Federal Court Cour fédérale

**Date: 20110908**

**Docket: T-1366-10**

**Citation: 2011 FC 1061**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, September 8, 2011**

**PRESENT: The Honourable Mr. Justice Scott**

**BETWEEN:**

**FATEH KAMEL**

**Applicant**

**and**

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

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] On April 6, 2001, the Tribunal de Grande Instance de Paris convicted the applicant, a Canadian citizen, as follows:

> [TRANSLATION]
>
> . . .

> FINDS Fateh KAMEL GUILTY of PARTICIPATION IN A CRIMINAL ASSOCIATION FOR THE PURPOSE OF PREPARING AN ACT OF TERRORISM (acts committed between 1996 and 1998, in ROUBAIX (North) and in French territory as well as in CANADA, TURKEY, BOSNIA, BELGIUM and ITALY), COMPLICITY in FORGING AN ADMINISTRATIVE DOCUMENT ATTESTING TO A RIGHT, AN IDENTITY OR A CAPACITY (acts committed during 1996, in ROUBAIX (North) and in French territory as well as in CANADA, TURKEY, BOSNIA and BELGIUM) and COMPLICITY in USING A FORGED ADMINISTRATIVE DOCUMENT ATTESTING TO A RIGHT, AN IDENTITY OR A CAPACITY (acts committed during 1996, in ROUBAIX (Nord) and in French territory as well as in CANADA, TURKEY, BOSNIA and BELGIUM).
> With the circumstance that the offence set out above was in principal or related connection with an individual or collective undertaking the purpose of which is to seriously disturb public order through intimidation or terror.
>
> SENTENCES HIM TO A TERM OF IMPRISONMENT OF EIGHT YEARS.
>
> ORDERS THAT HE BE HELD IN DETENTION.
>
> Having regard to articles 422-4 and 131-30 of the Penal Code, orders that he be PERMANENTLY BANISHED FROM FRENCH TERRITORY.
>
> . . .

[2] Since he was released and returned to Canada in January 2005, the applicant has been trying, without success, to obtain a Canadian passport. This is why he filed an application for judicial review under subsection 18.1(1) of the *Federal Courts Act* (RSC 1985, c F-7) and for remedy under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (UK), 1982, c 11 (Charter). The applicant is challenging the decision by Canada’s Minister of Foreign Affairs and the federal agency of Passport Canada (Passport Canada) dated July 15, 2010, to refuse to issue him a

passport for reasons of national security on the basis of section 10.1 of the *Canadian Passport Order*, SI/81-86, as amended by the *Order Amending the Canadian Passport Order*, SI/2004-113 (Order).

## I. <u>Facts</u>

[3] The applicant has been a Canadian citizen since January 27, 1993. He was born in Algeria in 1960 and immigrated to Canada in 1987.

[4] In May 1999, the applicant was arrested in Jordan, then extradited to France, where he was convicted for his [TRANSLATION] "role as principal organizer of international networks determined to prepare attacks and procure weapons and passports for terrorists acting throughout the world" (Tribunal de Grande Instance de Paris, case No 9625339012, judgment dated April 6, 2001, page 86).

[5] After serving half of his eight-year prison sentence, the applicant was released. Passport Canada then issued him a passport valid only for his return trip. He therefore returned to Canada in January 2005.

[6] On June 13, 2005, the applicant applies for a new passport at the Passport Canada office in Montréal. On December 1, 2005, the Minister refused, under section 10.1 of the Order, to issue him a passport.

[7] The applicant then files an application for leave and for judicial review on the grounds that the principles of procedural fairness had been breached and that section 10.1 of the Order violates his rights guaranteed by sections 6, 7 and 15 of the Charter.

[8] On March 13, 2008, Justice Noël of the Federal Court allows the application for judicial review in part. He concludes, first, that the principles of procedural fairness had been breached and, second, that section 10.1 of the Order infringes the applicant's mobility rights guaranteed by subsection 6(1) of the Charter. According to Justice Noël, this infringement is not justified under section 1 of the Charter. Consequently, he does not rule on the application of sections 7 and 15 of the Charter (*Kamel v Canada (Attorney General)*, 2008 FC 338, [2009] 1 FCR 59 [*Kamel* 2008]).

[9] Justice Noël declares that section 10.1 of the Order is invalid and gives the Governor General in Council six months to rewrite section 10.1 of the Order and make a new order. The judge sets aside the Minister's decision dated December 1, 2005, to refuse to issue the applicant a passport, but also refuses to make an order compelling the Minister to issue the requested passport.

[10] The Attorney General of Canada (AGC) files an appeal. The appeal is essentially limited to the issue of the constitutional validity of section 10.1 of the Order with regard to sections 1 and 6 of the Charter, since the AGC admitted that the principles of procedural fairness had been breached.

[11] On January 23, 2009, the Federal Court of Appeal allows the AGC's appeal and sets aside Justice Noël's decision in part (*Kamel v Canada (Attorney General)*, 2009 FCA 21, [2009] 4 FCR 449 [*Kamel* 2009]). In its decision, the Federal Court of Appeal states that section 10.1 of the Order infringes subsection 6(1) of the Charter, but that this infringement can be justified under section 1 of the Charter.

[12] The applicant then applies for leave to appeal to the Supreme Court of Canada.

[13] On February 10, 2009, the applicant files another passport application. Passport Canada informed him that this new application would not be processed immediately because the time for filing an application for leave to the Supreme Court of Canada had not yet expired.

[14] In a letter dated February 26, 2009, Passport Canada informs the applicant that his passport application dated February 10, 2009, would not be processed because Justice Noël's decision still stands. This decision states that the applicant's file must be re-examined. As a result, the Minister must deal with the passport application dated June 13, 2005.

[15] On April 3, 2009, the applicant formally demands that Passport Canada issue him a passport.

[16] In a letter dated April 24, 2009, the Department of Justice Canada confirms to the applicant that Passport Canada intends to process his passport application.

[17] In a subsequent letter dated April 27, 2009, Passport Canada requires the applicant to complete and file a new passport application form. Passport Canada's policies and procedures require that the passport application form not predate the review of the file by more than one year.

[18] On May 5, 2009, the applicant files the new form.

