T-937-04

2006 FC 727

Abdurahman Khadr (*Applicant*)

v.

Attorney General of Canada (*Respondent*)

INDEXED AS: KHADR v. CANADA (ATTORNEY GENERAL) (F.C.)

Federal Court, Phelan J.—Toronto, December 5 and 6, 2005; Ottawa, June 8, 2006.

Crown — Prerogatives — Judicial review of decision made under Crown prerogative by Minister of Foreign Affairs to deny issuance of passport — Applicant Canadian citizen, issued Canadian passport scheduled to expire in November 2004 — Application for replacement passport made in accordance with Canadian Passport Order — No known or stated grounds upon which to refuse to issue passport — Decision actually made by Minister, not Passport Office — Grant, refusal of passport matter within Crown prerogative — Source of power for issuance of passports royal prerogative — Prerogative can only be abolished, exhausted by clear words in statute, by necessary implication from words in statute — Canadian Passport Order not being statute, not raising necessary implication prerogative exhausted — Application allowed.

Federal Court Jurisdiction — Judicial review of refusal to issue new passport to applicant — Source of power for issuance of passports royal prerogative — Federal Court previously taking jurisdiction in matters involving Crown prerogative — Matter justiciable, amenable to judicial review if subject-matter affects rights, legitimate expectations of individual — Refusal to issue passport for improper purpose, without affording procedural fairness, judicially reviewable — Federal Court having jurisdiction on grounds Minister's decision not to issue passport "order", pursuant to exercise of prerogative falling within Federal Courts Act, s. 2(1) definition and under purposive interpretation of Federal Courts Act, s. 18 — Order made pursuant to exercise of Crown prerogative squarely within exclusive jurisdiction of Federal Court.

Administrative Law — Judicial Review — Grounds of Review — Applicant initially advised by Passport Office of decision to refuse to issue passport — Decision actually made by Minister of Foreign Affairs, not Passport Office — Whether applicant entitled, on grounds of procedural fairness, to have passport application dealt with by Passport Office, as stipulated in Canadian Passport Order — Content of duty of procedural fairness depending on number of factors — Principle of legitimate expectation requiring government to follow processes, procedures, regular practices held out to individual, public at large — Minister's decision contrary to fairness principle generally, to legitimate expectation Minister directly and through Department officials created — Applicant entitled to have legitimate expectation met.

Constitutional Law — Charter of Rights — Mobility Rights — Applicant arguing Minister's refusal to issue new passport contrary to Charter, s. 6 — Primary purpose of s. 6(1) to guarantee right to remain in Canada — Canadian government recognizing importance of passport even for entry into Canada — Access to passport manifestation of exercise of Charter right — Importance of passport meaning principle of fairness must be closely, rigorously adhered to.

Constitutional Law — Charter of Rights — Life, Liberty and Security — Applicant submitting denial of passport violation of right to liberty, contrary to principles of fundamental justice — Liberty more than freedom from physical restraint, including personal autonomy — S. 7 right to liberty encompassing only matters properly characterized as fundamentally, inherently personal — Right to leave Canada not constituting s. 7 right to liberty.

Construction of Statutes — Provisions of Federal Courts Act should be read purposefully to give effect to objects,

aims of legislation, subjecting exercise of federal decision-making powers to Court's supervisory jurisdiction — In face of two acknowledged reasonable interpretations, court must find which one better according with purpose of legislation, intent of section, avoiding inconsistency, problems — Interpretation of "may" in Canadian Passport Order, ss. 4, 9 — Under Interpretation Act, s. 11, "shall" to be construed as imperative, "may" as permissive — More consistent with purpose, intent of Canadian Passport Order to read "may" as granting permission to Canadian citizens to be issued passport.

This was an application for judicial review of a decision made by the Minister of Foreign Affairs pursuant to the Crown prerogative to deny the issuance of a new passport. The applicant, a Canadian citizen, was issued a Canadian passport in November 1999 with an expiry date of November 2004. Following the loss of his passport, the applicant applied to the Canadian Passport Office for a replacement passport in accordance with the *Canadian Passport Order.* There was no known basis upon which to refuse his application. However, by letter of April 16, 2004, from the Chief Executive Officer of the Passport Office, the applicant was informed that his application was denied. The letter did not state the grounds for the denial, the identity of the person who made the decision or the legal authority on which the decision was based. It took the applicant some time to determine that the decision had actually been made by the Minister and not the Passport Office. The principal reason for denying the passport—in the interests of national security—was based on concern about Canada-U.S. relations and public disapproval for issuing a passport to a member of an infamous family, many members of which are openly supporters of Al-Qaida. National security was not a ground for denial of a passport listed in the *Canadian Passport Order* at the time.

The applicant sought a declaration, pursuant to paragraph 18(1)(*a*) of the *Federal Courts Act*, that the Minister's decision was unlawful, unconstitutional, in violation of sections 6 and 7 of the *Canadian Charter of Rights and Freedoms*, and therefore invalid. The respondent admitted that the Minister's decision was procedurally unfair and requested that it be quashed and the matter remitted to the Minister for re-determination in accordance with the amended *Canadian Passport Order*. It was agreed that the grant or refusal of a passport is a matter within the prerogative of the Crown, and that refusal of a passport application on the grounds of national security is not within the authority vested in the Passport Office by the *Canadian Passport Order* as it stood at the time of the applicant's application.

Held, the application should be allowed.

