

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130416

Docket: A-377-11

Citation: 2013 FCA 103

**CORAM: BLAIS C.J.
PELLETIER J.A.
TRUDEL J.A.**

BETWEEN:

FATEH KAMEL

Appellant

and

**ATTORNEY GENERAL OF CANADA
MINISTER OF FOREIGN AFFAIRS
PASSPORT CANADA**

Respondents

Hearing held at Montréal, Quebec, on December 12, 2012.

Judgment delivered at Ottawa, Ontario, on April 16, 2013.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

**BLAIS C.J.
PELLETIER J.A.**

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] Mr. Kamel (the appellant) is appealing from a judgment of the Federal Court (2011 FC 1061) [*Kamel-FC 2011*] rendered by Justice Scott (the Judge), who dismissed his application for judicial review of a decision by the Minister of Foreign Affairs (the Minister), on the recommendation of the Passport Canada Security Bureau, to refuse to issue him a regular

passport (the 2010 Decision or Minister's Decision). The appellant was informed of that decision in a letter dated July 15, 2010. The Minister's refusal was based on reasons involving the "national security of Canada or another country", citing section 10.1 of the *Canadian Passport Order*, SI/81-86, as amended by the *Order Amending the Canadian Passport Order*, SI/2004-113 (the Order).

[2] This is the second round of legal proceedings for Mr. Kamel, who was initially refused passport services in 2005 (the 2005 Decision). The 2005 Decision was also judicially reviewed by the Federal Court (2008 FC 338, Noël J.) [*Kamel-FC 2008*], resulting in an appeal to this Court, which held that section 10.1 of the Order violated section 6 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 (Charter), which protects the right of Canadian citizens to enter or leave Canada, but that this violation was justified under section 1 of the Charter (*Kamel v. Canada (Attorney General)*, 2009 FCA 21, leave to appeal to S.C.C. refused, 33088 (August 20, 2009)) [*Kamel-FCA 2009*]. It thus rejected the ruling of the Federal Court. Justice Noël also declared that the principles of procedural fairness had not been respected during Passport Canada's administrative investigation and set aside the Minister's unfavourable decision. As this ruling was not challenged, it was not affected by this Court's judgment in *Kamel-FCA 2009*. It is the appellant's second passport application and the Minister's resulting unfavourable decision that are at issue here.

[3] In this case, Mr. Kamel submits that the 2010 Decision infringes his rights under sections 6, 7 and 8 of the Charter. Given the constitutional aspects of his claim, he criticizes the

Federal Court for having failed to use the correct legal approach in its analysis of the Minister's decision. He is, therefore, asking this Court to refer the matter back to the Federal Court for a new review of the 2010 Decision in accordance with the applicable legal principles. He is also asking this Court, on the basis of subsection 24(1) of the Charter, to order Passport Canada to issue him a regular passport.

[4] Although my analytical approach differs from that of the Federal Court, I nevertheless propose that the appeal be dismissed with costs. I find that the restriction of Mr. Kamel's rights is based on sufficiently important objectives and that the refusal to issue him a regular passport is proportional to those objectives.

[5] For a better understanding of the context of the 2010 Decision, it is important to set out the facts relevant to the dispute.

The relevant facts

[6] Mr. Kamel, originally from Algeria, has been a Canadian citizen since January 27, 1993.

In *Kamel-FCA* 2009, we find the following facts (citations omitted):

[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.

[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.”

[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.

[7] This was the background to Mr. Kamel’s first application for judicial review before the Federal Court, with the outcome described above.

[8] A few weeks after *Kamel-FCA 2009*, on February 10, 2009, Mr. Kamel completed a new passport application, which he submitted on May 5 of that year to the Passport Canada office in Montréal (Appeal Book, Volume 4, at pp. 682 *et seq.*). He was notified by a letter from Passport Canada dated July 27, 2009, that its Investigation and Entitlement Review Section was reviewing his entitlement to passport services under section 10.1 of the Order (*ibid.* at p. 686). This entitlement review resulted in Passport Canada’s recommendation to the Minister to refuse Mr. Kamel’s passport application (Appeal Book, Volume 11, at pp. 2394 *et seq.*). What followed was the 2010 Decision, of which the appellant was notified by a letter dated July 15, 2010.