[19] In a letter dated July 27, 2009, Passport Canada notifies the applicant that his eligibility for a passport is being investigated under section 10.1 of the Order. The letter specifies that the applicant's criminal conviction by the Tribunal de Grande Instance de Paris had triggered Passport Canada's investigation. The applicant is invited to file all additional facts, mitigating information and corrections to inaccurate information which could be relevant.

[20] On August 20, 2009, the Supreme Court of Canada denies the applicant's leave to appeal.

[21] On December 23, 2009, the applicant files an application for leave and for judicial review against the AGC and Passport Canada for a declaratory judgment and remedy under the Charter (file number T-2151-09 of this Court).

[22] On January 14, 2010, Passport Canada notifies the applicant that his file has been given to the Minister. The applicant is also given a copy of the first draft of the recommendation to the Minister. The applicant is asked to provide all additional facts, mitigating information and

corrections to inaccurate information which could have a bearing on Passport Canada's recommendation to the Minister.

[23] On March 5, 2010, the applicant replies to Passport Canada. He points out that the first draft of the recommendation to the Minister left out certain important facts in his favour.

[24] On April 7, 2010, the applicant receives a copy of the second draft of the recommendation to the Minister which Passport Canada prepared after considering the information he had sent the agency in March. This second draft addresses the points raised by the applicant in response to the first draft. Passport Canada again asks him to file all additional facts that could be relevant.

[25] On April 19, 2010, the applicant responds to the second draft and states that this draft still fails to take into account the comments made in response to the first draft.

[26] On June 16, 2010, Passport Canada gives the Minister its recommendation that he refuses, under section 10.1 of the Order, to issue a passport to the applicant. In support of Passport Canada's negative recommendation, the Minister receives a complete file containing all of the information relied on by the agency in making its recommendation.

[27] In a letter dated June 17, 2010, the applicant is notified that, following a review of all of the information in his file, including his written representations of March and April 2010, Passport Canada sent his file to the Minister and recommends that the Minister refuse to issue

him a passport. This final recommendation also contains the applicant's comments in response to the second draft.

[28] On June 17, 2010, the Minister makes his decision. He refuses, under section 10.1 of the Order, to issue a passport to the applicant. The applicant is informed of the decision in a letter dated July 15, 2010.

[29] On July 28, 2010, the Minister's decision and the French translation of that decision are sent to the applicant.

[30] Following the Minister's decision, the Court concludes, on July 28, 2010, that the application for judicial review in file T-2151-09 is moot. As a result, the Court does not rule on that application.

[31] On August 25, 2010, the applicant files a notice of application for judicial review of the decision to refuse him a passport.

[32] This is the application under consideration by the Court.

## II. Issues

[33] The issues are as follows:

1. *What is the appropriate standard of review for decisions made by the Minister under section 10.1 of the Order?*

2. *Were the principles of procedural fairness breached?*

3. *Were the applicant's constitutional rights guaranteed by section 6 of the Charter violated by the investigative process, Passport Canada's recommendation and the Minister's decision to refuse to issue him a passport?*

4. *Were the applicant's constitutional rights guaranteed by section 7 of the Charter violated by the investigative process, Passport Canada's recommendation and the Minister's decision to refuse to issue him a passport?*

5. *Were the applicant's constitutional rights guaranteed by section 8 of the Charter violated by the investigative process, Passport Canada's recommendation and the Minister's decision to refuse to issue him a passport?*

6. *If so, are those violations justified under section 1 of the Charter?*

7. *Should the Court make a declaratory judgment stating that the Minister of Foreign Affairs and Passport Canada infringed the applicant's rights guaranteed by sections 6, 7 and 8 of the Charter?*

8. *Given the violation of the applicant's rights as guaranteed by sections 6, 7 and 8 of the Charter, should the Court order Passport Canada to issue a passport to the applicant as relief under subsection 24(1) of the Charter?*

**Relevant legislation**

[34] The relevant legislation is reproduced in the Appendix to these reasons.

1. *What is the appropriate standard of review for decisions made by the Minister under section 10.1 of the Order?*

**Applicant's submissions**

[35] The applicant has not submitted any arguments on this issue.

**Respondents' submissions**

[36] The respondents submit that paragraphs 57 to 61 of *Kamel* 2008 establish that, given the specialized expertise of the decision-maker, the subject matter of the Order, the nature of the question to be decided and the fact that the power to be exercised is discretionary, the Court must apply the reasonableness standard, a standard commanding considerable deference in its application.

**Analysis**

[37] First, the Court wishes to reiterate that the standard applying to questions of fact is the reasonableness standard. The Court agrees entirely with Justice Noël's position in this same case (*Kamel* 2008), which he expressed as follows in his decision:

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

[38] As for the issues concerning the duty of procedural fairness and violations of Charter rights, those are questions of law requiring application of the correctness standard (*Kamel* 2008 at paragraph 62).

*2. Were the principles of procedural fairness breached?*

**Applicant's submissions**

[39] The applicant contends that, for the reasons set out below, the principles of procedural fairness were breached in his file.

Failure to mention favourable information

[40] In the case at bar, the applicant contends that the respondents fail, in their recommendation to the Minister, to mention a number of relevant pieces of information favourable to the applicant, specifically:

- The applicant is not subject to section 9 of the Order contemplating refusal to issue a passport to an applicant, a fact not disputed by Passport Canada.

- All of the previous passports issued to the applicant were lawfully renewed or replaced, a fact acknowledged by Passport Canada.

- The 2005 report by the Canadian Security Intelligence Service [CSIS] does not identify the applicant as an individual who is a danger to national security, a fact and an item of evidence on which Passport Canada is silent in its recommendation to the Minister. That fact was already known by Passport Canada following the application for judicial review.

- The applicant is not the subject of any legal restriction on grounds of terrorism or a danger to the national security of Canada imposed either under the *Anti-terrorism Act* or the *Criminal Code* or by a court order. That is a fact and an item of evidence on which Passport Canada is silent in its recommendation to the Minister.

- The applicant is not on a Canadian terrorist list, a fact that Passport Canada in no way disputes.

- The applicant is not on an international terrorist list, a fact that Passport Canada in no way disputes.