(1) The first question was whether the exercise of the Crown prerogative was subject to judicial review and, if so, whether the Federal Court has jurisdiction to conduct that review. The Supreme Court of Canada has held that where the Crown prerogative violates an individual's rights provided under the Charter, the exercise of the prerogative can be reviewed by the Court. In *Black v. Canada (Prime Minister)*, the Ontario Court of Appeal ruled that a matter is justiciable and amenable to judiciable review if its subject-matter affects the rights or legitimate expectations of an individual. The subject-matter herein, the granting of a single passport to an individual, was readily justiciable. The law is now that the refusal to issue a passport is justiciable, particularly where there are issues of Charter rights and questions of fairness and legitimate expectations. The Federal Court had jurisdiction over the exercise of Crown prerogative on both the grounds that the Minister's decision not to issue a passport was an "order" within the *Federal Courts Act*, subsection 2(1) definition and that a purposive interpretation of the *Federal Courts Act* indicates that Parliament intended the Federal Court to have exclusive jurisdiction over the exercise of the justiciable aspects of the federal exercise of the Crown prerogative. The Minister's decision was carried out by an order to officials to deny the passport application; as such, it was an order made pursuant to the exercise of the Crown prerogative and it fell squarely within the exclusive jurisdiction of the Federal Court. In *Canada (Human Rights Commission) v. Canadian Liberty Net*, the Supreme Court of Canada underlined the intent of Parliament to grant to the Federal Courts general administrative jurisdiction over federal decision makers. The Federal Court has previously, either expressly or by action, taken jurisdiction in matters involving the Crown prerogative. The provisions of the *Federal Courts Act* should be read purposefully to give effect to its objects and aims, subjecting the exercise of federal decision-making powers to the Federal Court's supervisory jurisdiction. By including a reference to the Crown prerogative, Parliament intended the Federal Court to have jurisdiction over justiciable matter of that prerogative. Subsection 2(1) of the *Federal Courts Act* is aimed at control of the exercise of a federal power; it focusses on the source of the power, be it Parliament or the executive. In the face of two acknowledged reasonable interpretations, a court must find the one which better accords with the purpose of the legislation, the intent of the section, and avoids inconsistency and problems. Therefore, even where there is no

order, the exercise of the federal Crown prerogative as the source of the power in the area of justiciable matters is within the jurisdiction of the Federal Courts under subsection 2(1) and specifically assigned to the Federal Court under section 18.

(2) The applicant submitted that the Minister's decision to refuse the renewal of his passport was contrary to sections 6 and 7 of the Charter. While not determinative, the Charter arguments were addressed. Section 6 gives to citizens a right to enter, remain in and leave Canada. The Supreme Court of Canada has ruled that the primary purpose of subsection 6(1) of the Charter was to guarantee the right to remain in Canada. The Canadian government in its own published materials recognized the importance of a passport even for entry into Canada. Access to a passport is a manifestation of the exercise of a Charter right. The importance of a passport means that the principle of fairness must be closely and rigorously adhered to. As to section 7 of the Charter, the applicant argued that the denial of a passport violates the right to liberty and is contrary to the principles of fundamental justice. Liberty is more than freedom from physical restraint and includes personal autonomy. The section 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As such, the right to leave Canada does not constitute a section 7 right to liberty. The matter of choice to leave Canada is enshrined in section 6. If one provision of the Charter covers a specific freedom, other section should not be presumed to cover the same freedom.

(3) The applicant submitted that the *Canadian Passport Order* exhausts the Crown prerogative over passports. The source of power for the issuance of passports is the royal prerogative, both in the United Kingdom and Canada. The prerogative is the residue of discretionary or arbitrary authority left in the hands of the Crown; it is the Crown's power left over from that which was taken away by Parliament. The prerogative can only be abolished or exhausted by clear words in a statute or by necessary implication from words in a statute. There was no such statute at play in this case. The *Canadian Passport Order*, not being a statute, could not raise the necessary implication that the prerogative has been exhausted. While the prerogative may not have been exhausted and therefore remained in place, the executive could not exercise that prerogative in any manner it chooses. The power is still subject to other legal norms including the Charter and the duty of fairness. The issue remained whether the Minister could exercise the prerogative given that an order in council governed the administration of passports. There is nothing in the *Canadian Passport Order*, other than that it emanated from Cabinet, to suggest that the power to deal with passports had been transferred to the Governor in Council. Where the prerogative can be exercised by other than the Governor in Council, the only issue was which minister or other authority may do so. In this case, the Minister of Foreign Affairs was the appropriate Crown minister to exercise that authority.

(4) The respondent acknowledged that the Minister had breached the duty of fairness by failing to give notice and an opportunity to be heard. The applicant would have expected, on grounds of procedural fairness, to have his passport application dealt with by the Passport Office as stipulated in the *Canadian Passport Order*. The content of the duty of procedural fairness depends on a number of factors, including the importance of the decision to the individual or individuals affected and the legitimate expectations of the person challenging the decision. The word "may" appears three times in the *Canadian Passport Order* as it stood at the time of the applicant's passport application. For example, subsection 4(1) states that "Subject to this Order, any person who is a Canadian citizen under the Act may be issued a passport"; and section 9 provides that "The Passport Office may refuse to issue a passport to an applicant [on seven different grounds]". Section 11 of the *Interpretation Act* states that " 'shall' is to be construed as imperative" and " 'may' as permissive". It is more consistent with the purpose and intent of the *Canadian Passport Order* to read the verb "may" as granting permission to Canadian citizens to be issued a passport. The authority granted by the verb "may" is exhausted by the grounds listed in section 9 for the refusal of a passport. Although "may" implies discretion, it can, in certain circumstances, carry with it an obligation. The obligation imported by "may" in section 9 of the Order is one of refusal. The Order gives to the Passport Office the power, coupled with the duty, to refuse a passport to a person who falls into one of the conditions enumerated.

In respect of the applicant's legitimate expectations, the Supreme Court of Canada has confirmed that this principle is part of the doctrine of fairness or natural justice. It does not create substantive rights. The principle of legitimate expectation requires that government, at a minimum, follow the processes, procedures and regular practices which it has held out to either an individual or the public at large. The applicant was informed by the Chief Executive Officer of the Canadian Passport Office, without any indication of ministerial direction, that his passport application

was denied leading to the inference that officials at Passport Office made the decision. The clandestine decision making was never explained either as to its necessity or how it accords with the principle of procedural fairness. Knowing who the decision maker is or may be is an important aspect of the rules of natural justice and procedural fairness. It is an aspect of the principles of natural justice and fairness that one know the case one must meet. As one is entitled to notice of a proceeding, one is entitled to know who will decide and the basis on which the decision can be made. The Minister's decision was contrary to the fairness principle generally and to that legitimate expectation that the Minister directly and through officials of the Department created. The applicant was entitled to have that legitimate expectation met. That the applicant would not necessarily qualify as a model citizen did not disentitle him to the application of fairness and natural justice to his passport application.

