

**Date: 20090123**

**Docket: A-167-08**

**Citation: 2009 FCA 21**

**CORAM: DÉCARY J.A.  
LÉTOURNEAU J.A.  
BLAIS J.A.**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Appellant**

**and**

**FATEH KAMEL**

**Respondent**

Hearing held at Montréal, Quebec, on January 12, 2009.

Judgment delivered at Ottawa, Ontario, on January 23, 2009.

**REASONS FOR JUDGMENT BY:**

**DÉCARY J.A.**

**CONCURRED IN BY:**

**LÉTOURNEAU J.A.  
BLAIS J.A.**

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**REASONS FOR JUDGMENT**

**DÉCARY J.A.**

[1] This appeal essentially deals with the constitutional validity of section 10.1 of the *Canadian Passport Order* (Order), which authorizes the Minister of Foreign Affairs (the Minister) to refuse to issue a passport “if the Minister is of the opinion that such action is necessary for the national security of Canada or another country” (SI/81-86 as amended by SI/2004-113).

[2] The circumstances that form the backdrop to this dispute are relatively simple and clearly uncontroversial. I will relate only those that are the most relevant.

[3] The respondent, Mr. Kamel, was born in Algeria in 1960. He immigrated to Canada in 1988 and became a Canadian citizen on January 27, 1993.

[4] On January 29, 1993, Mr. Kamel was issued a Canadian passport. In October 1995, Mr. Kamel informed the Canadian authorities that his passport had been stolen. A new passport was issued, valid until November 10, 2001. In July 1997, he found the stolen passport and filed a new passport application. A new passport was then issued, valid until July 2002.

[5] In May 1999, Mr. Kamel was arrested in Jordan and then extradited to France. On April 6, 2001, after a trial lasting several days, the Tribunal de Grande instance de Paris convicted him of membership in a criminal organization for the purpose of preparing a terrorist act and complicity in the forgery of three passports he had brought from Canada. The act of terrorism in question was the attack in Roubaix, France, in 1998. Mr. Kamel had legal representation. The Tribunal described Mr. Kamel as the [TRANSLATION] "... principal organizer of international networks determined to prepare attacks and procure weapons and passports for terrorists acting throughout the world". Some twenty accused were tried at the same time as Mr. Kamel. He received the harshest sentence: imprisonment for eight years and permanent exclusion from France.

[6] Mr. Kamel was imprisoned in France. He was released after serving half of his sentence. He returned to Montréal, his place of residence in Canada, on January 29, 2005, with a [TRANSLATION] "temporary passport valid for one trip only" issued as an exceptional case to allow him to return to Canada (A.B., Vol. 7, p. 1441).

[7] On June 13, 2005, Mr. Kamel applied to the Canadian authorities for a new passport. He was planning a business trip to Thailand. According to the evidence on record, “there is intense passport trafficking activity in Thailand.” (Rudner Affidavit, Reasons for Judgment, para. 40).

[8] Eventually, after numerous exchanges that are not relevant for the purposes of this appeal, Passport Office Canada recommended that the Minister refuse Mr. Kamel’s passport application. On December 1, 2005, the Minister refused to issue the passport.

[9] Mr. Kamel then applied to the Federal Court for judicial review of the Minister’s decision. He argued, first of all, that the rules of procedural fairness had been violated. He also submitted that sections 4 and 10.1 of the Order infringed his rights as guaranteed by sections 6, 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the Charter).

[10] Mr. Justice Simon Noël allowed Mr. Kamel’s application in part (2008 FC 338). He determined that (1) the Federal Court has jurisdiction to review the legality of a Minister’s decision in the exercise of a royal prerogative; (2) the requirements of procedural fairness were breached in this case; (3) section 10.1 of the Order infringes the mobility rights guaranteed by subsection 6(1) of the Charter; and (4) the Attorney General of Canada cannot seek to justify this infringement under section 1 of the Charter since section 10.1 of the Order, owing to its vagueness, is not a “law” within the meaning of section 1. As a result of that determination, Justice Noël did not address the issue of whether section 10.1 of the Order infringes the rights guaranteed by sections 7 and 15 of the Charter.

