel *was* in jail for almost six years from May 1999 to January 29, 2005.  
See also Tab 6 - s.721-I French Code of Criminal Procedure.

<sup>15</sup> *Comeau's Sea Foods Ltd v. The Queen in right of Canada* (1997) 192 D.L.R.(4th) 193 at p.201 (SCC), *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3.

<sup>16</sup> "When a Public Authority *is* prevented from exercising its statutory powers it can be said that the public interest of which the authority is the guardian suffers irreparable harm," per Pratte, LA\_ of the FCA in *Canada v. Fishing Vessel Owner's Association of B.a* , [1985] 1 F.C.791.

<sup>17</sup> See Tab 9 - Sections of the French Penal Code.

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for terrorist purposes, and section 83.04 CC under which no one may use or possess property for terrorist purposes.

15. Kamel was also convicted in France at the same time and in relation to the terrorist offence, of abetting the forgery of a public document establishing a right, an identity or a capacity and abetting the use of a forged public document establishing a right, an identity or a capacity contrary to sections 441-1 and 441-2 of the Penal Code of France.<sup>18</sup> These last two offences as they relate to passports are equivalent to the indictable offences described in section 57 CC, namely the forgery of a passport or the use of a forged passport.

16. In federal legislation, "terrorism" is recognized *as* a serious threat to national security. For example, a terrorist activity committed in or outside Canada is one of the purposes listed *as* prejudicial to the safety or interests of the State in section 3 of the *Security of Information Act*, 1985, c. 1; 2001, c. 41, s. 25. The *Anti-terrorism Act* was enacted on December 24, 2001, to protect Canadians from terrorist activity. It amended the Criminal Code to include terrorist offences and establish a list of terrorist groups under section 83.05. The French Court that convicted Kamel of terrorism found that he was assisting the CIA (Armed Islamic Group), a terrorist group listed under the CC on July 23, 2002 by the Governor in Council on the recommendation of the Minister of Public Safety and Emergency Preparedness and that Kamel had early sympathy with the Jemaah Islamiyah, a terrorist group listed on April 23, 2003.<sup>19</sup> The GIA and Jemaah Islamiyah are also listed as being involved in terrorist activity in the United Nations Suppression of Terrorism Regulations (SOR/2001-360) for which you *as* the Minister of Foreign Affairs is responsible.<sup>20</sup>

17. Under section 10.1 of the CPO, the Minister of Foreign Affairs must consider not only the national security of Canada but also international security. The Canadian passport is an identity document whose purpose is to facilitate international travel. You, *as* the Minister of Foreign Affairs, have a responsibility in issuing a Canadian passport to protect its reputation and safeguard global security as well as the security of Canadians.

18. The Supreme Court of Canada in *Suresh Canada*<sup>21</sup> on the issue of lack of any direct evidence of danger to the security of Canada, said at paragraph 88:

"Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved,

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<sup>18</sup> See Tab 9 -Sections of the French Penal Code.

<sup>19</sup> See Tab 2 at page 81 and Tab 7 - Listed Terrorist Entities under the CC.  
See Tab 8 - UN Suppression of Terrorism Regulations.

<sup>21</sup> See Endnote 15.

we believe courts now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada's security... International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid. First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them in the terrorist activity. Second, terrorism itself is a world-wide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventative or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered. Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism. These considerations lead us to conclude that to insist on direct proof of a specific threat to Canada as the test for "danger to the security of Canada" is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security."

19. The current National Security Policy of the Government of Canada (NSP) focuses on addressing three core national security interests: protecting Canada and Canadians at home and abroad, ensuring that Canada *is not a* base for threats to our allies, and contributing to international security. The NSP specifically mentions that Canada has played a key role in negotiating the implementation of 12 UN terrorism conventions.<sup>22</sup>

20. In the UN convention for the Suppression of Terrorist Bombings ratified by Canada in May 2002, Canada agreed to cooperate with other states in the prevention of terrorist bombings by taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of terrorist bombing offences within or outside their territories.' Section 10.1 of the CPO, authorizing the Minister. of Foreign Affairs to refuse or revoke a passport on the grounds of national security of Canada or another country, was enacted in December 2004.