(5) The respondent asked that the Court send the matter back to the Minister and that it be dealt with under the 2004 *Canadian Passport Order*. The respondent's proposed remedy would authorize the Minister to decide the passport application on the basis of new criteria not in place at the time the applicant made his filing. This would in fact give retrospective effect to the 2004 CPO, something not specifically authorized in that Order. To remit the matter to the Minister on that basis would be to violate the presumption against retroactivity of laws. Nothing in the 2004 CPO would suggest that retroactive effect. The doctrine of legitimate expectation is a significant procedural protection to the public at large from arbitrary government action. Its goal is to put the person, at least procedurally, in the same position as if the impugned decision or action had not occurred. The only way in which that can occur is to remit the matter back to the Passport Office to be dealt with by it in accordance with the *Canadian Passport Order* as it was when the passport application was submitted.

statutes and regulations judicially considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 6, 7.

Canadian Passport Order, SI/81-86, ss. 2 "Passport Office", 4 (as am. by SI/2004-113, s. 3), 9, 10, 10.1 (as enacted *idem*, s. 5) .

Canadian Passport Regulations, C.R.C., c. 641.

Citizenship Act, R.S.C., 1985, c. C-29.

Federal Court Act, R.S.C., 1985, c. F-7, s. 2(1) "federal board, commission or other tribunal" (as am. by S.C. 1990, c. 8, s. 1), 18 (as am. *idem*, s. 4).

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 2(1) "federal board, commission or other tribunal" (as am. *idem*, s. 15), 18 (as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26).

Interpretation Act, R.S.C., 1985, c. I-21, ss. 2, 11, 17.

Order Amending the Canadian Passport Order, SI/2004-113, ss. 3, 5.

cases judicially considered

applied:

Black v. Canada (Prime Minister) (2001), 54 O.R. (3d) 215; 199 D.L.R. (4th) 228; 147 O.A.C. 141 (C.A.) (as to the justiciability of the Crown prerogative); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; (1977), 52 D.L.R. (4th) 577; 47 C.R.R. (2d) 1; 43 M.P.L.R. (2d) 1; 219 N.R. 1; *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816; (2002), 213 D.L.R. (4th) 193; [2002] 9 W.W.R. 391; 168 B.C.A.C. 1; 3 B.C.L.R. (4th) 201; [2002] 3 C.N.L.R. 229; 289 N.R. 233; 2002 SCC 54; *Brink's Canada Ltd. v. Canada (Human Rights Commission)*, [1996] 2 F.C. 113; (1996), 39 Admin. L.R. (2d) 203; 96 CLLC 230-010; 105 F.T.R. 215 (T.D.).

not followed:

Black v. Canada (Prime Minister) (2001), 54 O.R. (3d) 215; 199 D.L.R. (4th) 228; 147 O.A.C. 141 (C.A.) (on the issue of jurisdiction).

considered:

Khadr v. Canada (Attorney General) (2004), 49 Imm. L.R. (3d) 292; 2004 FC 1719; *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441; (1985), 18 D.L.R. (4th) 481; 12 Admin. L.R. 16; 13 C.R.R. 287; 59 N.R. 1; *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (H.L.); *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281; 200 D.L.R. (4th) 193; 36 Admin. L.R. (3d) 71; 271 N.R. 104; 2001 SCC 41; *Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465; (1990), 73 D.L.R. (4th) 289; 1 C.R.R. (2d) 193; 114 N.R. 255 (C.A.); *Canada v. Tremblay*, [2004] 4 F.C.R. 165; (2004), 244 D.L.R. (4th) 422; 327 N.R. 160; 2004 FCA 172; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; (1998), 157 D.L.R. (4th) 385; 6 Admin. L.R. (3d) 1; 22 C.P.C. (4th) 1; 224 N.R. 241; *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469; (1989), 23 Q.A.C. 182; 96 N.R. 321; 48 C.C.C. (3d) 193; *Vancouver Island Peace Society v. Canada*, [1994] 1 F.C. 102; (1993), 19 Admin. L.R. (2d) 91; 11 C.E.L.R. (N.S.) 1; 64 F.T.R. 127 (T.D.); *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 S.C.R. 227; (2006), 262 D.L.R. (4th) 454; 221 B.C.A.C. 1; 88 L.C.R. 161; 18 M.P.L.R. (4th) 1; 35 N.R. 140; 40 R.P.R. (4th) 159; 2006 SCC 5; *R. v. S.(S.)*, [1990] 2 S.C.R. 254; (1990), 57 C.C.C. (3d) 115; 77 C.R. (3d) 273; 49 C.R.R. 79; 110 N.R. 321; 41 O.A.C. 81; *Julius v. Lord Bishop of Oxford and another*, [1874-80] All E.R. Rep. 43 (H.L.); *Brown v. Metropolitan Authority* (1996), 150 N.S.R. (2d) 43 (C.A.).

referred to:

Schreiber v. Canada (Attorney General), [2000] 1 F.C. 427; (1999), 174 F.T.R. 221 (T.D.); *Copello v. Canada (Minister of Foreign Affairs)*, [2002] 3 F.C. 24; (2001), 39 Admin. L.R. (3d) 89; 213 F.T.R. 272; 2001 FCT 1350; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405; (2002), 245 N.B.R. (2d) 299; 209 D.L.R. (4th) 564; 31 C.C.P.B. 55; 17 C.P.C. (5th) 1; 91 C.R.R. (2d) 1; 282 N.R. 201; 2002 SCC 13; *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271; (1975), 66 D.L.R. (3d) 449; [1976] CTC 1; 75 DTC 5451; 7 N.R. 401.

APPLICATION for judicial review of a decision by the Minister of Foreign Affairs denying the issuance of a passport pursuant to an exercise of the Crown prerogative. Application allowed.

appearances:

Clayton C. Ruby and *Jai Dhar* for applicant.

Peter M. Southey and *Michael H. Morris* for respondent.

solicitors of record:

Ruby & Edwardh, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

PHELAN J. :

I. OVERVIEW

[1] This judicial review concerns a Canadian citizen, who is neither convicted nor charged with any offence nor said to be a threat to Canada, who applied for his passport renewal for which he qualified in all respects under the existing provisions. The government, recognizing that the applicant was entitled to his passport, changed the qualifications, without notice to anyone, to deprive the applicant of his passport. This is the judicial review of the decision to deny the issuance of the passport, a decision made pursuant to an exercise of the prerogative of the Crown.