Since it was unnecessary, the judge also did not conduct the justification analysis under section 1 of the Charter. However, he refused to compel the Minister to issue a passport to Mr. Kamel. He set aside the Minister's decision and remitted the file to the Minister for a re-determination that meets the requirements of procedural fairness. He declared section 10.1 of the Order invalid and gave the Attorney General of Canada a period of six months to draft wording that would comply with the Charter.

[11] The Attorney General of Canada is appealing. The suspension of the declaration of invalidity was extended until this Court disposes of the appeal. The Attorney General is limiting the appeal to the following points: the violation of section 6 of the Charter and the justification under section 1 of the Charter. Accordingly, I will not comment on the other aspects of this case, and nothing in my reasons shall be interpreted as having an impact on the decision that the Minister will eventually make after reconsidering Mr. Kamel's passport application. In addition, since the respondent did not refer in his memorandum to the allegations regarding section 15 of the Charter, I will not deal with them any further. As regards section 7, the respondent merely indicated in a footnote that he was relying on his memorandum from the Federal Court. This is inappropriate and unacceptable. I will not deal with section 7 either.

[12] From the outset, I point out that the real issue is section 10.1 of the Order and that even if the respondent also takes issue with section 4, specifically subsections 4(3) and (4), this incidental attack has no basis whatsoever and does not merit our attention.

[13] I also note that, although this case involves an Order and not a statutory provision, I will be using the word “Parliament” to facilitate reading the reasons.

**Relevant provisions**

*Canadian Passport Order*

*Décret sur les passeports canadiens*

4. (1) Subject to this Order, any person who is a Canadian citizen under the Act may be issued a passport.

4. (1) Sous réserve du présent décret, un passeport peut être délivré à toute personne qui est citoyen canadien en vertu de la Loi.

(2) No passport shall be issued to a person who is not a Canadian citizen under the Act.

(2) Aucun passeport n’est délivré à une personne qui n’est pas citoyen canadien en vertu de la Loi.

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

(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) 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.

(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.

...

[...]

REFUSAL OF PASSPORTS AND  
REVOCAATION

REFUS DE DÉLIVRANCE ET  
RÉVOCAATION

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

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

- (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;

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

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

- (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) 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) 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 assujéti 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

(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*;

(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

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

**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

imposées dans le cadre de dispositions privatives de liberté comparables à celles énumérées aux sous-alinéas d)(i) à (iii);

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

**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;



means of false or misleading information; or

(e) has ceased to be a Canadian citizen.

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

e) n'est plus citoyen canadien.

**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.

**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.

***Canadian Charter of Rights and Freedoms***

***Charte canadienne des droits et libertés***

**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.

**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.

...

[...]

**6.** (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

**6.** (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :

- a) to move to and take up residence in any province; and
- b) to pursue the gaining of a livelihood in any province. ...

- a) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;
- b) de gagner leur vie dans toute province.[...]

## **I. Section 6 of the Charter**

[14] The appellant submits that subsection 6(1) of the Charter, which gives every Canadian citizen “the right to enter, remain in and leave Canada”, does not impose a duty on the state to facilitate the international travel of Canadian citizens. The appellant also maintains that the respondent has not demonstrated that a passport is required to enter or leave Canada.

[15] At the hearing, we did not consider it useful to hear the respondent on this issue. In fact, we agree substantially with Justice Noël’s remarks on this point. To determine that the refusal to issue a passport to a Canadian citizen does not infringe that citizen’s right to enter or leave Canada would be to interpret the Charter in an unreal world. It is theoretically possible that a Canadian citizen can enter or leave Canada without a passport. In reality, however, there are very few countries that a Canadian citizen wishing to leave Canada may enter without a passport and very few countries that allow a Canadian citizen to return to Canada without a passport (A.B., Vol. 7, p. 1406, Thomas Affidavit). The fact that there is almost nowhere a Canadian citizen can go without a passport and that there is almost nowhere from which he or she can re-enter Canada without a passport are, on their face, restrictions on a Canadian citizen’s right to enter or leave Canada, which is, of course, sufficient to engage Charter protection. Subsection 6(1) establishes a concrete right that must be assessed in the light of present-day political reality. What is the meaning of a right that, in practice, cannot be exercised?

[16] Moreover, it is ironic, as Justice Noël observed, that the same state that seeks to minimize the consequences of not holding a passport felt the need to issue Mr. Kamel a temporary passport valid only for his return to Canada.