The 2010 Decision

[9] The letter dated July 15, 2010, is actually just a notice to the appellant that the Minister had rendered his decision and approved the recommendation that had been made to him, namely, [TRANSLATION] “to refuse to issue you a passport under section 10.1 of the Order for a five-year period, until June 17, 2015”. It is added that, despite that refusal, [TRANSLATION] “Passport Canada may, at any time, consider an application for a limited validity passport with geographical restrictions for urgent and compassionate reasons, such as the critical health or death of a member of the immediate family”.

[10] The recommendation referred to in the letter is that of the Investigation Division of Passport Canada’s Security Office that accompanies an [TRANSLATION] “action memorandum” addressed to the Minister by the Deputy Minister of Foreign Affairs. It is at the bottom of that memorandum that the Minister indicates whether or not he agrees with the proposed recommendation. In this case, it was on June 17, 2010, that the Minister followed Passport Canada’s recommendation.

[11] I will consider this in more detail below, but for now it would be useful to point out that this memorandum advises the Minister that he is being [TRANSLATION] “asked to approve a recommendation to refuse the issuance of a passport to Fat[e]h Kamel, on the basis that he was convicted of terrorist acts in France in 2001”. This memorandum informs the Minister that Mr. Kamel had been given the opportunity to provide new information and make submissions on the information contained in his Passport Canada file. The Minister was also informed that the

recommendation took into account the arguments and information submitted by Mr. Kamel on March 5 and 17, 2010, as well as in April 2010.

[12] As indicated above, Passport Canada's recommendation was made on the basis of section 10.1 of the Order, which reads as follows:

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.

[13] After explaining its assessment of the appellant's case, Passport Canada makes its negative recommendation based primarily on the following considerations:

[TRANSLATION]

- a. The real risk associated with Mr. Kamel's possession of a travel document in the light of his conviction in France;
- b. Canada's international obligations to counter terrorism;
- c. The integrity and reputation of the Canadian passport, even though nine years have passed since Mr. Kamel's conviction in France.

The Federal Court decision

[14] At paragraph 33 of his reasons, the Judge lists the issues that he must rule on the application for judicial review before him, which cover the following topics:

- a. the standard of review applicable to the 2010 Decision;

- b. the procedural fairness of the Passport Canada investigation;
- c. the appellant's constitutional rights under sections 6, 7 and 8 of the Charter;
- d. whether the violation of the appellant's rights was justified under section 1 of the Charter;
- e. whether the Court should make a declaratory judgment stating that the appellant's constitutional rights were infringed; and
- f. remedies under subsection 24(1) of the Charter.

[15] According to the appellant, the Judge's analytical approach [TRANSLATION] "guttled" the framework that *Kamel-FCA 2009* had imposed on the Minister's discretionary power. This leads me to a review of the Federal Court's judgment with respect to the issues that were before it and that ground for complaint.

[16] In *Kamel-FCA 2009*, this Court considered the phrase "if the Minister is of the opinion that such action is necessary for the national security" found in section 10.1 of the Order. After recognizing that section 10.1 vests the Minister with discretion, *Kamel-FCA 2009* stated "that the decision-maker must exercise this discretion in a reasonable manner, taking relevant factors into account". As for the words "is necessary", *Kamel-FCA 2009* noted that they "afford a basis for 'a legal debate'" and "provide a framework for, and therefore limit, the discretion conferred upon the decision-maker" (at paras. 28 and 29). It follows that the decision maker cannot simply be satisfied that his or her decision would "merely be convenient or advantageous" (*ibid.*). Those words impose an additional burden on the State. What is this burden? *Kamel-FCA 2009* says the following:

[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* [2002 SCC 1] 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*.

[17] The Judge begins his analysis by addressing the standard of review applicable to each issue. Relying on Justice Noël’s reasons in *Kamel-FC 2008*, he applies the standard of reasonableness to the questions of fact and the standard of correctness to the issues involving procedural fairness and violations of the Charter (Judge’s Reasons at paras. 37 and 38). When he analyzes the parties’ submissions on section 1 of the Charter, the judge adopts the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*]. I should start by noting that when he signed his judgment, the Judge did not have the advantage of the Supreme Court’s doctrine in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*], a case in which the Supreme Court propounds different analytical frameworks depending on whether it is an impugned law or an impugned decision that allegedly violates the Charter. This is not, in and of itself, fatal to the appeal.