[2] The above neutral description is the legally relevant synopsis of what occurred. However, the description lacks the colour of the surrounding facts, that the applicant is a member of a family, many of whom are openly supporters of Al-Qaida. The principal reason for denying the passport—in the interests of national security—was based on concern about Canada-U.S. relations and public disapproval for issuing a passport to a member of such an infamous family. National security was not a ground for denial of a passport listed in the *Canadian Passport Order* [SI/81-86] at the time.

[3] The principal issues raised by this case can be summarized as follows:

• the jurisdiction of the Federal Court over the exercise of the Crown prerogative;

• who can exercise the prerogative in respect of the *Canadian Passport Order*;

• whether the prerogative was exhausted by the *Canadian Passport Order*;

• the role of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K) [R.S.C., 1985, Appendix II, No. 44]], in particular section 6 (mobility rights), section 7 (liberty and security of the person), and section 1 (reasonable limitation), in the exercise of the prerogative;

• the applicability of the doctrine of legitimate expectation; and

• the appropriate remedy, if any.

[4] For the reasons which follow, I have concluded that, in this case, every citizen is entitled to be treated, procedurally at least, in the manner in which the government says his or her rights or interests will be dealt with. It is part of our law of procedural fairness that in order to know the case one must meet, one is entitled to know who will decide and on what criteria the decision may be based. As a result, the applicant will be entitled to have his passport renewal dealt with by the Passport Office in accordance with the *Canadian Passport Order* as it stood at the time he applied for renewal of that passport. However, nothing in these reasons should be held to conclude that the respondent is prevented from immediately taking steps to revoke the passport on the grounds now enumerated in the amended *Canadian Passport Order*, if such grounds exist.

II. BACKGROUND

[5] This is an application for judicial review in respect of the April 16, 2004 denial of Abdurahman Khadr's (Khadr) passport application purportedly made by the Passport Office, Department of Foreign Affairs and International Trade. The actual decision was made by the Minister of Foreign Affairs (Minister) on March 3, 2004. The judicial review includes a review of a decision of the Minister to refuse the applicant access to passport services pursuant to the exercise of the Crown prerogative. However, the central issue is the refusal to issue a new passport.

[6] The applicant seeks a declaration, pursuant to paragraph 18(1)(*a*) [as am. by S.C. 1990, c. 8, s. 4; 2002, c. 8, s. 26] of the *Federal Courts Act* [R.S.C., 1985, c. F-7, s. 1 (as am. by S.C. 2002, c. 8, s. 14)] that the Minister's decision is unlawful, unconstitutional, is a violation of sections 6 and 7 of the *Canadian Charter of Rights and Freedoms*, and therefore invalid. As a remedy, the applicant seeks an order of *mandamus* directing the Minister to issue or cause to be issued a passport to him.

[7] The respondent, in the course of the litigation, admitted that the Minister's decision was procedurally unfair, largely through failure to disclose certain information. The respondent requested that the decision be quashed and the matter remitted to the Minister for re-determination in accordance with the amended *Canadian Passport Order*.

[8] Given the Minister's concession, the respondent had argued, in a motion to amend the application for judicial review, that the whole matter was moot because of the Minister's concession. Justice MacKay (sitting as a Deputy Judge) [(2004), 49 Imm. L.R. (3d) 292 (F.C.)] concluded that the matter was not moot because the applicant contests the Minister's decision "in light of the principles of the Rule of Law and of the Charter" [at paragraph 12].

In summary, Justice MacKay concluded [at paragraph 18]:

The submissions invite this Court to ignore any questions concerning the jurisdiction of the Minister to make the decision of March 3. In my opinion, the proper exercise of the prerogative, by anyone purporting to be authorized, is a matter of concern to the Court when it is raised by an individual affected by the exercise.

[9] It is common ground between the parties that the grant or refusal of a passport is a matter within the prerogative of the Crown. They also agree that refusal of a passport application on the grounds of national security is not within the authority vested in the Passport Office by the *Canadian Passport Order* as it stood at the time of the applicant's application. There was no statute or order vesting that specific authority in the Minister or anyone else until the *Canadian Passport Order* was subsequently amended to add national security as grounds for refusal and giving the authority to deny a passport to the Minister.

III. FACTS

[10] The applicant is a Canadian citizen, in his early 20s. In November 1999 he was issued a Canadian passport. That passport was scheduled to expire in November 2004.

[11] Sometime in November 2001, the applicant's father (now deceased) took the passport from the applicant, allegedly for safekeeping. The passport then fell into the hands of his mother in Pakistan. As a result of unusual circumstances, by November 2003 he ended up in Bosnia and reported his passport inaccessible.

[12] According to the applicant, in November 2001 he was detained in Afghanistan. He was subsequently liberated by U.S. authorities and in March 2003 he was flown to Guantanamo Bay, Cuba to act as a "mole" for the U.S. Central Intelligence Agency (CIA). He was released from Guantanamo Bay in November 2003 and flown to Sarajevo, Bosnia by the CIA. It was there in November 2003 that he went to the Canadian Embassy to obtain help returning to Canada and where he received an emergency passport.

[13] Members of the Khadr family have admitted involvement as associates of Usama bin Laden and the parents and four of their children, including the applicant, have been on the passport control list since 2000 as "persons of interest".

[14] Based on the information in its file showing the connection between members of the Khadr family and Al-Qaida, the Passport Office became concerned that the issuance of passports to members of the family might be contrary to the national security interests of Canada.

[15] In this regard and in respect of the applicant, there is no evidence that the Canadian authorities took any steps to revoke the passports previously issued. Revocation of a passport can occur on the same grounds as a refusal to issue a passport under the then *Canadian Passport Order*.

[16] The respondent states that there were meetings between officials of the Department of Foreign Affairs and the Canadian Security Intelligence Service (CSIS) concerning the issuance of passports and that CSIS provided a report expressing national security concerns. No effort was made to put this evidence before the Court. However, on March 3, 2004, the Passport Office prepared an action memorandum, more fully described in paragraph 22.

[17] On April 5, 2004, the applicant applied to the Canadian Passport Office for a replacement passport. He submitted all the required documents to the Passport Office in support of his application. In all respects, his application was in accordance with the *Canadian Passport Order* and there was no known basis upon which to refuse his application.