[17] It must be noted that subsection 6(1) does not grant the right to enter another country or the right to leave another country. It is the authorities of that other country who determine their own entry and exit conditions. Subsection 6(1) does not impose any obligation on the Canadian government to guarantee entry to or exit from another country.

[18] I add, however, that my determination, which is favourable to the respondent, is a double-edged sword. For although the courts can, and even must, consider present-day political realities in interpreting the nature of the protection granted by subsection 6(1) of the Charter, they can, and even must, consider those same realities, with the appropriate burden of proof, when the time comes to determine whether the restriction is justified “in a free and democratic society” (section 1 of the Charter).

## **II. Justification under section 1 of the Charter**

*(a) Is there a “law” (“règle de droit”)?*

[19] In my opinion, Justice Noël erred in finding that section 10.1 of the Order was not a “law” allowing the state to claim the benefit of section 1 of the Charter, on the ground that the provision was vague and overbroad.

[20] I adopt the following principles from the teachings of the Supreme Court of Canada regarding the constitutional invalidity of statutory or regulatory provisions for vagueness:

- (1) the threshold for finding a law vague is relatively high. State conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one (*R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 626, 638-639);
- (2) a law is unconstitutionally vague if it does not provide an adequate basis for legal debate and analysis, does not sufficiently delineate any area of risk or is not intelligible. The law must offer a grasp to the judiciary. Certainty is not required. (*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, para. 15; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, para. 90);
- (3) the courts may use a number of sources to determine whether the words used may guide a legal debate, always bearing in mind the intention of Parliament. The courts must first consider the words used in their legal and social context. They may also refer, *inter alia*, to authorities and expert opinions, whether they were expressed before or after the provision in question was adopted (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, para. 80);

- (4) even if, in a given case, the drafters could have adopted a more detailed definition, the provision is not constitutionally vague for that reason.
  
- (5) some fields, such as international relations and security, do not lend themselves to precise codification insofar as the situations envisaged are variable and unpredictable. In that sense, a certain level of generality and flexibility is necessary to preserve the effectiveness of the law for the future (*Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, para. 48; *Nova Scotia Pharmaceutical*, above, pages 641-642; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, para. 85);
  
- (6) more specifically, with regards to the security of Canada or national security (in a Canadian context, these terms seem to me to be interchangeable and I consider the expression “national security of Canada” to be redundant; in a global context, the expression “national security” appears to me to be the most widely used), the term “national security of Canada” serves to guide a legal debate. In *Suresh*, where the expression “danger to the security of Canada” was not defined at paragraph 53(1)(b) of the *Immigration Act*, the Supreme Court of Canada recognized, at paragraph 85, that the expression was difficult to define and accepted that the determination of what constitutes such a danger is highly fact-based and political in a general sense. The Court nevertheless determined, at paragraphs 82 and 85 to 90, that the expression was sufficiently intelligible to be subject to judicial interpretation, and therefore, to satisfy the constitutional test for precision.

[21] Section 10.1 must be read in the context of the nature of the royal prerogative at issue and in the context of the Order itself, particularly the September 2004 additions of subsections 4(3) and (4) and section 10.1.

[22] For the purposes of the debate and assuming, without deciding, that the *Canadian Passport Order* adopted in 1981 (SI/81-86), which made no reference to national security, nonetheless preserved the royal prerogative over passports in cases of national security, there can be no doubt that the amendments made to the Order in 2004 (SI/2004-113), namely, the addition of subsections 4(3) and (4) and section 10.1, confirm that this prerogative is maintained.

[23] Subsection 4(3) confirms the existence of a royal prerogative over passports, which is broader than the prerogative to which the Order applies.

[24] Subsection 4(4) indicates that the royal prerogative over passports can be exercised by the Governor in Council or the Minister of Foreign Affairs.

[25] Section 10.1 states that the Minister has the power to refuse to issue a passport for reasons of national or international security. This new section establishes that in cases of national or international security, the Minister, rather than Passport Canada, exercises that power. We know that under section 9 of the Order, Passport Canada has the power to refuse to issue a passport on the

grounds set out in that section. This clearly shows the Governor in Council's intention to place the refusal to issue passports for reasons of national security in a particular category.

[26] It is curious that the provisions clarifying the Order's effect and expressly identifying a previously unmentioned ground for refusing to issue a passport are now alleged to be vague. Read in the context of sections 9 and 10, subsections 4(3), 4(4) and section 10.1 provide an important clarification, which was perhaps unnecessary (which, I repeat, I am not deciding), but which is now unavoidable.