[18] It is true that *Doré* proposes a more flexible model for analyzing administrative decisions, taking into account that (a) these decisions are generally the result of the exercise of a discretionary power and (b) “administrative decisions are *always* required to consider fundamental values” (*Doré* at para. 35). However, the *Oakes* test cited by the Judge at paragraph 96 of his reasons “works the same justificatory muscles: balance and proportionality”

(*Doré* at para. 5) as those on the basis of which *Doré* was decided. Bearing this in mind, my analytical approach will more closely reflect that of *Doré* and *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761 [*Lake*], in which it was decided that the Minister of Justice, given his expertise in matters of extradition and understanding of the relevant facts, was owed deference with respect to his assessments of the opposing interests at stake. There is no reason that these comments would not apply equally to the Minister of Foreign Affairs making a decision under section 10.1 of the Order. *Lake* also addressed subsection 6(1) of the Charter.

[19] To continue the analysis of the decision under appeal, I note that the Judge also considers the appellant's arguments on procedural fairness and rejects them all. Applying Justice Noël's statement in *Kamel-FC 2008* regarding the legal principles applicable to procedural fairness, he concludes that there has been no breach in this case: Passport Canada took into account the Federal Court's conclusions in *Kamel-FC 2008*; the recommendation to the Minister adequately integrates the appellant's comments; the appellant had access to the investigation report prepared by Passport Canada and was given several opportunities to comment on it. Finally, the time it took to render the 2010 Decision does not constitute an undue or unreasonable delay in the light of the legal proceedings between the parties and the specific nature of the case. I agree. At paragraphs 87 *et seq.* of his memorandum, the appellant also argues that Passport Canada and the Minister do not represent an independent and impartial tribunal. In my view, that argument has no merit, and I do not intend to address it.

[20] At paragraph 68 of his reasons, the Judge asks whether the appellant's constitutional rights under sections 6, 7 and 8 of the Charter were violated by the investigation process, Passport Canada's recommendation and the Minister's unfavourable decision.

[21] With respect to section 7 of the Charter, the Judge notes the appellant's argument that he has been unfairly deprived, since 2005, of his mobility rights because he has been prevented from travelling to develop the import business that he plans to start with his brother, to visit his family in Algeria or to take leisure vacations with his spouse and son (Judge's reasons at para. 74). Ultimately, the Judge accepts the respondents' argument to the effect that the rights claimed by the appellant are not "among the 'basic choices going to the core of what it means to enjoy individual dignity and independence'" (*ibid.* at para. 79). In any case, he concludes, section 7 of the Charter does not protect economic rights.

[22] With respect to section 8 of the Charter (protection against unreasonable search and seizure), the Judge holds that the appellant presented no evidence in support of his argument that Passport Canada's investigation procedure infringed his section 8 rights (*ibid.* at para. 90). Furthermore, the Judge notes that the very process of issuing a passport automatically involves a security check for all Canadians. Before this Court, the appellant submits that the 2010 Decision violates his right to privacy by requiring him to justify his travel needs, which also constitutes a violation of his section 8 rights.

[23] I agree with the Judge's treatment of the issues involving sections 7 and 8 of the Charter. First, the right to leave or enter Canada is protected by subsection 6(1) of the Charter and is

therefore not included in section 7 (Peter Hogg, *Constitutional Law of Canada*, 5th ed., (Toronto: Carswell, 2007) at p. 47-11). Moreover, “[t]he ability to generate business revenue by one’s chosen means is not a right that is protected under s. 7 of the *Charter*” (*Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6 at para. 46).

[24] Nor did the Judge err in finding that there was no evidence to support the appellant’s argument concerning section 8 of the Charter. He was certainly entitled to expect the appellant to provide a factual basis for his allegation (*MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at p. 361; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873 at para. 28). The French judgment heavily emphasizes the appellant’s acts and associations in conjunction with the terrorist activities of which he was found guilty by the Tribunal de grande instance de Paris. Passport Canada’s knowledge of these facts does not result from any unreasonable search and seizure on its part that would engage section 8 of the Charter, nor is that section engaged by the requirement that the appellant justify his travel needs to obtain a temporary passport.

[25] I now turn to the part of the judgment under appeal that deals with section 6 of the Charter.

[26] At paragraph 72 of his reasons, the Judge relies on *Kamel-FCA 2009* in ruling that the decision to deny the appellant a passport violates his rights under subsection 6(1) of the Charter. This ruling is not challenged.