- The French law under which the applicant was convicted in France has received harsh criticism by the courts in Canada and in France. The following is stated in *France v Ouzchar*, [2001] OJ No 5713 (QL) [*Ouzchar*]:

> 21 In terms of the strength of the case, I am compelled to say that I find the manner in which the charges against the defendant were proceeded with in France to be highly disturbing. While there may be an explanation forthcoming in the fullness of time, on the record before me it is inexplicable why notice of the charges or of the trial was not given to the defendant.
>
> 22 Further, the information before me regarding the offences is contained entirely in the judgment of the High Court of Paris. While I do not mean to be critical because I do not know the usual practice of that court in terms of what normally is included in a judgment, I must say that the judgment is long on generalities and short on specifics as to exactly the events and activities of this defendant in respect of the offences with which he was charged.
>
> 23 While I appreciate that certain telephone numbers were found in the defendant's possession and that certain telephone calls were either placed from the defendant's telephone or received at his telephone number, that evidence by itself would appear to fall considerably short of what would be considered necessary in this court for a conviction on these offences beyond a reasonable doubt. There is no information provided regarding the specifics of any discussions that took place between the defendant and any of the other individuals or the specifics of any telephone calls that were intercepted between the defendant and any of the other individuals or any other similar direct evidence of inculpatory behaviour by the defendant.
>
> . . .

> 25 . . . I adopt the approach of Mr. Justice Green in *R. v. Parsons* (1997), 124 C.C.C. (3d) 92 (Nfld. C.A.) that the court should consider the matter from the point of view of a reasonably informed, right thinking member of the community, cognizant of the presumption of innocence and the notion that an accused person should not be deprived of liberty without a sufficient legal basis.

- No new facts or information about the applicant has been entered in Passport Canada's file since the Tribunal de Grande Instance de Paris delivered its judgment in 2001 (pages 1 and 6 of the recommendation).

- The applicant's criminal record does not establish that it is necessary, for national security, to deny him his passport. In *Thompson v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1097 (QL), (1996), 41 Admin LR (2d) 10 at paragraph 19, the Court wrote as follows:

> 19 I am satisfied that although there may be no need to impose formal guidelines on the respondent regarding what constitutes a danger to the public, that phrase must have some meaning in itself; it must constitute more than mere duplication of the conviction for a serious offence element of the legislative scheme. I am satisfied that Parliament did not intend for danger opinions to have no meaning, and that in order for the respondent to form an opinion pursuant to subsection 70(5), the fact of a conviction alone is an insufficient basis; the circumstances of each case must, over and above the conviction, indicate a danger to the public. By this, I do not wish to be taken as indicating that there is no instance where a danger opinion pursuant to subsection 70(5) could be properly issued where a person has only one conviction; I simply find that there must be circumstances in the case additional to a single conviction that indicate a danger to the public. There may very well be cases where the circumstances surrounding a single conviction point to a danger to the public. . . .

- Our society has no place for double punishment or discrimination on the basis of criminal record, which the respondents have not taken into account. The respondents acknowledge that the applicant's file contains no new facts that have come to light since the Tribunal de Grande Instance de Paris' decision in 2001 (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc*, [2003] 3 SCR 228 at paragraph 63).

<u>Failure to provide Passport Canada's investigation report</u>

[41] Furthermore, the applicant contends that he never received Passport Canada's investigation report (applicant's affidavit at page 28 of the Applicant's Record), whereas, according to the declaration in *Kamel* 2008, that report should have been disclosed to him. The applicant therefore submits that the respondents are failing to comply with the Court's order as regards their duty to act fairly (see *Kamel* 2008 at paragraphs 87 to 89).

<u>Breaches of duty to act within a reasonable time</u>

[42] The applicant also submits that the respondents breached the principles of procedural fairness. In fact, the respondents did not resume processing the applicant's passport application within a reasonable time, and the applicant has been denied a passport since June 2005.

[43] The applicant also points out that, in 2008, owing to breaches of procedural fairness, the Federal Court set aside the Minster's decision to refuse him a passport (*Kamel* 2008). On appeal,

the respondents nonetheless acknowledged the breaches of the principles of procedural fairness. This aspect of the decision was not appealed (since this ground for appeal was withdrawn on July 9, 2008) (paragraphs 22 to 25 at pages A19 to A24 of the Applicant's Record).

[44] The applicant points out that approximately two years went by following the first decision until the Minister informed the applicant of the decision to refuse him a passport.

Factual errors

[45] The applicant also submits that the respondents are incorrect to contend that he was given 30 days to reply to the letter dated July 27, 2009 (page A40 of the Applicant's Record), as this is false according to the contents of the letter from Passport Canada dated July 27, 2009 (pages A36 to A39 of the Applicant's Record).

Reasonable apprehension of bias

[46] The applicant argues that the sequence of events leading up to Passport Canada's final recommendation to the Minister (pages A79 to A90 of the Applicant's Record) supports the conclusion of a reasonable apprehension of bias.

**Respondents' submissions**

[47] The respondents, on the other hand, reply that the principles of procedural fairness were not breached. The respondents are relying on the decision in *Kamel* 2008, in which Justice Noël stated that having regard to the five factors from *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]), the principles of procedural fairness are satisfied if:

> *(a)* *the investigation includes disclosure to the individual affected of the facts alleged against him or her and all of the information obtained in the course of the investigation;*
>
> *(b)* *the investigation informs the individual of the investigator's objectives and gives the individual an opportunity to respond fully; and*
>
> *(c)* *the decision-maker must have all of the facts necessary in order to make an informed decision.*

[48] The respondents therefore submit that the applicant has failed to establish that the principles of procedural fairness were breached in any way in this case.

*(a) The investigation includes disclosure to the individual affected of the facts alleged against him or her and the information obtained in the course of the investigation*

[49] The respondents emphasize that the letter dated July 27, 2009, notifies the applicant that, on account of the judgment made against him by the Tribunal de Grande Instance de Paris in 2001, Passport Canada is in the process of reviewing his eligibility for a passport.

[50] The respondents remind the Court that the applicant did not provide any additional information in the interval between the date he received the letter dated July 27, 2009, and the date the first draft of the recommendation was sent, January 14, 2010.

[51] The respondents contend that the applicant was informed of all of the relevant facts and documents from the investigation that form the basis for the allegations against him when he was sent the drafts of Passport Canada's recommendation to the Minister on January 14 and April 7, 2010.