[27] If I understand his argument, the appellant contends that the expression "if the Minister is of the opinion that such action is necessary for the national security of Canada or another country" at section 10.1, or one of its components, is vague. I do not agree.

[28] The words "is of the opinion" ("s'il est d'avis") are part of the usual language of Canadian administrative law. They vest a decision-maker with discretion. It is not disputed in the jurisprudence that the decision-maker must exercise this discretion in a reasonable manner, taking relevant factors into account. There is no vagueness within the constitutional meaning of the term.

[29] The words "is necessary" are also words found in many statutory and regulatory provisions. They afford a basis for "a legal debate". They even provide a framework for, and therefore limit, the discretion conferred upon the decision-maker. As Chief Justice Lamer noted in *R. v. Morales*, [1992] 3 S.C.R. 711, at page 737, the word "necessary" means that the decision-maker cannot simply

be satisfied that his or her decision would “merely be convenient or advantageous”. These words impose an additional burden on the state.

[30] The words “for the national security of Canada or another country” must be interpreted in light of the Supreme Court of Canada’s finding in *Suresh* concerning the expression “danger to the security of Canada”. If the concept of “security of Canada” was held to be sufficiently precise in *Suresh*, it must be all the more so in this case, where (1) the adjective “necessary” clarifies the provision in that it introduces the requirement of a causal connection between national security and the refusal to issue a passport; and/or (2) the provision at issue specifies that the threat to the security of another country is envisaged, thus responding to the concerns expressed by the Supreme Court of Canada at paragraphs 87 and 88 of its reasons in *Suresh*.

[31] I conclude that section 10.1 of the Order satisfies the test of precision that is required to constitute a “law” (“règle de droit”) within the meaning of section 1 of the Charter. Justice Noël erred in law by confusing the constitutional validity of a provision with the validity of the decision made under that provision. If the court believes that, in a given case, the link between the refusal to issue a passport and the national security of Canada or another country was not established or that the Minister’s decision does not meet the other requirements of Canadian administrative law, the remedy is not to strike down the enabling provision but to set aside the decision.



*(b) The justification itself*

[32] The analysis to determine whether a restriction of a Charter right is justified under section 1 requires that the following two questions be answered in the affirmative:

- (1) is the restriction designed to achieve a sufficiently important objective?
- (2) are the means chosen proportional to the objective?

*(R. v. Oakes*, [1986] 1 S.C.R. 103, p.138-139)  
*(Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34,  
[2003] 1 S.C.R. 835, at para. 33)

[33] In turn, the second part—proportionality—has what Chief Justice Dickson describes in *Oakes* at page 139 as “three important components”:

- the measure must be rationally connected to the objective: it must be carefully designed to achieve this objective and be neither arbitrary nor unfair;
- the means chosen to reach the objective should impair as little as possible the right or freedom in question; and
- there must be a proportionality between the effects of the measure and the objective sought.

[34] The analysis calls for “canvassing the nature of the social problem which [the impugned provision] addresses” (*Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, para. 87). Only a contextual analysis will serve to establish the objective of the impugned provision, measure the proportionality of the means used and determine the type of proof which a court can demand of the legislator to justify its measures.

[35] The analysis must be conducted with flexibility. The standard of proof that the Attorney General must meet is that of the balance of probabilities, which is established by the application of

common sense to what is known, even though what is known may be deficient from a scientific point of view (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, paras. 63 and 137).

[36] Justice Bastarache stated in *Harper*, above, at paragraphs 77 and 78, “[w]here the court is faced with inconclusive or competing social science evidence relating the harm to the legislature’s measures, the court may rely on a reasoned apprehension of that harm”. He added: “This Court has, in the absence of determinative scientific evidence, relied on logic, reason and some social science evidence in the course of the justification analysis in several cases”. In *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, at paragraph 29, he accepted evidence consisting of approximations and extrapolations.

[37] This leads me to examine the context of the impugned measure.

[38] The measure in question is the discretion vested in the Minister of Foreign Affairs to refuse to issue a passport to a Canadian citizen where the refusal is necessary for the national security of Canada or another country.

