Supreme Court Declines to Hear Terrorist's Charter Appeal of Denied Passport

On August 20, 2009, the Supreme Court of Canada decided not to hear an appeal from a convicted terrorist living in Canada who had applied for a Canadian passport. Earlier this year, in *Canada (Attorney General) v. Kamel*,[1] the Federal Court of Appeal determined that the discretion of the Minister of Foreign Affairs to deny a passport is constitutional. Following its normal practice, the Supreme Court did not give reasons for dismissing the application for leave to appeal; its refusal to hear the case, however, does not necessarily mean the Court thinks the lower court rightly decided the case.[2]

Background

Fateh Kamel, a Canadian citizen since 1993, was convicted by a French court of membership in a terrorist organization and complicity in the forgery of three Canadian passports. He was imprisoned in France, where he served half of his eight-year sentence. Upon his release in 2005, the Canadian government provided him with a temporary passport so he could return home to Montréal.[3] In 2005, Kamel applied for a new passport to fly to Thailand on business. His application was denied.[4] The denial was at the discretion of the Minister of Foreign Affairs, as provided by sections 4 and 10.1 of the *Canadian Passport Order*:

> ***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.*
>
> ***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.[5]*

Mr. Kamel challenged the constitutional validity of section 10.1 of the *Passport Order*, arguing that it breached his mobility rights. Section 6(1) of the *Charter* provides that "every citizen of Canada has the right to enter, remain in and leave Canada."

***Charter* Mobility Rights**

Both levels of the Federal Court found that section 10.1 of the *Passport Order* breaches section 6(1) of the *Charter*. The trial decision noted that it may be theoretically possible to enter and exit Canada without a passport, but it is not the practical reality.[6] Unanimously, the Federal Court of Appeal agreed:

> *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…. [T]here 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…. Subsection 6(1) [of the Charter] establishes a concrete right that must be assessed in light of present day political reality. What is the meaning of a right that, in practice, cannot be exercised?[7]*

According to both the trial and appeal courts, then, the ability of the Minister of Foreign Affairs to deny a passport to a Canadian citizen is contrary to *Charter* mobility rights.[8] Consequently, the constitutional question turned on section 1 of the *Charter*, which authorizes limitations on *Charter* rights as long as they are both "prescribed by law" and "demonstrably justified in a free and democratic society."

Reasonable Limits: "prescribed by law"

The trial and appeal levels of the Federal Court parted company on the question of whether the Minister's discretion to deny a passport is genuinely "prescribed by law." At the trial level, the Federal Court found that section 10.1 of the *Passport Order* did not pass this hurdle under section 1. The limitations on mobility rights are not "prescribed by law" because this part of the *Passport Order* is not a law.[9] The judge found that it lacks the necessary precision: "The applicant contends that the Order is not law. I agree. Its source lies in the royal prerogative; it is … vague and it is ultimately overbroad."[10] The court noted in particular the lack of any explanation of the term "national security" in the*Passport Order*:

> *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….[11]*

Having found that the power to deny a passport is not "prescribed by law," the trial court saw no need to proceed to an analysis of whether it is justified in a free and democratic society.[12] The Federal Court of Appeal rejected the trial judge's conclusion that section 10.1 is too vague to be a law.[13] Applying the Supreme Court of Canada's standard of "vagueness," the Court of Appeal found that "the Order satisfies the test of precision that is required to constitute a 'law' … within the meaning of section 1 of the Charter."[14] The appeal court noted that under Supreme Court precedent, "the threshold for finding a law vague is relatively high" and "a law is unconstitutionally vague [only] if it does not provide an adequate basis for legal debate and analysis." Further, "some fields, such as international relations and security, do not lend themselves to precise codification."[15] In particular, the appeal court cited a Supreme Court decision in finding the term "national security" precise enough to amount to "law" under the *Charter*.[16] Therefore, the *Passport Order* is constitutional under the "prescribed by law" standard. Nonetheless, an individual

decision of the Minister under the Order may be unconstitutional:

> *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.[17]*

Reasonable Limits: "demonstrably justified"

Having found that the Minister's decision-making power "prescribed by law," the Federal Court of Appeal proceeded to consider justifications for the power, as section 1 of the *Charter* requires. The appeal court applied the section 1 test (the *Oakes* test). The court found that "a passport is an essential work tool for terrorist groups."[18] Thus there is 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."[19] The Court of Appeal went on to find that the denial of a passport is a "minimal impairment" of mobility rights, and the effects of the impairment are proportional to the objective of the *Passport Order*.[20] The infringement of section 6 mobility rights is therefore justified under section 1.[21] With the Supreme Court's decision not to hear Kamel's appeal, the decision of the Federal Court of Appeal is the final word on section 6 of the *Charter* and ministerial discretion to withhold a passport on grounds of national security.

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[1] 2009 FCA 21. [2] "Judgments in Leave Applications" *Supreme Court of Canada* (20 August 2009); Hogg, Peter W.,*Constitutional Law of Canada,* 2008 Student ed. (Toronto: Thomson Carswell) at 256. [3] *Supra* note 1 at paras. 5-6. [4] *Ibid*. at paras. 7-8. [5] *Canadian Passport Order*, SI/81-86. [6] *Kamel v. Canada (Attorney General)*, 2008 FC 338 at paras. 112-113. [7] *Supra* note 1 at para. 15. [8] *Ibid*. at para. 68. [9] *Supra* note 6 at paras. 115-132. [10] *Ibid*. at para. 120. [11] *Ibid*. at para. 128. [12] *Ibid*. at para. 132. [13] *Supra* note 1 at para. 19. [14] *Ibid.* at para. 31. [15] *Ibid.* at para. 20. [16] *Ibid*. at para. 30. [17] *Ibid.* at para. 31. [18] *Ibid.* at para. 53. [19] *Ibid.* at para. 56. [20] *Ibid*. at paras. 65-67. [21] *Ibid*. at para. 68.