[18] The issuance and revocation of Canadian passports has been governed since 1981 by the *Canadian Passport Order* issued by the Governor in Council to replace the *Canadian Passport Regulations* [C.R.C., c. 641]. At the time, a passport could be refused on the following grounds:

9. The Passport Office 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 serving a term of imprisonment or is forbidden to leave Canada by

(i) the terms and conditions of any parole or mandatory supervision imposed under or by virtue of the *Parole Act*,

(ii) the conditions of a probation order made under the *Criminal Code*, or

(iii) the conditions of the grant of a temporary absence without escort from a prison or penitentiary;

(*e*) has been convicted of an offence under section 58 of the *Criminal Code*;

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

(*g*) has been issued a passport that has not expired and has not been revoked or whose name is included in such a passport.

[19] The applicant has not been charged with any offence in Canada or any other nation, has never been convicted of any crime or served any term of imprisonment and is not indebted to the Crown for expenses related to repatriation to Canada. There were no stated grounds upon which to refuse to issue the passport.

[20] In the face of what officials obviously saw as a forthcoming undesirable public reaction, the Passport Office issued an action memorandum dated March 3, 2004 (one month before the applicant's passport application filing) signed by the Deputy Minister and two Assistant Deputy Ministers. The version before the Court of this memorandum and related subsequent documents are severely redacted.

[21] This action memorandum, which recommended that the Minister refuse further passport issuance to the applicant in the interests of the national security of Canada, was signed by the Minister, indicating his decision to refuse passport issuance to the applicant. However, the applicant was initially advised by the Passport Office that it had been decided to deny Khadr's application, the clear implication being that the decision was made by the Passport Office in accordance with the *Canadian Passport Order*. It took the applicant some period of time to force out disclosure that the decision had actually been made by the Minister and not the Passport Office.

[22] The action memorandum sets out the rationale for the decision and contains the gravamen of the decision. The pertinent parts of the action memorandum state:

• "The Passport Office requires your approval or that of Cabinet, to formally refuse further passport issuance to . . . Abdurahman Khadr (they hold passports valid until November 2004) in the interests of the national security of Canada and the protection of Canadian troops in Afghanistan."

• "National interests and national security are not listed in the *Canadian Passport Order* as grounds for the refusal of passport services. This limitation constrains passport officials but does not constrain the Crown."

• "The Passport Office believes that denial of passport services to several members of the Khadr family (a family

tree is attached) is warranted."

• "Section 9 of the *Canadian Passport Order* (CPO) limits the right to refuse passport issuance to specific circumstances. Threats to national security are not within the scope of the CPO and as such the Passport Office has no legal justification to refuse to issue full validity passports to the Khadr family. A Canadian citizen must stand charged with an indictable offence (such as terrorist activity or affiliation) in order to refuse or revoke a passport under the CPO."

• "However, in the interim, the Passport Office is unable to support Canadian government interests in cases where a subject is a threat to national security or is a person of interest to other agencies."

• "Further, if the refusal of passports were subjected to judicial review before the Federal Court, it is doubtful that a court would be satisfied with a bald assertion by the Passport Office alone that the members of the Khadr family are the subject of a national security investigation. The Passport Office must have documentation from source agencies on file, including any sensitive intelligence prior to the Minister taking the decision to refuse passport issuance. The Passport Office now holds that documentation from CSIS on file."

• "The *Canada Evidence Act* provides a mechanism by which a prohibition order can be obtained from the court to prevent disclosure of information, that, if made public, would encroach on the public interest, in this case national security." (As it stands, none of this evidence has been presented, and no such prohibition order sought. The Court is largely left with the "bald assertions". There is evidence of a general concern about misuse of Canadian passports and the activities of members of the Khadr family. However, there is nothing that singularly addresses the applicant as distinct from other members of his family.)

• Lastly—"We believe the implications of providing passports to the high risk members of the Khadr family are significant in terms of 'Canada-U.S. relations'. Given the circumstances described, it seems likely that the Canadian public and the American government would be highly critical of full passport services being provided to this family."

[23] In summary, the unestablished national security concern, coupled with the concerns for the approbation of an ally and the Canadian public, was the shoal upon which the interests of a Canadian citizen in obtaining his passport foundered.

[24] By letter of April 16, 2004 from the Chief Executive Officer of the Passport Office, the applicant was informed that his application was denied. The letter did not state the grounds for the denial, the identity of the person who made the decision or the legal authority on which the decision was based.

[25] On September 1, 2004, the Governor General in Council enacted an *Order Amending the Canadian Passport Order* [SI/2004-113], including the following amendments:

3. . . .

(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.

. . .

5. . . .

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.

IV. ISSUES

[26] The issues arising in this case have been described earlier in paragraph 3.

V. ANALYSIS

A. Court Jurisdiction

(1) Justiciability

[27] In the current case, this is an exercise of the Crown prerogative outside any statutorily based discretion. The first question then is whether this particular exercise of the Crown prerogative is subject to judicial review. If so, the second question is whether the Federal Court has jurisdiction to conduct that review.

[28] In *Operation Dismantle Inc. et al. v. The Queen et al.*, [1985] 1 S.C.R. 441, the Supreme Court of Canada held that where the Crown prerogative violates an individual's rights provided under the Charter, then that exercise of the prerogative can be reviewed by the Court.

[29] At about the same time, the House of Lords in the case of *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 (H.L.) [at paragraph 42] expanded the areas of the Crown prerogative which may be subject to judicial review to include situations where the prerogative power affected rights either by altering an individual's legal rights and obligations or by affecting the individual's legitimate expectations:

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker [that the benefit or advantage] will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[30] It is well to bear in mind that in the U.K., the doctrine of legitimate expectations creates substantive and procedural rights whereas in Canada the Supreme Court has limited the principle to the protection of procedural rights (*Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281). This Court is therefore constrained by the more limited application in this country of the principle of legitimate expectation.

[31] In the context of the Crown prerogative, Laskin J.A. in *Black v. Canada (Prime Minister)* (2001), 54 O.R. (3d) 215 (C.A.), a case involving the award (or non-award) of honours by the Crown, held that a matter is justiciable and amenable to judicial review if its subject-matter affects the rights or legitimate expectations of an individual [at paragraph 51]:

Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.

[32] I adopt Justice Laskin's rationale in respect of justiciability. In the instant case the applicant raises both Charter and legitimate expectation arguments. Most importantly, the subject-matter, the granting of a single passport to an individual (in contrast to a matter of great state policy such as war or treaty making), is readily justiciable. The issue then becomes under what grounds can the matter be reviewed. I do not understand Justice Laskin's comments

to extend to creating protection of substantive rights under the principle of legitimate expectation.