[39] It is clear from the explanatory note accompanying the publication of the amendments to the Order in 2004 that these amendments are part of the Government of Canada’s “strategic framework and action plan” tabled in the House of Commons on April 27, 2004, entitled “Securing An Open Society: Canada’s National Security Policy”:

The national security policy is an integrated, comprehensive approach for ensuring the safety of Canadians and for responding to emerging threats to national and international security. Canada is facing an increasingly complex and changing security environment, both domestically and internationally, underscored by growing threats of terrorism and organized criminal activity. One of the six major strategic areas requiring action to address those threats is border security, including using facial recognition biometric technology to enhance it. The passport program, which is part of Canada's national security framework, must be adjusted to meet this evolving threat environment.

[40] The Attorney General of Canada filed two affidavits in evidence.

[41] One affidavit, that of Jody Thomas, Acting Director General of the Security Bureau at Passport Canada, relates the circumstances surrounding Mr. Kamel's passport application and sets out the practices followed at Passport Canada for issuing, refusing and revoking passports (A.B., Vol. 7, pp. 1398 to 1411). The exhibits to the affidavit run to some 700 pages (A.B., Vol. 7 to Vol. 10).

[42] Ms. Thomas describes the types of passports that are issued and provides an account of recent legislative and regulatory developments in the United Kingdom, Australia, New Zealand and the United States. She explains the role played by Passport Canada in the fight against terrorism. The misuse of Canadian passports is of particular concern to the Canadian government, which is participating in the international effort to better control the fraudulent use of passports. This effort is evidenced by the adoption of numerous resolutions by INTERPOL, the G-8 summit, the European Union and the International Civil Aviation Organization.

[43] Passport Canada is the government agency responsible for ensuring the security, integrity and value of Canadian passports. Its Security Bureau advises the Minister regarding the possible refusal of a passport for national security reasons. Passport Canada's Business Plan for 2005-2008 states that, in the current environment, ". . . security requirements have become the primary drivers of our business, and the most important aspect of our product." (A.B., Vol. 9, p. 1690).

[44] The other affidavit was filed by Professor Martin Rudner, who taught at Carleton University, Ottawa, who was Director of the Canadian Centre of Intelligence and Securities Studies. His 34-page affidavit (A.B., Vol. 1, pp. 92 to 125) is accompanied by 42 documents spanning 1200 pages (A.B., Vol. 1, p. 162, to Vol. 7, p, 1397). He concludes as follows, at paragraphs 2 and 54 (A.B., Vol. 1, pp. 93 and 125):

2. I have been asked to examine international terrorism as it relates to the issue and misuse of passports. It is my opinion that passport misuse and travel identity fraud enable international terrorist networks to operate and threaten the security of nations and the safety of peoples. It is, therefore, important and necessary to maintain in place robust systems for protecting the passport entitlement and determination process, and for ensuring the proper utilization of passports, in the interests of public safety, national security, and international cooperation in combating terrorism.
  
54. It is my opinion that the misuse of passports is a staple of international terrorism. Travel documents are as important for terrorists as are weapons. Terrorist groups depend on travel to meet, organize, train, plan, reconnoitre (sic) targets, and deploy for attacks. For their travels, terrorist activists and operatives make use of improperly obtained, altered or counterfeit passports and visas, and often tie in with people smuggling networks, and immigration and identity fraud. A seemingly genuine passport, however improperly acquired and fraudulently used, can provide near-impenetrable cover for terrorist activists and operatives on cross-border missions.

[45] At paragraphs 36 to 43 of his reasons, Justice Noël summarized the contents of Mr. Rudner's affidavit as follows:

[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.

[46] Mr. Kamel filed a five-page affidavit (A.B., Vol. 11, p. 2115), together with documents that run to some 600 pages (A.B., Vol. 11, p. 2120 to Vol. 12, p. 2706). This affidavit and these documents deal primarily with the "administrative" component of this case, which is no longer in dispute before us. These documents are of little value to the constitutional component.

[47] It follows from this context that the changes to the passport program in 2004 must be analyzed in the always fleeting, sometimes elusive light of national and international security and in conjunction with other measures in this regard taken by Canada, other countries and the international community. The constant efforts to improve the passport program are a link in a long chain that terrorist threats forced Canada and the rest of the world to forge during recent years.