[52] The respondents also submit that Passport Canada's recommendation, given to the Minister on June 16, 2010, and disclosed to the applicant, contains no new facts.

*(b) The investigation informs the individual of the investigator's objectives and gives the individual an opportunity to respond fully*

[53] The respondents note that it was open to the applicant to file further information and arguments in response to the two drafts of Passport Canada's recommendation and that the applicant exercised that right.

*(c) The decision-maker must have all of the facts necessary in order to make an informed decision*

[54] The respondents deny the applicant's allegation that the recommendation is silent on the points raised in his replies of March and April 2010. The recommendation to the Minister addresses the additional information and arguments presented by the applicant, which are appended to the recommendation. In this regard, the respondents remind the Court of the contents of the file sent to the Minister, which is found, more specifically, at Tab B of the Respondents' Record, at pages 1347 to 1905.

[55] The respondents submit that the Minister had all of the relevant information and documents required to make an informed decision.

[56] The respondents further state that, in the circumstances, given the nature of the decision and the legal framework through which it was made and taking into account the process followed by Passport Canada, the applicable principles of procedural fairness were observed.

**Analysis**

[57] To establish the scope of the duty of procedural fairness in this case, the Court is relying on Justice Noël's decision in *Kamel* 2008, especially since both parties agree on this element of the decision. In this regard, it is useful to reproduce the paragraphs of the judgment setting out the main principles that are applicable:

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

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

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

[68] In this case, the Minister had to decide whether to issue a passport to a Canadian citizen, and an administrative investigation was conducted. As we shall see, denial of a passport application prevents a Canadian citizen from travelling throughout the world. Accordingly, the decision is an important one for the person who is denied a passport. As a result, the investigation leading to the

recommendation to be made to the Minister must include full participation by the individual affected. Procedural guarantees are therefore necessary: a passport applicant must be able to know exactly what the allegations against him or her are and what the information collected in the course of the investigation is, and must be able to respond to it completely, so that the report submitted to the Minister includes his or her comments.

[69] The third factor requires that the importance of the right affected be considered. As noted earlier, Mr. Kamel's interest in obtaining his Canadian passport is an important one, not only because he needs it in order to travel, but also because a passport is an identity document that gives its holder the protection of the other country, at Canada's request. Mobility rights are facilitated by this travel document. As the Supreme Court said in *Suresh*, above, at paragraph 118: "The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*." Denial of a Canadian passport has major consequences both personally and financially. No elaboration on that point is needed. As a result, this factor calls for adherence to stronger procedural guarantees to be observed in applying section 10.1 of the Order.

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

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

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

[58] In his decision, Justice Noël criticizes Passport Canada's omission to provide the applicant with a copy of the CSIS report that served as a basis for the decision to recommend that the applicant be refused a passport. As Justice Noël points out, at paragraph 19, "In the CPO document that accompanied the recommendation to the Minister, there is no specific reference to the CSIS document. However, it is apparent from reading the CPO report to the Minister that it was a determining factor."

[59] At paragraph 83 of his decision, Justice Noël also takes into account the fact that the investigation file does not objectively reflect the applicant's position. Justice Noël emphasizes that this report does not present the Minister with both parties' positions, but instead sets out the position of Passport Canada. He also states that "[a] report of this nature must present the parties' positions in a factual and balanced way".

[60] In this case, the Court finds that the principles of procedural fairness were not breached.

[61] It is clear, from reading the documents in the file, that Passport Canada takes the above comments by Justice Noël into account. In addition, the report containing the recommendation to the Minister integrates all of the applicant's representations. Certainly, counsel for the applicant submits that the report leaves something to be desired in terms of the wording used to convey the applicant's representations that no charges have been laid against him since his conviction in France, in 2001. However, from reading the recommendation to the Minister, this Court is satisfied that the opposite is true, since the recommendation reproduces verbatim excerpts from the letter to Passport Canada, dated April 19, 2010, from the counsel for the applicant. Indeed, the recommendation states, [TRANSLATION] "In her reply to the first draft of the recommendation made under section 10.1 of the *Canadian Passport Order* concerning national security, Mr. Kamel's legal advisor, Johanne Doyon, states that Mr. Kamel has never been investigated under section 9 of the Order, is not on a list of persons considered to be Canadian or international terrorists, has never been arrested for or convicted of any crime since his release in 2004 and has lawfully replaced all of the passports issued in his name".

[62] Furthermore, the Court notes that the applicant did indeed have access to the investigation report prepared by Passport Canada and was given the opportunity to comment on it. At paragraph 99 of his memorandum, the applicant contends to the contrary. However, on written cross-examination on his affidavit, more specifically at page 38 of the Applicant's Record, the applicant gives the following answer to a question:

> [TRANSLATION]
> I am referring to the investigation report prepared by Passport Canada's Investigation and Entitlement Review Section, Security Bureau and/or Investigations Division as part of their investigation of me. The investigation report I refer to in my affidavit may also include all reports about me prepared by the Canadian Security

> Intelligence Service and disclosed to Passport Canada, as the case may be.

[63] Aside from Passport Canada's investigation report, there are no reports in the file. The Court notes that the applicant did in fact have access to Passport Canada's investigation report, since he states, many times in his written submissions, that this report does not identify him as posing a danger to national security:

> [TRANSLATION]
> The 2005 CSIS report did not identify him as a danger to national security, a fact and item of evidence overlooked in the federal agency's recommendation to the Minister despite the fact that Passport Canada was already in possession of the report as part of the judicial review in T-100-06 (*Kamel c Canada*, 2008 CF 338, paras. 19, 23, 79 and 85) . . .

[64] What is more, the following documents are included in full in the appendices to the recommendation to the Minister: counsel for the applicant's letters to Passport Canada dated March 4 and 16, 2010, and a complete copy of the decision in *Ouzchar*, above, referred to by the applicant. The sections of Canada's *Criminal Code* referred to by counsel for the applicant are also found in the appendices to the recommendation. Considering this material evidence, the applicant's contention that the principles of procedural fairness were breached cannot be accepted because the file given to the Minister contained all of the applicant's representations.