[33] In *Black*, above, the Court of Appeal, in what is clearly *obiter*, proceeded to expound on the very issue of passports. It made the point that common sense dictates that a refusal to issue a passport for an improper purpose or without affording a person procedural fairness should be judicially reviewable.

[34] That Court then went on to discuss the basis upon which the refusal to issue a passport may be reviewed [at paragraph 54]:

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

[35] While the Ontario Court of Appeal's comments must be considered *obiter* in *Black*, both because passports were not the subject of that case and because such a refusal is a matter for the Federal Court, it is not *obiter* in this case and I adopt it. The law is now that the refusal to issue a passport is justiciable—particularly where there are issues of Charter rights and questions of fairness and legitimate expectations—as are the issues in this case.

(2) Federal Court

[36] In *Black*, the Ontario Court of Appeal held that despite (or because of) section 2 of the *Federal Court Act*, there was a gap in jurisdiction in respect of the federal Crown prerogative. As a result, it concluded that a provincial superior court had jurisdiction over the exercise of federal Crown prerogative in certain limited circumstances. The pertinent part of subsection 2(1) [as am. by S.C. 1990, c. 8, s. 1] is as follows:

2. (1) In this Act,

. . .

"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*; [Emphasis added.]

[37] The issue of jurisdiction turned on whether the Federal Court had exclusive jurisdiction under section 18 of the *Federal Court Act* where the exercise of the federal Crown prerogative is not exercised by means of an order.

[38] The Ontario Court of Appeal expressed concern that sections 2 and 18 of the *Federal Court Act* were efforts to oust the inherent jurisdiction of a provincial superior court. It therefore held that in subsection 2(1) of the *Federal Court Act*, the phrase "an order made pursuant to" modifies "by" and "under" and concluded that absent an order, the exercise of the federal Crown prerogative power may be reviewed by a provincial superior court. In other words, the exercise of the prerogative itself, absent an antecedent order, would not fall within the jurisdiction of the Federal Court.

[39] The counterargument, rejected by the Ontario Court of Appeal, was that "an order" related to "under" but not "by". This interpretation was said to be more consistent with the purpose of the *Federal Court Act* and avoided the "gap" in jurisdictional consistency created by the alternate interpretation.

[40] As a result of this jurisdictional issue, the Court asked the parties to address the issue of this Court's jurisdiction, although both parties had accepted that the Federal Court was the appropriate forum.

[41] The applicant submitted that the Minister's decision not to issue a passport was an "order" and therefore fell

squarely within subsection 2(1). In the alternative, the applicant argued that, applying a purposive approach, the pure exercise of the prerogative would fall within subsection 2(1). The respondent takes a slightly different tack contending that the Minister's decision is a direct exercise of the prerogative power but that the Ontario Court of Appeal erred in *Black* and that under a purposive test, the Federal Court has the jurisdiction over the exercise of the federal Crown prerogative.

[42] It is my conclusion that the Federal Court has jurisdiction on both the grounds that there is an "order" and further that a purposive interpretation of the legislation indicates that Parliament intended the Federal Court to have exclusive jurisdiction over the exercise of the justiciable aspects of the federal exercise of the Crown prerogative. On the facts of this case, there is a decision which resulted in an order to deny the passport. The Minister's decision was carried out by an order to officials to deny the passport application. That order flows from the Minister's acceptance of the action memorandum. As such, it was an order made pursuant to the exercise of the Crown prerogative. It falls squarely within the exclusive jurisdiction of the Federal Court, as recognized in *Black*.

[43] However, even accepting the respondent's view that there was a direct exercise of the prerogative, this Court has jurisdiction. The Ontario Court of Appeal acknowledges that there were two reasonable interpretations of the relevant parts of subsection 2(1) of the *Federal Court Act*. When that situation occurs, a court must engage in a purposive approach to the legislation as mandated by the *Interpretation Act* [R.S.C., 1985, c. I-21] and the Supreme Court of Canada.

[44] In interpreting the jurisdiction of the Federal Court set out in the *Federal Courts Act*, one must take a fair and liberal approach to the words as best achieves the objectives of the legislation. Section 12 of the *Interpretation Act* reads:

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[45] In *Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465 (C.A.), Chief Justice Iacobucci (as he then was) described the purpose of the then *Federal Court Act* as [at page 481]:

The major purpose of this aspect of the *Federal Court Act* was to transfer the supervisory jurisdiction of federal boards and tribunals from provincial superior courts to the newly created Federal Court . . .

[46] The concern which was to be addressed by the expanded powers of the Federal Court (as it moved from the Exchequer Court) was to ensure consistency with respect to the exercise of justiciable federal powers. This was articulated by Desjardins J.A. in *Canada v. Tremblay*, [2004] 4 F.C.R. 165 (C.A.), [at paragraph 10]:

The Parliament of Canada thus ensured that federal boards, commissions or other tribunals, whose activities are spread across Canada, would not be subjected to potentially contradictory decisions from one province to the next. Henceforth, they would come under the superintending and reforming power of the Federal Court of Canada.

[47] In *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, Justice Bastarache addressed some of the jurisdictional issues raised in this judicial review. In *Black*, the Ontario Court of Appeal was concerned with what it saw as the ousting of superior court jurisdiction and therefore gave a narrow interpretation to the *Federal Court Act*. However, in *Canadian Liberty Net*, the Supreme Court cautioned against such approach—the inherent jurisdiction of a provincial superior court is to ensure that, absent some other court's jurisdiction, there is always a court available to vindicate a right [at paragraph 32]:

The notion of "inherent jurisdiction" arises from the presumption that if there is a justiciable right, then there must be a court competent to indicate the right. The issue addressed in *Board v. Board* was whether a failure to grant jurisdiction should be read as implicitly excluding jurisdiction. In that context, the doctrine of inherent jurisdiction requires that only an explicit ouster of jurisdiction should be allowed to deny jurisdiction to the superior court. In my view, the case does not stand for the fundamentally different proposition that statutes which purport to grant jurisdiction to another court should be read narrowly so as to protect the jurisdiction of the superior court. That is not the purpose of the doctrine of inherent jurisdiction, which is simply to ensure that a right will not be without a

superior court forum in which it can be recognized.