[48] It follows that the courts that are called upon to evaluate the choices made by the Canadian government, whether these choices take the form of statutes, regulations, orders or programs, must show humility—since this is an area for the initiated; deference—since this is an area that involves efforts characterized by international solidarity; prudence—since this is an area that is constantly shifting; and also vigilance—since this is an area in which information is rare and secret and where there is a temptation to overreact, even in good faith.

[49] It follows, therefore, that in an analysis under section one of the Charter, the courts must be satisfied with documentary and oral evidence that is limited, incomplete, imperfect and inconclusive, and must weigh it with flexibility, good sense and pragmatism.

*(i) sufficiently important objective*

[50] I conclude from the evidence that section 10.1 of the Order has both a broad objective—to contribute to the international fight against terrorism and to comply with Canada's commitments in this area, and a particular objective—to maintain the good reputation of the Canadian passport.

[51] These objectives are, on their face, sufficiently important for a measure to be adopted that restricts the right of a Canadian citizen to enter or leave the country. Moreover, counsel for the respondent acknowledged at the hearing that if we conclude that section 10.1 of the Order is sufficiently precise to constitute a law, the intended objective was sufficiently important.

*(ii) proportionality test*

*(a) rational connection*

[52] Since the attacks of September 11, 2001, in the United States, terrorism and the means to counteract it have become a major concern and a top priority for the international community. Many countries, including Canada, have adopted policies, programs, statutes and regulations to strengthen their national security as well as international security.

[53] Professor Rudner's affidavit paints a picture of the context of the fight against terrorism, both nationally and internationally. His testimony demonstrates, in particular, that the passport is an essential work tool for terrorist groups. These groups will use valid, falsified, forged or stolen passports to travel surreptitiously, which facilitates recruiting members, transmitting information, obtaining funds and establishing cells, all with the ultimate aim of perpetrating attacks.

[54] It is, therefore, very important for Canada to implement a system for issuing passports that is secure and flawless. As Professor Rudner states,

Anything that might jeopardize the integrity of Canada's system for issuing and assuring the proper use of passports could put these national security interests at risk. Governmental authorities the world over have become wary of the dangers of passport misuse and identify fraud as facilitators of terrorism." (A.B., Vol. 1, p. 98)



If terrorists were found to be in possession of Canadian passports, this would be damaging to Canada, to Canadian interests, and to the integrity of the Canadian passport system.  
(A.B., Vol. 1, p. 101)

Justice Noël made the following finding of fact at paragraph 41 of his reasons, which I believe bears repeating:

[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.

[55] Canada has signed and ratified twelve of the thirteen United Nations conventions on terrorism, which attest to the solidarity of the international community in the fight against terrorism. The United Nations Security Council has passed a number of resolutions, including Resolution 1624 in 2005, which, at article 2,

2. Calls upon all States to cooperate, inter alia, to strengthen the security of their international borders, including by combating fraudulent travel documents and, to the extent attainable, by enhancing terrorist screening and passenger security procedures with a view to preventing those guilty of the conduct in paragraph 1(a) from entering their territory.

[56] This evidence, combined with logic, reason and common sense readily establishes a causal connection between the violation—refusing to issue a passport—and the benefit

sought—maintaining the good reputation of the Canadian passport and Canada’s participation in the international fight against terrorism.

*(b) minimal impairment*

[57] Parliament has a duty to “minimally impair” the right protected by the Charter.

Madam Justice Deschamps recently explained the step that the court must take in this regard as follows:

36 Although the legislative means are rationally connected to the legislative objective, if it can be shown that they do not minimally impair the right at issue, they will still fail to satisfy the proportionality element of the *Oakes* test (*supra*, at p. 139). In applying the minimal impairment requirement, a court is required to afford the legislature a margin of appreciation (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 999). That a court can propose means that are less impairing than the impugned legislation is not sufficient to give rise to a finding that an impairment is not minimal (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, at p. 1138). However, if legislation does not impair an individual’s rights “as little as is reasonably possible” (*R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 772), if in other words, legislation falls beyond “a range of reasonable alternatives” (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160), it will not satisfy the minimal impairment requirement. (*Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, para. 36)

[58] Furthermore, there are areas in which “a certain measure of deference” is appropriate. The area of national security and the fight against terrorism is most certainly one of them. These statements by Chief Justice McLachlin in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, paragraphs 43-44, where the issue was prohibiting commercial advertising, apply *a fortiori* to this case:

43 Again, a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem. There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake

less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives: *R. v Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy*.