[65] Regarding the time that elapsed before the Minister made his decision, although the Court sympathizes with the applicant, it cannot find that there was undue delay in this case. It is true that the decision of the Federal Court of Appeal is dated January 23, 2009; however, this Court finds it reasonable that Passport Canada waited until the Supreme Court made its decision on the application for leave to appeal. It was not until August 2009 that the Supreme Court denied the

application for leave to appeal. The Court also notes that on January 14, 2010, approximately five months later, Passport Canada sent the applicant the first draft of its recommendation. Considering the particular nature of the file, the Court cannot characterize the delay as "unreasonable". Moreover, following the first communication by Passport Canada, the time between communications shortens considerably.

[66] As for the applicant's argument concerning Passport Canada's errors of fact, more specifically regarding the reference allegedly made in the letter dated July 27, 2009, to a 30-day time limit for the applicant to send in his representations, the Court notes that the respondents do not specify the time limit in that letter. This requirement is instead found in the appendices to the letter delivered by hand to the applicant. In the letter dated January 14, 2010, the respondents merely state that [TRANSLATION] "the applicant had 30 days to reply or provide relevant information". In the circumstances, it is difficult for the Court to conclude that the respondents made inaccurate statements. However, the Court is of the opinion that the respondents had to specify the time the applicant had to reply if he then wanted to object to such a time limit. Such an error cannot provide a valid basis for asserting an apprehension of bias, especially since it did not result in any harm to the applicant, as, moreover, he has acknowledged through his counsel.

[67] For these reasons, the Court finds that the principles of procedural fairness applicable in this file were not breached.

*3. Were the applicant's constitutional rights guaranteed by section 6 of the Charter violated by the investigative process, Passport Canada's recommendation and the Minister's decision to refuse to issue him a passport?*

**Applicant's submissions**

[68] The applicant states that the case law and doctrine have established that refusal to issue a passport has a direct impact on the mobility rights guaranteed by section 6 of the Charter. Such a measure prevents citizens from freely entering or leaving their country (see *Kamel* 2008 at paragraph 113).

[69] The applicant once again stresses that the right of access to a passport is also acknowledged in the case law in various contexts. This access is considered a direct manifestation of the right guaranteed by section 6 of the Charter and section 12 of the *International Covenant on Civil and Political Rights* (International Covenant).

[70] The applicant therefore argues that the respondents are refusing, without reasonable justification, to issue him a passport, thus violating his rights guaranteed by subsection 6(1) of the Charter.

**Respondents' submissions**

[71] The respondents acknowledge that a decision to refuse to issue a passport to a Canadian citizen violates the citizen's rights guaranteed by subsection 6(1) of the Charter.

**Analysis**

[72] Given the statements of the Federal Court of Appeal in this case, the Court acknowledges that the decision to refuse to issue a passport to the applicant violates his rights guaranteed by subsection 6(1) of the Charter.

> *4. Were the applicant's constitutional rights guaranteed by section 7 of the Charter violated by the investigative process, Passport Canada's recommendation and the Minister's decision to refuse to issue him a passport?*

**Applicant's submissions**

[73] The applicant asserts that the sections of the Order at issue in the case at bar, which allow for a passport to be refused, infringe general liberty and the security of the person.

[74] According to the applicant, since 2005, his mobility and liberty rights guaranteed by sections 6 and 7 of the Charter have been unfairly infringed. As an example, he notes that the refusal to issue him a passport prevents him from travelling, which he must do to develop and

work in the import business he intends to set up with his brother. This refusal also denies him the opportunity to visit his family in Algeria and travel with his spouse and son for leisure vacations. Last, he cannot exercise complete, unfettered liberty.

[75] The applicant also contends that neither the Minister's decision nor the process followed by Passport Canada satisfies the requirements of the principles of fundamental justice. Any decision must turn upon the facts and the law. It must be made without bias and by applying an appropriate standard of proof and be consistent with all Charter values, including the presumption of innocence and good faith and the right to privacy.

[76] The applicant also submits that the Minister's decision and the process followed are inconsistent with the principles of fundamental justice, which ensure that everyone subject to the law has the right to a hearing by an independent and impartial tribunal. The applicant alleges having been denied a full and impartial hearing of his case in accordance with the principles of fundamental justice within the meaning of section 7 of the Charter. He also relies on the International Covenant and paragraph 2(*e*) of the *Canadian Bill of Rights* (SC 1960, c 44). The applicant asserts that Passport Canada and the Minister of Foreign Affairs do not constitute an "independent decision-maker" having jurisdiction to deprive him in this manner of his most fundamental rights.

**<u>Respondents' submissions</u>**

[77] The respondents point out that, for the purposes of section 7 of the Charter, the applicant must prove, first, that a deprivation of his right to life, liberty and security of the person has occurred and, second, that the deprivation is not in accordance with the principles of fundamental justice (*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at paragraphs 29 and 30 [*Chaoulli*]).

[78] In the case at bar, the respondents submit that the applicant has failed to meet his burden of proving that his constitutional rights guaranteed by section 7 of the Charter were infringed (*Mahjoub (Re)*, 2009 FC 988, at paragraphs 46 and 47).

[79] The respondents further contend that the applicant's allegations also fail to show that the Minister's decision results in an infringement of the right to liberty. The rights claimed by the applicant are not among the "basic choices going to the core of what it means to enjoy individual dignity and independence" (*Godbout v Longueuil (City)*, [1997] 3 SCR 844 at paragraph 66 [*Godbout*]). Furthermore, the respondents point out that the scope of the Constitution cannot be expanded to protect any activity that a person decides to define as essential to his or her lifestyle.

[80] Regarding the allegations concerning the applicant's occupational choices, the respondents note that it is clearly established that section 7 of the Charter does not protect economic rights. This section does not protect the right to choose a career or the choice to transact business whenever one wishes (*Chaoulli*, at paragraphs 200 to 202).

[81] Furthermore, the respondents emphasize that the evidence presented by the applicant to establish that he was prevented from travelling for leisure vacations is insufficient to show that this is a violation of his rights guaranteed by section 7 of the Charter (*Khadr v Canada (Attorney General)*, 2006 FC 727, [2007] 2 FCR 218 at paragraphs 73 to 75 [*Khadr*]).