[48] In the same vein, the Supreme Court adopted the fair and liberal interpretation of the *Federal Court Act* and cautioned against finding gaps unless the words clearly created them [at paragraph 34]:

But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow, rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction, is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them. The doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada.

[49] Finally, the Supreme Court [at paragraph 36] underlined the intent of Parliament to grant to the Federal Courts general administrative jurisdiction over federal decision makers. I take this to mean all persons exercising powers conferred by statute or prerogative.

As is clear from the face of the *Federal Court Act*, and confirmed by the additional role conferred on it in other federal Acts, in this case the *Human Rights Act*, Parliament intended to grant a general administrative jurisdiction over federal tribunals to the Federal Court. Within the sphere of control and exercise of powers over administrative decision-makers, the powers conferred on the Federal Court by statute should not be interpreted in a narrow fashion. This means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction.

[50] This Court has previously, either expressly or by action, taken jurisdiction in matters involving the Crown prerogative. (See: *Schreiber v. Canada (Attorney General)*, [2000] 1 F.C. 427 (T.D.); and *Copello v. Canada (Minister of Foreign Affairs)*, [2002] 3 F.C. 24 (T.D.).) However, the issue raised in *Black* has not been considered explicitly by this Court.

[51] With the greatest respect to the Ontario Court of Appeal and while I adopt that Court's conclusions on the justiciability of the Crown prerogative, on this issue of jurisdiction, I cannot concur.

[52] The provisions of the *Federal Courts Act* should be read purposefully to give effect to its objects and aims of the legislation, in this instance, subjecting the exercise of federal decision-making powers to this Court's supervisory jurisdiction. It is evident by the inclusion of a reference to the Crown prerogative that Parliament intends the Federal Court to have jurisdiction over justiciable matters of the exercise of that prerogative.

[53] It would be inconsistent with that intent that some aspect of the justiciable area of federal Crown prerogative could be truncated off to the jurisdiction of another court. That could lead to the very inconsistency of judicial decisions which the *Federal Courts Act* was designed to avoid.

[54] The *Federal Courts Act*, in particular subsection 2(1) [as am. by S.C. 2002, c. 8, s. 15], is aimed at control of the exercise of a federal power—that is, its central purpose—the means of exercise are secondary. The focus of the provision is the source of the power, be it Parliament or the executive. The alternate interpretation adopted by the Ontario Court of Appeal focuses attention on the means of the exercise not the source of the power.

[55] Finally, on this point, in the face of two acknowledged reasonable interpretations, a court must find the one which better accords with the purpose of the legislation, the intent of the section, and avoids inconsistency and problems. A "gap" should not be accepted where a reasonable interpretation resolves the issue of the gap. Therefore, in my view, by interpreting subsection 2(1) in this manner, one must conclude that even where there is no order, the exercise of the federal Crown prerogative as the source of the power in the area of justiciable matters, is within the jurisdiction of the Federal Courts under subsection 2(1) and specifically assigned to the Federal Court under section 18.

B. Charter Issues

(1) Preliminary

[56] The applicant has, as indicated in paragraph 6, raised the issue of whether the Minister's decision is contrary to sections 6 and 7 of the Charter. On the other hand, the respondent asks that the Court exercise its discretion not to decide the issue because of the inadequacy of the record before the Court upon which to make such a determination.

[57] The respondent's concern for the record is two-fold. Firstly, the respondent acknowledges that the applicant was not treated fairly because he did not have a chance to address the new grounds for denial of a passport—national security. This assumes that the Minister had the right to create this new ground outside the bounds of the *Canadian Passport Order*. Secondly, the respondent says that it has not put forward sufficient section 1 Charter evidence to demonstrate that any breach of a Charter right is justified.

[58] The simple response to that is that the respondent cannot deprive the applicant of his rights to a proper determination because of the respondent's failure to put forward proper evidence. The applicant must take the record as it is—not the record it would like. So too, the respondent has to take the record it created—it does not get a second chance to create a further and better record.

[59] With respect to section 1 evidence, the respondent gambled that the Charter arguments would be dismissed without the necessity of a section 1 analysis. Sometimes the gamble does not pay out.

[60] In this case, the section 1 analysis would be critical, particularly to the issue of whether the Crown prerogative, as interpreted by the respondent, is a matter "prescribed by law". The respondent argues that the *Canadian Passport Order* does not limit the Crown in any way. It has argued that the Minister can add to or subtract from the grounds for refusal of a passport as it sees fit without notice or publication. In my view, if the argument is correct, it truly challenges the notion of "prescribed by law" because it takes an arbitrary and important power, the Crown prerogative, and allows it to operate secretly and arbitrarily.

[61] However, in this case, the applicant's rights can be addressed sufficiently under the doctrine of legitimate expectation. I therefore will not decide this case on Charter grounds raised in the application for judicial review because, as stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, "courts should refrain from dealing with *Charter* issues raised in an application for judicial review where it is unnecessary to do so". I will, nevertheless, address the Charter arguments as they give context and importance to the legitimate expectations of this applicant and any other applicant for a passport.

(2) Section 6—Mobility Rights

[62] Section 6 gives to citizens a right to enter, remain in and leave Canada. A passport plays a role in two out of three of the rights accorded under section 6. The Ontario Court of Appeal in *Black* [at paragraph 54] captured the modern approach to passports when it said, "[i]n today's world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or a luxury but a necessity".

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

[64] Virtually everyone in Canada is aware of the current issue with the United States which may result in Canadians being required to carry passports for travel to the United States. The passport is becoming the primary international travel document for much of the world. It symbolizes not only the ability to travel but one's identity and nationality. It has gone long past the point of a form of diplomatic communication only.

[65] Applied at an individual level, it is no answer to say that it is not the Canadian government which prevents one from leaving Canada when a passport is denied, that the responsibility is solely that of the foreign country which requires it. If that were correct, the right to leave would in any realistic sense in today's world, be subject to the will of the Canadian government. To accept this interpretation is to give a narrow and technical meaning to a Charter right.

[66] In *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469, the Supreme Court [at page 1482], in the context of an extradition case, held that the "central thrust of s. 6(1) is against exile and banishment, the purpose of which is the exclusion of membership in the national community". The Supreme Court found that the primary purpose of subsection 6(1) was to guarantee the right to remain in Canada. However, I do not interpret that decision as holding that that is all that subsection 6(1) is designed to protect. If that were the case, Parliament would never have enshrined a right to leave Canada but merely have prohibited expulsion.