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22 See Tab 10 - UN Terrorism Conventions.

23 See Tab 1 I - international Convention for the Suppression of Terrorist Bombings.

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21. In the Karna case, France has banned Kamel from its territory for life as a result of his part in plotting terrorist bombings. The issuance of a Canadian passport to Kamel would facilitate his travel to other countries of the European Economic Community from which entry to France does not require a passport thus thwarting France's own efforts to prevent terrorist bombings and safeguard its national security. When Kamel applied for a passport in Montreal on June 13, 2005, he indicated that he needed the passport by June 25 so that he could travel to Thailand. Bangkok is recognized worldwide as the central market for counterfeit passports.' The group, Jemaah Islamiyah, with which Kamel was found by the French court to have sympathy, is described under section 83.05 CC as an Islamist terrorist organization that has emerged as the most extensive transnational radical Islamist group in Southeast Asia, including Thailand.'

22. There is a statutory mechanism to remove non-Canadians on security grounds under the *Immigration and Refugee Protection Act* (IRPA) but, other than your discretion to refuse a passport to a Canadian citizen, there is no statutory means in Canada, short of criminal prosecution, of preventing a Canadian citizen who poses a threat to the security of Canada or another country from travelling freely.

23. This legislative lacuna was, in light of the London bombings in July 2005, the subject of the prophetic comments of the House of Lords in a 2004 judgment dealing with the detention of non-Britons suspected of terrorism.

"In the aftermath of the attacks on targets in the United States of America on 11 September 2001 Her Majesty's Government had to consider what steps they should take to guard against the risk of similar attacks in this country. In particular, they had to consider what should be done about suspected international terrorists living here who might be involved in plotting such attacks ("suspects"). In principle, the nationality of the suspects would be irrelevant to the threat that they posed. **If a man is holding a gun at your head**, it makes no difference whether he **has a** British or a foreign passport in **his pocket**. [our emphasis] Similarly, if a network of terrorists is planning an attack on the life of the nation, the danger is the same, irrespective of the nationality of the individuals involved."

A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department [2004] UKHL 56, per Lord Rodger of Earlsferry, at paragraph 160.

24. In summary, the issuance of a passport is an administrative decision. It is not a determination of the guilt or innocence of a person of a criminal offence, nor is it determinative of a person's right to stay in Canada. It is a decision about whether or not to facilitate the foreign travel of an individual by issuing an identity document authorized by the Government of Canada.

25. Kamel's passport history shows that, prior to his arraignment and conviction, he has repeatedly applied for and been issued replacement passports. He was convicted in France of a terrorist offence and passport fraud in support of terrorist activity. The policy and international obligations of the Government of Canada demand that Canada does its utmost to prevent threats to international security.

**RESOURCE IMPLICATIONS:**

26. NIL.

**COMMUNICATIONS IMPLICATIONS:**

27. The decision to formally refuse Kamel's passport application will likely draw media attention, if the applicant wants to make the refusal public. The refusal will also likely be linked to the formal refusal of a passport to Abdurahman Khadr, which remains before the courts.

28. A majority of Canadians will likely be in favour of the passport refusal based on national security grounds. A smaller number of Canadians may feel that the passport refusal goes against the Charter of Rights and Freedoms and could oppose that decision.

**COMMUNICATIONS ACTION:**

29. FAC will take a responsive approach to communications. A communications approach and media lines will be developed with input from Department of Justice Canada, Foreign Affairs Canada and Public Security and Emergency and Preparedness Canada. Media lines will also be shared with the Privy Council Office.