[82] Last, the respondents submit that the fact that there is a specific provision in the Charter applicable to the facts—in this case subsection 6(1) of the Charter, which encompasses the right to a passport—bars all recourse to other, more general provisions of the Charter.

**Analysis**

[83] The Court agrees with the respondents' argument that the rights claimed by the applicant are not among the "basic choices". The Constitution does not protect economic rights or confer a right to travel for leisure vacations. In addition, the Applicant's Record contains no specific evidence showing that the issuance of a passport is essential for him to start up his import business; in any event, the Constitution does not protect economic rights. Furthermore, as Justice Phelan wrote in *Khadr* at paragraph 73,

> Liberty includes more than freedom from physical restraint; it includes personal autonomy. It is fairly arguable that if choosing where to establish one's home is a quintessentially private decision going to the very heart of personal or individual autonomy, as held in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at 893, so too is the choice of where to go either in or outside Canada.

[84] As well, procedural fairness does not always require that an oral hearing be held (*Baker*, above, at paragraph 33; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 at paragraph 121 [*Suresh*]. The Court is satisfied that, in this case, it was not necessary to hold an oral hearing. The applicant had the opportunity to present his entire case because the process allowed for each of his arguments to be incorporated into the file given to the Minister. In those circumstances, there can be no breach of the principles of procedural fairness.

*5. Were the applicant's constitutional rights guaranteed by section 8 of the Charter violated by the investigative process, Passport Canada's recommendation and the Minister's decision to refuse to issue him a passport?*

**<u>Applicant's submissions</u>**

[85] The applicant submits that section 8 of the Charter gives everyone the right to be secure against unreasonable search and seizure (*R v Morelli*, 2010 SCC 8, [2010] 1 SCR 253). In this case, he states that Passport Canada had no right to delve into or meddle with his private life, and even less of a right to do so by investigating into an individual's actions, beliefs and lawful associations, which are among the fundamental freedoms guaranteed by section 2 of the Charter, or to do so because the applicant allegedly had a "dubious reputation".

**Respondents' submissions**

[86] The respondents state that the applicant is simply making a general allegation that Passport Canada's investigation violates his rights guaranteed by section 8 of the Charter, without introducing any actual evidence to support his allegation.

[87] The respondents further submit that in an investigation conducted under section 10.1 of the Order, Passport Canada may take into consideration the applicant's actions, beliefs and associations without infringing the applicant's right to privacy. The respondents also submit that there is no evidence in the record establishing that Passport Canada did in fact take into consideration the actions, beliefs and associations of Mr. Kamel.

[88] The respondents contend that, in this case, Passport Canada opened an investigation into the applicant's eligibility for a passport and took into account the French judgment, which is a public document. The respondents further state that the responsibility the Order confers on Passport Canada entails, by necessary implication, the power to verify the truthfulness of the information provided and, if necessary, to investigate the applicants' eligibility to receive Passport Canada's services.

[89] The respondents remind the Court that section 10.1 of the Order is aimed at ensuring that the government meets its objectives with respect to fighting international terrorism, honouring Canada's commitments in that area and maintaining the good reputation of the Canadian passport. The respondents therefore conclude that Passport Canada's investigation of the

applicant is consistent with achieving those ends and strikes the appropriate balance between those objectives and the applicant's right to privacy (*Kamel* 2009 at paragraphs 50 and 51; *R v Rodgers*, 2006 SCC 15, [2006] 1 SCR 554 at paragraph 44).

**Analysis**

[90] The Court notes that the applicant did not file any evidence to support his allegation that the investigation violates his rights protected by section 8 of the Charter. Moreover, the file accompanying the recommendation to the Minister does not contain any objective evidence establishing that Passport Canada took into account the applicant's actions, beliefs and associations. Passport Canada's decision is predicated exclusively on the judgment by the Tribunal de Grande Instance de Paris. In the circumstances, the Court cannot conclude, as the applicant alleges, that his right to privacy was infringed. The only evidence supporting the recommendation to the Minister is public; it is the judgment by the Tribunal de Grande Instance de Paris.

[91] Furthermore, the very process of issuing a passport automatically entails fact checking and a security assessment for all Canadian citizens. The applicant cannot be exempted from this rule, especially since there is in this case a public document, a judgment, bearing specifically on an element that it is essential to take into consideration given Passport Canada's obligations under section 10.1 of the Order, namely with regard to fighting terrorism, honouring Canada's commitments in that area and maintaining the good reputation of the Canadian passport.

[92] In these circumstances, the Court cannot find that the applicant's rights guaranteed under section 8 of the Charter were violated.

*6. If so, are those infringements justified under section 1 of the Charter?*

[93] The Court declares that the applicant's fundamental rights guaranteed by subsection 6(1) of the Charter were indeed infringed, but this infringement is justified under section 1 of the Charter for the reasons below.

**Analysis framework**

[94] Under section 1 of the Charter, Charter rights are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

**The decision is prescribed by law**

[95] This issue is addressed by part of the decision in *Kamel* 2009. The Federal Court of Appeal concluded that section 10.1 of the Order is, in fact, a law. The Court fully adopts the Federal Court of Appeal's analysis, found in paragraphs 20 to 31 of *Kamel* 2009 and, more specifically, the paragraphs reproduced below, which state that the language of section 10.1 of the Order is sufficiently precise for it to be a law within the meaning of section 1 of the Charter.

[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, at pages 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, at paragraph 15; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paragraph 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, at paragraph 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 in so far 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, at paragraph 48; *Nova Scotia Pharmaceutical*, at pages 641-642; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paragraph 85);

(6) More specifically, with regard 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*) [as am. by S.C. 1992, c. 49, s. 43] of the *Immigration Act* [R.S.C., 1985, c. I-2], 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 85–90, 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.

**Justified in a free and democratic society**

[96] The analysis framework for determining whether a legislative provision is a reasonable limit to a Charter-guaranteed freedom or right is set out in *R v Oakes*, [1986] 1 SCR 103. Both parties in this case agree on that. The Federal Court of Appeal words the test as follows in *Kamel* 2009 at paragraphs 32 and 33:

> [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?
>
> (*The Queen v. Oakes*, [1986] 1 S.C.R. 103, at pages 138-139; *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 S.C.R. 835, at paragraph 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.