[27] The Judge then considers whether this violation is justified within the meaning of section 1 of the Charter, again applying the analytical framework of *Kamel-FCA 2009*. First, the Judge holds that the Minister's decision at issue is prescribed by law (Judge's reasons at para. 95). Then, citing paragraphs 32 and 33 of *Kamel-FCA 2009*, which cite *Oakes* and *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, he sets out the legal test for justifiability (Judge's reasons at para. 96):

- i. Is the restriction designed to achieve a sufficiently important objective?
- ii. Are the means chosen proportional to the objective?

[28] In response to the first question, the Judge simply points to paragraphs 50 and 51 of *Kamel-FCA 2009*:

(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 [here the appellant] 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.

[29] With respect to the second question, the Judge made the following finding at paragraph 106:

The applicant's conviction is for crimes that are inextricably connected to travel and passport use. It seems to me that the rational connection between the objective and the rights violation is clearly established.

[30] Finally, the Judge summarizes the parties' arguments under the headings "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".

[31] In analyzing these arguments, the Judge commences by citing paragraph 67 of *Kamel-FCA 2009*:

[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* [*Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827], "a reasoned apprehension of . . . harm". Common sense dictates that the possible collective harm outweighs the real individual harm.

and concludes that, in this case, the proportionality test "is satisfied, since the [appellant's] rights are infringed for a limited time of five years. In addition, the infringement cannot be qualified as final and irrevocable, since it is possible that a limited validity passport could be issued" (Judge's reasons at para. 125).

Analysis

[32] In my view, by following so closely to this Court's reasoning in *Kamel-FCA 2009*, the Judge set out the general principles without a more thorough consideration of the 2010 Decision and the issue of whether the Minister had infringed Mr. Kamel's Charter rights in a disproportionate and therefore unreasonable manner. This is where I diverge from his analytical approach. It should be recalled that *Kamel-FCA 2009* was considering the constitutional validity of section 10.1 of the Order and not of the Minister's decision authorized by that legislative provision, which calls for a very different type of analysis. In *Kamel-FCA 2009*, this Court even specified that the controversy was limited to section 10.1 of the Order and that it would therefore refrain from making any comments that might influence the Minister's new decision (*Kamel-FCA 2009* at paras. 12 and 11). In this case, the Charter values at issue apply to the appellant's circumstances. It was against this particular factual backdrop that the Minister, and then the Judge, were supposed to balance Mr. Kamel's interests and the objectives of the Order.

[33] It is not enough, in my view, to cite paragraph 67 of *Kamel-FCA 2009* in support of a finding that the 2010 Decision satisfied the necessity test and that "there is proportionality between the harm to the [appellant] and the benefit for the community as a whole" (Judge's reasons at para. 122). Nor is it sufficient, in my view, to find that the 2010 Decision is reasonable because the "unique paradigm of national security and the rules which apply . . . [require that there] be room for the exercise of informed discretion" (*ibid.* at para. 124). One must consider how the discretion was exercised before determining whether it was exercised appropriately.

[34] Of course, the definition of “national security” cannot be summed up in a few words. We must accord the term a fair, large and liberal interpretation in accordance with Canada’s international obligations (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 85) [*Suresh*].

[35] I acknowledge that the Minister’s decision made under section 10.1 of the Order “is highly fact-based and political in a general sense” (*Suresh* at para. 85). These considerations call for deference in reviewing the Minister’s decision. However, I would not give any deference to a ministerial decision that does not take Charter rights into account or that restricts them disproportionately. That would be an unreasonable decision.

[36] I must therefore determine whether the 2010 Decision is a reasonable decision that satisfies the necessity test. By this I mean a ministerial decision that shows a balancing of the relevant Charter values and the objectives of the Order, not one that is merely “convenient or advantageous” (*Kamel-FCA 2009* at para. 29). Obviously, the Minister had to carry out this balancing exercise, in accordance with section 10.1 of the Order, before deciding to reject Mr. Kamel’s passport application. Passport Canada’s recommendation and the accompanying action memorandum bearing the Minister’s signature constitute the 2010 Decision. I will therefore analyze these two documents more closely.

- The action memorandum and recommendation from Passport Canada

[37] In the action memorandum, Passport Canada starts by describing the context on which its recommendation is based, informing the Minister of, among other things, Mr. Kamel's arguments, including his argument that [TRANSLATION] "the application of section 10.1 of the Order would infringe [Mr. Kamel's] Charter rights" (Appeal Book, Volume 11, at p. 2399).