**PARLIAMENTARY IMPLICATIONS/ACTION:**

30. NIL.

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## INDEX TO SUPPORTING DOCUMENTS

Tab 1 - Passport history of Fatah Kamel

Tab 2 - Tribunal de Grande Instance de Paris, No d'affaire 9625339012, Jugement du 06 avril 2001

Tab 3 - Stewart Bell, "Terrorist returns: Tory urges Ottawa to consider revoking citizenship", *National Post*, February 26, 2005

Tab 4 - Letters from Fatah Kamel to Acting Director of Security, Passport Canada, dated August 18, 2005 and November 9, 2005

Tab 5 - Case Notes from Canadian Embassy in Paris

Tab 6 - French Code of Criminal Procedure section 721-1

Tab 7 - List and Description of Terrorist entities under the Criminal Code

Tab 8 - UN Suppression of Terrorism Regulations

Tab 9 - Sections of the French Penal Code Tab 10

- List of UN Terrorism Conventions

Tab 11 - International Convention for the Suppression of Terrorist Bombings

Tab 12 - Sebastien Berger, "Bangkok world hub of fake passports", *Vancouver Sun*, August 29, 2005, taken from the *Daily Telegraph*  
Alisa Tang, "Thailand emerges as fake passport capital for criminal underworld, terrorists", Associated Press, September 8, 2005

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APPENDIX 2

Passeport Passport  
Canada Canada

Gatineau, Canada MA  
003

December 14, 2005

*Notre référence*

*Notre référence*

*Our as*

A-9540

*Your file*

**BY PRIORITY POST**

**Subject: Notice of decision concerning your passport application dated June 13, 2005**

Dear Mr. Kamel:

This is further to the passport application you submitted on June 13, 2005, at the Montreal office of Passport Canada, and takes into account your letters dated August 18 and November 9, 2005, in reply to our letters of August 5 and October 28, 2005.

As you were informed in our earlier communications, your eligibility for a Canadian passport has been reviewed by the Security Bureau of Passport Canada. Among the information that came to our attention are your convictions in France for terrorism-related offences and fraud offences in relation to passports used to support terrorist activities. In addition, your previous passport history shows numerous replacements of valid passports.

In its policy for fighting terrorism, Canada has committed itself to doing everything in its power to combat threats to national security. Given this context, section 10.1 of the Canadian Passport Order (EI/81-86), hereinafter referred to as the Order, provides that the Minister of Foreign Affairs may refuse or revoke a passport if the Minister is of the opinion that such action is necessary for the national security of Canada or another country.

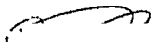
After considering all of the information relevant to your case, including your written submissions, the Security Bureau has recommended to the Minister of Foreign Affairs that he refuse you a passport under section 10.1 of the Order.

This is to inform you that on December 1, 2005, after considering that information and those submissions and weighing your interests in the issuance of a passport and the national interests of Canada and other countries, the Minister formally approved the recommendation and decided to refuse you a passport under section 10.1 of the Order.

The Minister's decision is considered to be final and effective as of the date on which it is received by the applicant. In the event that you wish to contest this decision, you may apply to the Federal Court of Canada for judicial review within 30 days of the date on which you receive this notice.

Notwithstanding this decision, you may at any time send any additional noteworthy information relating to your eligibility for a passport to the Security Bureau. That information will then be considered by the Security Bureau, which will determine whether it warrants a new recommendation to the Minister of Foreign Affairs.

Sincerely yours,



Jody Thomas  
Acting Director General  
Security Bureau

**FEDERAL COURT OF APPEAL**  
**SOLICITORS OF RECORD**

**DOCKET:** T-100-06

**STYLE OF CAUSE:** FATEH KAMEL

**Applicant**

v.

ATTORNEY GENERAL OF CANADA

**Respondent**

**PLACE OF HEARING:** Montréal

**DATE OF HEARING:** November 26 to 28, 2007

**REASONS FOR JUDGMENT  
& JUDGMENT BY:** The Honourable Mr. Justice Simon Noël

**DATED:** March 13, 2008

**APPEARANCES:**

Johanne Doyon APPLICANT

Nathalie Benoît RESPONDENT

**SOLICITORS OF RECORD:**

Doyon et associés APPLICANT

Montréal, Quebec

John H. Sims, QC Department of Justice Canada Montréal, Quebec	RESPONDENT
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