[97] Justice Décary of the Federal Court of Appeal adds, at paragraph 35, that “[t]he 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 SCR 199, at paragraphs 63 and 137 [*RJR-MacDonald Inc*]).”

[98] In this case, the analysis of this question by the Federal Court of Appeal, in *Kamel* 2009, confines the debate. In fact, given that this is the same case, the Court must determine whether the Federal Court of Appeal’s analysis is still relevant to the particular facts of the case at bar. The Court also notes the judge’s comments in *Abdelrazik v Canada (Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267:

> [133] Therefore, although there is no doubt that section 10.1 of the *Canadian Passport Order* has been found to be constitutionally valid by the Federal Court of Appeal in *Kamel*, it does not follow that every refusal of the Minister made pursuant to that section must necessarily also be constitutionally valid. The issue before the Federal Court of Appeal in *Kamel* was limited to whether section 10.1 violated section 6 of the Charter and, if it did, whether it was justified under section 1. In his judgment, Justice Décary was careful to note: “<u>I will not comment on other aspects of this</u>

> 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 other words, while the section is valid, the decision made under it may not be. [Emphasis added.]

[99] The Court must therefore undertake a new analysis. The Court must emphasize, however, that the distinctive feature of this case is that this analysis has already been conducted for the same applicant in similar circumstances.

**(1) Is the restriction designed to achieve a sufficiently important objective?**

[100] For this first question, the Court relies on the judgment of the Federal Court of Appeal, at paragraphs 50 and 51, given that there have been no changes to the aim of the legislation or in the concerns to do with security and the fight against terrorism since *Kamel* 2009:

> [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.

### (2) Are the means chosen proportional to the objective?

*The rights violation must be rationally connected to the aim of the legislation*

**Applicant's submissions**

[101] The applicant states that the allegations concerning the danger in issuing him a passport because the international community will no longer have the necessary confidence in Canadian passports are mere, unproven conjecture related to the objective of purportedly maintaining the "good reputation" of the Canadian passport. The applicant submits that this fear alone cannot suffice to establish a connection between the violation of his rights and the legislative objective.

**Respondents' submissions**

[102] In reply, the respondents note that satisfying the rational connection test between the violation of the applicant's rights and the objective stated in the Order calls for nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt. The applicant also points out that if there is a reasonable basis for believing a rational connection exists between the means chosen by the government and the purpose of the Order, that may suffice (*RJR-MacDonald Inc*, above, at paragraph 82).

[103] The respondents contend that, in this case, the evidence in the record shows that the Minister has a basis for believing that refusing to issue Mr. Kamel a passport logically furthers the objectives stated in the Order.

**Analysis**

[104] In its analysis, at paragraph 56, the Federal Court of Appeal concludes that "[t]his evidence [Professor Rudner's affidavit and the United Nations conventions on terrorism ratified by Canada] 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".

[105] The Court calls attention to paragraph 5 of Fateh Kamel's case history, which is included in Passport Canada's recommendation to the Minister:

> [TRANSLATION]
> Mr. Kamel and 21 other persons are convicted by the Tribunal de Grande Instance de Paris for their activities in 1996, 1997 and 1998, in a conspiracy to prepare acts of terrorism and, more specifically, for their involvement in a conspiracy to carry out bomb attacks of metro stations located in Paris and their involvement in a series of attacks in Roubaix, in the north of France. In its decision, the French court stated that, in 1994 and 1995, Mr. Kamel had travelled extensively in Bosnia, in Slovenia, to Montréal, in Austria and in the Netherlands to consolidate his position in this terrorist network. In 1996, Mr. Kamel participated in forging and supplying passports to benefit the terrorist network.

[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. Indeed, there is no way to isolate the facts leading to the applicant's conviction and examine whether they support any sort of connection with the purpose of the Order.

*The impugned provision must impair the Charter rights as little as possible*

**Applicant's submissions**

[107] The applicant submits that section 10.1 of the Order does not satisfy the minimal impairment test with regard to his rights. Relying on the lack of concrete evidence in the record, the applicant concludes that it is not necessary to deny him a passport to meet the national security objectives set out in the departmental policy.

[108] At the hearing, counsel for the applicant argued that there are means to meet the Order's stated purpose without infringing the applicant's rights.

**Respondents' submissions**

[109] The respondents, for their part, note that the Supreme Court addresses what constitutes a "minimal impairment" in *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256. At paragraph 50 of that decision, the Court calls to mind *RJR-MacDonald*

*Inc*, in which it gave the following definition of the applicable test, that is, that rights must not be impaired more than necessary:

> 160 . . . The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement: . . .

[110] The respondents also refer to *Kamel* 2009, in which the Court of Appeal stressed the following:

> [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.

[111] The respondents state that, in this case, the refusal to issue a passport is limited to a five-year period, which does not irreversibly deprive Mr. Kamel of his right to leave the country, especially since the applicant may still file an application for a limited validity passport for urgent or compassionate reasons (*Kamel* 2009 at paragraph 62).

[112] Last, the respondents note that, even if a court proposes less impairing means, that is not sufficient to make a finding that the impairment is not minimal (*Trociuk v British Columbia (Attorney General)*, 2003 SCC 34, [2003] 1 SCR 835 at paragraph 36; *United States of America v Cotroni and United States of America v El Zein*, [1989] 1 SCR 1469).

**Analysis**

[113] First of all, the Court notes that the Minister is placing a five-year time limit on his refusal to issue a passport to the applicant. This refusal is further mitigated in that the applicant may, at any time, apply for a limited validity passport for urgent or compassionate reasons. These two factors show that the applicant's rights are, to a certain extent, being weighed against the aim of the legislation. Indeed, the applicant is not facing a final, ill-considered refusal. The refusal decision mentions the possibility of obtaining a limited validity passport. In the circumstances, the refusal to issue a passport falls within the range of reasonable measures and, in the opinion of the Court, is a minimal impairment of the applicant's rights.

*The effects of the measure must be proportional to its objective*

**Applicant's submissions**

[114] The applicant is contesting the merits of the conclusion that it was "necessary" for the national security of Canada or another country to refuse him a passport. He contends that the respondents do not have the evidence necessary to conclude that he should be denied a passport. Counsel for the applicant submits that Mr. Kamel served his sentence in France and has no other entries in his criminal record, and that the government has no evidence against him aside from the French decision. The applicant contends that this single piece of evidence cannot justify the Minister's refusal, given the lack of a direct causal link between his prior conviction and national security or the fight against terrorism.