[38] The following was recommended to the Minister:

[TRANSLATION]

- 1) that you exercise your powers under section 10.1 of the Canadian Passport Order and that you refuse to issue a passport to Mr. Kamel;
- 2) should you accept the above recommendation, that your decision be valid for a five-year period from the date it is made.

Deputy Minister of Foreign Affairs

I agree.

(Minister's original signature)

The Minister

(*Ibid.* at p. 2394)

[39] This memorandum is followed by Passport Canada's recommendation, which explains, among other things, the investigation process used to assess:

[TRANSLATION]

. . . the risk associated with the possession of a travel document by the individual in question, the impact of this decision on the integrity and reputation of the Canadian passport and Passport Canada's international obligations to counter terrorism. The

Section also considers the individual's actions, beliefs and associations, as well as the risk that the passport may be used in Canada or abroad for reasons that would threaten the national security of Canada or another country. The investigative process has been specifically designed to ensure procedural fairness and compliance with the rules of natural justice.

(*Ibid.* at p. 2406)

[40] Then, turning to the facts specific to Mr. Kamel's case, Passport Canada addresses his conviction in France and matches the provisions of the French *Code pénal* under which Mr. Kamel was found guilty with the corresponding provisions of the *Criminal Code*, R.S.C. (1985), c. C-46. Reiterating that Mr. Kamel is now inadmissible to France, Passport Canada notes that issuing Mr. Kamel a Canadian passport [TRANSLATION] "could facilitate his travel to other European Union countries from which entry into France does not require a passport, thereby frustrating France's efforts to protect its national security" (*ibid.* at p. 2409).

[41] Finally, Passport Canada presents its evaluation of the case and its recommendation:

[TRANSLATION]

EVALUATION

The Section is of the view that the risk associated with Mr. Kamel's possession of a travel document is real because he was convicted in a court of law for procuring passports for terrorists. The Section maintains this view despite the fact that, as indicated above, Mr. Kamel denies the facts underlying his conviction.

As for Passport Canada's international obligations, it is important to consider Canada's active role in international counter-terrorism efforts and therefore to monitor the issuance of travel documents to prevent terrorism.

Were Mr. Kamel to obtain a Canadian passport, the impact on the integrity and reputation of the Canadian passport would certainly be negative. It is important not to give the impression that Canadian passports are easy for anybody to obtain, and they must not be granted to those who represent a risk. The reputation of the Canadian passport is at stake. 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.

Passport Canada has taken into consideration the fact that Mr. Kamel was convicted in 2001; however, this fact diminishes neither Passport Canada's obligations, nor the negative impact on the integrity and reputation of the Canadian passport if a passport were to be issued to him.

RECOMMENDATIONS

The Minister is responsible for protecting the reputation and value of the Canadian passport, world security and the security of Canadians. You must therefore consider this information before evaluating whether there is a risk or a possibility of harm to Canada or another country making it necessary to refuse passport services in the interest of national security.

In short, issuing a passport is an administrative decision. It is a determination neither of guilt nor of innocence of a criminal offence. It is a decision regarding whether or not to facilitate Mr. Kamel's foreign travel by issuing an identity document authorized by the Government of Canada.

The Passport Canada Security Bureau recommends that you exercise your authority under the royal prerogative, as described in section 10.1 of the Order, and refuse passport services to Fateh Kamel. In the event that you decide to refuse passport services, we recommend that your decision be made effective for a period of five years from the date the decision is rendered and that no passport services be provided to Fateh Kamel during that five-year period.

(Ibid. at pp. 2411-2412)

[42] As indicated above, the Minister declared his agreement on the basis of the action memorandum, Passport Canada's recommendation and the accompanying file.

[43] At the hearing before this Court, Mr. Kamel's principal complaint was that the Judge did not correctly analyze the evidence justifying the recommendation made to the Minister. The

appellant submits that the Minister failed to assess [TRANSLATION] “the appellant’s rights according to the applicable law and standard of proof . . . , including respect for the presumption of innocence and good faith” (Appellant’s Amended Memorandum of Fact and Law at paras. 38 and 48). Moreover, he adds, he has already served his sentence in France: [TRANSLATION] “[D]ouble jeopardy has no place in our society, nor does discrimination based on one’s criminal record” (Appellant’s Amended Memorandum of Fact and Law at para. 44). One may not rely on his past to determine that he will break the law or threaten the security of Canada or other countries if a passport is delivered to him.