44 The minimal impairment analysis in this case will also be coloured by the relationship between constitutional review and statutory interpretation. Before engaging in constitutional review, the law must be construed. This may have a critical effect at the stage of minimal impairment, where overbreadth is alleged. The process of interpretation may resolve ambiguity in favour of a more limited meaning. This may only be done in cases of real ambiguity in the statute. In cases of ambiguity, therefore, claims of overbreadth may be resolved by appropriate interpretation: *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, para. 32.

[59] Once it is established that the refusal to issue a passport on the ground of national or international security rationally serves a sufficiently important objective, it becomes difficult to imagine how the refusal to issue a passport could, substantially, take place other than in the manner prescribed by the Order.

[60] As I already noted, the Minister's refusal can only be exercised in accordance with the rules of Canadian administrative law. This case is a good illustration of this principle: Mr. Kamel's application will have to be reconsidered since the original review breached the rules of procedural fairness, according to Justice Noël. The justification of section 10.1 of the Order must be assessed on the basis of a ministerial decision that meets the requirements of the law and the jurisprudence.

[61] Moreover, this refusal can only be exercised if it is a “necessary” measure. As I indicated above, this requirement for a necessary connection makes it more difficult for the state to adopt a measure that impairs a right protected under the Charter.

[62] Finally, this refusal to issue a general passport does not necessarily result in completely depriving a Canadian citizen of his or her right to leave the country. There are other types of passports that can be issued, if necessary, including the limited validity passport for urgent or compassionate reasons.

[63] The Attorney General referred to statutory provisions adopted in Australia, Great Britain, New Zealand and the United States to point out their similarity with the Canadian Order. Counsel for the appellant, in turn, pointed out the differences in the provisions and maintained that the Canadian provision does not contain the same requirements as some of the others.

[64] This comparison is useful insofar as the analogy shows the same concern and the same type of methods used. The fact that the method, or the way of expressing it, adopted in one or more countries is a little different does not in any way signify that the method adopted in Canada is not reasonable. It is not the Court’s role to speculate on what, in its opinion, would be the perfect solution as long as the one chosen is within the range of reasonable solutions.

[65] I find that there is minimal impairment in this case.

(c) proportionality between the effects of the measure and the law's objective

[66] To echo the words of Chief Justice McLachlin in *JTI-Macdonald*, at paragraph 45, this is an inquiry that “focuses on the practical impact of the law”:

45. . . . What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?

[67] Once the Minister is of the opinion, in the lawful exercise of his or her discretion, that it is necessary to refuse to issue a passport to a Canadian citizen on the ground of national or international security, the denial of a passport does not weigh heavily in the balance when compared to the resultant strengthening of security. It is not for the Court to speculate on the harm that this person could cause to the security of Canadians, Canada and the international community. The evidence is clear: the Minister would fail in his or her duty to protect Canadians and Canada and to comply with Canada's international commitments if the Minister issued the requested passport. There is no reason to wait for the risk to materialize. The Court must be satisfied, here, with hypotheses and realistic speculations and must rely on, to quote Justice Bastarache in *Harper*, “a reasoned apprehension of . . . harm”. Common sense dictates that the possible collective harm outweighs the real individual harm.

Disposition

[68] For these reasons, I conclude that section 10.1 of the *Canadian Passport Order* infringes the right of a Canadian citizen, under section 6 of the Charter, to enter or leave Canada, but that this infringement is justified under section 1 of the Charter.

[69] I would allow the appeal with costs, and I would set aside that part of Justice Noël's decision that declares section 10.1 of the Order to be invalid.

“Robert Décary”

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J.A.

“I concur.  
Gilles Létourneau J.A.”

“I agree.  
Pierre Blais J.A.”

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-167-08

**(APPEAL FROM A JUDGMENT OF MR. JUSTICE SIMON NOËL OF THE  
FEDERAL COURT DATED MARCH 13, 2006, DOCKET No. T-100-06).**

**STYLE OF CAUSE:** Attorney General of Canada v. Fateh Kamel

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** January 12, 2009

**REASONS FOR JUDGMENT BY:** DÉCARY J.A.

**CONCURRED IN BY:** LÉTOURNEAU J.A.  
BLAIS J.A.

**DATED:** January 23, 2009

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