[115] The applicant states that the respondents err in law in failing to recognize the difference between whether this measure is "necessary" for national security or "convenient or advantageous" for Canada (see *Kamel* 2009 at paragraph 29).

[116] The applicant also submits that the respondents have failed to assess his rights in accordance with the appropriate standard of proof and the applicable law.

**Respondents' submissions**

[117] The respondents note that the words "if the Minister is of the opinion" contained in section 10.1 of the Order give the Minister discretion, which is exercised within the bounds described by the words "such action is necessary".

[118] In addition, the applicant also emphasizes that the courts have recognized that a broad and flexible interpretation must be given to the notion of "security of Canada" (*Harkat (Re)*, 2010 FC 1241 at paragraphs 80 and 82 to 84 [*Harkat*]; *Suresh*, above, at paragraphs 85 to 87).

[119] The respondents acknowledge that the Minister's decision was made on the basis of the applicant's conviction in 2001 by the Tribunal de Grande Instance de Paris. They also state that in matters of national security, direct evidence of danger is not required. Furthermore, a person's past actions may be taken into account (*Harkat*, above, at paragraph 83; *Zündel (Re)*, 2005 FC 295 at paragraph 18 [*Zündel*]).

[120] The respondents also point out that the French judgment is not the only basis. In fact, also appended to the recommendation are the Order and documents providing a description of the Order's stated purpose, Passport Canada's mandate, Canada's commitments, the importance of a passport and terrorism in today's world. The respondents submit that, on the basis of all of those elements, the Minister is able to assess the contents of the file and exercise his discretion.

**Analysis**

[121] At paragraph 67 of *Kamel* 2009, the Federal Court of Appeal sets out the elements that the Minister must take into account in such files:

> [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 [at paragraph 77] in *Harper*, "a reasoned apprehension of . . . harm". Common sense dictates that the possible collective harm outweighs the real individual harm.

[122] What must therefore be determined is whether the respondents meet the "necessity" test. If so, there is proportionality between the harm to the applicant and the benefit for the community as a whole.

[123] The Court is very sensitive to the applicant's arguments that there must be sufficient evidence to justify the infringement of his right to be presumed innocent. However, it also notes that the decision to refuse a passport is not a criminal law measure. That being so, the Minister does not have to apply the standards and guarantees that generally hold sway in criminal law.

[124] Furthermore, in its analysis, the Court must take into account the unique paradigm of national security and the rules which apply in that sphere and evolve quickly as events unfold. Furthermore, this Court has already stated that in matters of national security, direct evidence of danger is not required and past actions may be taken into account (*Harkat*, above, at paragraph 83; *Zündel*, above, at paragraph 18). It follows that, in a certain context of the fight against terrorism and risks for national security, the general rules of evidence are not necessarily the same as those usually applied in other types of cases. In the case at bar, we are in the realm of exceptions. There must be room for the exercise of informed discretion. In this regard, it seems judicious to reiterate the words of the House of Lords in *Secretary of State for The Home Department v Rehman*, [2001] UKHL 47 (October 11, 2001) at paragraph 62:

> 62. *Postscript.* I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decision of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.

[125] The case law referenced above ably defines the evidence needed to satisfy the proportionality test and the deference required from this Court in considering a discretionary decision made in light of a recommendation by a specialized body. In this case, the Court is of the opinion that this test is satisfied, since the applicant’s rights are infringed for a limited time of five years. The infringement also cannot be characterized as final and irrevocable, since it is possible that a limited validity passport could be issued.

[126] The Minister’s decision in this case complies with all of the rules of procedural fairness and meets the Order’s stated objectives. In fact, the Order is designed, among other things, to maintain the good reputation of the Canadian passport. The Minister’s decision to refuse to issue a passport to the applicant, who has previously been found guilty of offences inextricably linked to passports, seems reasonable in the Court’s view. The causal link with the objectives stated in the Order seems clear to the Court. That is why the Court finds that the Minister’s decision to refuse the applicant a passport for reasons related to the national security of Canada or of another country is reasonable and consistent with the law in the circumstances.

[127] Given this finding, the Court is of the opinion that there is no need to analyze questions 7 and 8.

## III. Conclusion

[128] The Court notes that the principles of procedural fairness were not breached in the investigation leading to this dispute. As for the applicant's constitutional rights guaranteed by sections 6, 7 and 8 of the Charter, the Court concludes that only subsection 6(1) was violated, but that this violation is justified under section 1 of the Charter. Consequently, the application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT'S JUDGMENT IS that** the application for judicial review is dismissed.

"André F.J. Scott"
Judge

Certified true translation
Sarah Burns

## APPENDIX

***Canadian Passport Order,* SI/81-86**

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.

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

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

(i) in the application for a passport, or

(ii) pursuant to section 8;

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

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

(*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

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

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

(i) dans la demande de passeport, ou

(ii) selon l'article 8;

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

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

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

conditions imposées :

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

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

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

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

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

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

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

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

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

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

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

(*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 means of false or misleading information; or

(*e*) has ceased to be a Canadian citizen.

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.

*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;

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

*e*) n’est plus citoyen canadien.

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***

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.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

8. Everyone has the right to be secure against unreasonable search or seizure.

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

***Constitution Act, 1982***

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1366-10 |
| **STYLE OF CAUSE:** | FATEH KAMEL<br>V<br>THE ATTORNEY GENERAL OF CANADA<br>THE MINISTER OF FOREIGN AFFAIRS<br>PASSPORT CANADA |
| **PLACE OF HEARING:** | Montreal, Quebec |
| **DATE OF HEARING:** | May 18, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | SCOTT J. |
| **DATED:** | September 8, 2011 |

**APPEARANCES:**

| | |
|---|---|
| Johanne Doyon | FOR THE APPLICANT |
| Linda Mercier and<br>Sarah Gauthier | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

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| Myles J. Kirvan<br>Deputy Attorney General of Canada<br>Montréal, Quebec | FOR THE RESPONDENTS |