[44] In his Amended Memorandum of Fact and Law, he makes the following argument:

[TRANSLATION]

39. . . . [E]ven if maintaining “the integrity and reputation of the Canadian passport” can be considered a valid objective of the Order, this does not relieve the respondents of their obligation to present valid and relevant evidence that establishes, on a balance of probabilities, that the violation is necessary for national security and that justifies the infringement of Mr. Kamel’s constitutional rights protected by the Charter.

40. Moreover, with respect to the “reputation” of the Canadian passport, the Judge should not have passed over the fact that Passport Canada provided no evidence for its claim that “the international community will not have the necessary confidence in Canadian passports” if Mr. Kamel is issued a passport and that “Canadian citizens will suffer the consequences when they travel outside the country”, since they “might be subject to questioning or preventive detention in other countries, or even to arrest . . .”.

[45] In my view, these arguments and others along the same lines ignore the fact that the nature of the reasonableness analysis of the Minister’s decision, which in this case is discretionary, is contingent on its context (*Doré* at para. 7, citing *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5). This is not a penal or criminal matter. The

refusal to issue the appellant a passport is not supposed to be an additional punishment for the acts that led to his conviction. However, once he has served his sentence, the appellant cannot claim that the Minister may not take into account the past conviction in forming his opinion and making a decision in his application (*Kamel-FC 2011* at para. 124; *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482, application for leave to appeal to the S.C.C. refused, 30184 (August 26, 2004) at para. 38). This is a relevant factor.

[46] In this case, the Minister's decision was made under section 10.1 of the Order, because he is "of the opinion that such action is necessary for the national security of Canada or another country". As stated in *Kamel-FCA 2009*, the Court must be satisfied, here, with hypotheses and realistic speculations and must rely on a reasoned apprehension of harm (para. 67). There is no reason to wait for the risk to materialize. Again, the concept of national security must be accorded a fair, large and liberal interpretation (*Suresh; Harkat (Re)*, 2012 FCA 122; *Zündel (Re)*, 2005 FC 295) and requires that the Minister have some discretion in balancing Mr. Kamel's protected rights against the obligations of the Order. Moreover, the Minister's refusal to issue a passport to the appellant is limited to a five-year period. As noted by the Federal Court, "[t]his refusal is further mitigated in that the [appellant] may, at any time, apply for a limited validity passport for urgent or compassionate reasons" (Judge's reasons at para. 113). This leads me to find that the Minister was mindful of the proportionality test required for the second prong of the section 1 analysis under the Charter.

[47] The appellant would have liked the 2010 Decision to revisit all of his arguments and to include an exhaustive review of the evidence. In *Newfoundland and Labrador Nurses' Union v.*

Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708, the Supreme Court rejected a similar argument, preferring a more global exercise: “[T]he reasons must be read together with the outcome, and serve the purpose of showing whether the result falls within a range of possible outcomes”. In this case, the reasonable possible outcomes are few: a regular passport is either issued or denied, or another type of passport is issued, such as a temporary passport issued for travel of an urgent, compassionate nature. In this case, the Minister was considering a regular passport application. He had been informed that Mr. Kamel’s Charter rights were at stake and that the infringement of his rights under subsection 6(1) of the Charter had been recognized by *Kamel-FCA 2009*. The Minister was also aware of Mr. Kamel’s particular circumstances and the history of his case. The assessment of the infringement of Mr. Kamel’s rights implied a balancing that was essentially dependent on the assessment of the facts of the case.

[48] A careful review of the file reveals a causal link between national security and the Minister’s refusal to issue a passport to Mr. Kamel, who was sentenced in France for crimes directly related to terrorism, including the counterfeiting of passports. I am also satisfied with the Minister’s weighing of Mr. Kamel’s rights against the objective of the Order. I am mindful of the fact that, as it was put in *Kamel-FCA 2009*, the “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” (at para. 62).

[49] Therefore, I cannot accept the appellant’s arguments and find, as he invites us to do, that the Minister’s decision fails to meet the necessity test.

[50] Accordingly, I would dismiss the appeal with costs.

“Johanne Trudel”

J.A.

“I concur.
Pierre Blais C.J.”

“I concur.
J.D. Denis Pelletier J.A.”

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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PELLETIER J.A.

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