[67] Recognizing that the issuance of a passport is an aspect of subsection 6(1) rights does not impose on the Canadian government any corresponding duty to conduct its international affairs (matters of high policy and not justiciable) in any particular manner so as not to adversely affect the movement of people across borders. Nor does the statement that a passport is property of the Government of Canada lessen the interest of a citizen in holding a passport; it does, however, prevent foreign governments from seizing the passport and gives a measure of security to Canada's citizens.

[68] The Canadian government in its own published materials recognizes the importance of a passport even for entry into Canada. While this is not strictly accurate as, by law, proof of citizenship, birth certificate or other such documents is sufficient, the government's own publications and advice to travellers underscores the importance of a passport.

[69] Although the Court will not make a final determination on the section 6 argument, it is evident that access to a passport is a manifestation of the exercise of a Charter right. The right to leave Canada is a sufficiently important aspect of an individual's freedom that any exercise of power which has an impact on that Charter value must be held to a high standard— of fairness—of review.

[70] In my view, the greater the importance of the right or interest, the higher the standard of fairness which will be imposed. The importance of a passport means that the principle of fairness—of which legitimate expectation is one—must be closely and rigorously adhered to.

(3) Section 7—Liberty

[71] The applicant argues that the denial of a passport constitutes being deprived of liberty, in a manner not in accordance with principles of fundamental justice. The applicant also submits that the decision of the Minister, since it was done in a clandestine manner and was not based upon an articulated law, should be found constitutionally vague as it so lacks in precision that it does not give sufficient guidance for legal debate.

[72] While it is true that the Minister's decision is procedurally unfair (some aspects of that unfairness are admitted) and therefore potentially contrary to the principles of fundamental justice, there must first be a finding of a violation of the right to liberty.

[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 paragraph 66, so too is the choice of where to go either in or outside Canada.

[74] However, *Godbout*, above, makes clear that the section 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

[75] The ability to travel where and when one wants outside Canada does not strike at that basic value of

individual dignity and independence. I say this because the matter of choice to leave Canada is enshrined in section 6 of the Charter. If one provision of the Charter covers a specific freedom, other sections of the Charter should not be presumed to cover the same freedom. There is a presumption against redundancies in legislation. The denial of a passport, while limiting the right to leave Canada, is not tantamount to making one a prisoner in one's own country. As such, I would not consider that the right to leave Canada constitutes a section 7 right to liberty.

(4) Section 1

[76] As this matter can be determined on administrative law grounds, I have made no finding as to a violation of a Charter right. Therefore, it is unnecessary to perform a full Charter section 1 analysis. The analysis of sections 6 and 7 of the Charter was important to provide context to the issue of the applicant's legitimate expectation and the principles of procedural fairness.

[77] However, the starting point of a section 1 consideration is that the limit on a Charter right be "prescribed by law". The *Canadian Passport Order* would qualify as a matter prescribed by law as it indicates the basis upon which the Crown prerogative will be exercised. The difficulty arising in this case is that the respondent contends that what is contained in the *Canadian Passport Order* can be ignored, and that the Minister can arbitrarily insert new grounds for refusal of a passport.

[78] The issue of whether the *Canadian Passport Order* and the Crown prerogative in this case meets section 1 is best left to another case with a more complete record.

C. Exhaustion of Crown prerogative

[79] The applicant submits that the *Canadian Passport Order* deprives the Minister of the authority to exercise the Crown prerogative over passports. The issues raised are:

• whether the *Canadian Passport Order* exhausts the Crown prerogative in the sense that there is no residual power to exercise the prerogative except by a new order; and

• if there is still some residual prerogative power, is it vested in the Minister or only in the Cabinet?

[80] There is no question that the source of power for the issuance of passports is the royal prerogative, both in the U.K. and Canada. A circular dispatch from the Secretary of State for the Colonies dated September 23, 1891 confirmed the authority of the Governor General to issue passports. The issue of passports was transferred to the Department of External Affairs in 1909.

[81] Prior to 1981, passports were issued under the *Canadian Passport Regulations*. There was concern expressed that using a regulation gave rise to an implication that the regulation, being subordinate legislation, abrogated the Crown prerogative over passports. As a consequence, an order, which is a statutory instrument but not subordinate legislation, was put in place.

[82] The *Canadian Passport Order* assigned to the Canadian Passport Office the duties of passport issuance, refusal and revocation on specific grounds. The Passport Office had no authority to deny a passport on national security grounds as evidenced in the action memorandum. There was no reference in the *Canadian Passport Order* to any residual authority being vested in the Minister or the Cabinet to deal with passport issues.

[83] Following the problems raised by this case, amendments to the *Canadian Passport Order* (2004 CPO) were published in the *Canada Gazette* on September 22, 2004 [C. Gaz. 2004.II.1310]. In addition to providing for the use of biometric facial recognition technology in Canadian passports, the amendments did the following:

• added a statement that nothing in the Order limits or affects the Crown prerogative over passports;

• added that the Crown prerogative over passports can be exercised by the Governor in Council or the Minister;

• added that 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".

[84] The respondent contends that the amendments really add nothing new, that the powers of the Minister and grounds to revoke and refuse were always existent in the Crown prerogative despite their absence in the *Canadian Passport Order*. If that is so, one must conclude then that a significant reason for publishing the amendments is an acknowledgement that fairness required that Canadian citizens know the procedure and basis upon which their passport application will be dealt and that they are entitled to rely upon what their government says in the exercise of the Crown prerogative.

[85] A further aspect of the 2004 CPO, an issue for another day perhaps, is that a Canadian citizen could lose or be refused a passport, not because it is necessary for Canadian national security, but because another country convinces a minister that to do so against the interests of a Canadian citizen is in their national security interest.

[86] The respondent, as part of its concession that the original decision was procedurally flawed, submits that the applicant's passport application should be sent back to be dealt with under the terms of the amended *Canadian Passport Order*. Given the respondent's position that nothing has changed in terms of powers and grounds, it is difficult to see how there is any realistic likelihood of a new decision.

[87] As to whether the Crown prerogative has been exhausted, it is important to bear in mind the nature of the prerogative as being the residue of discretionary or arbitrary authority left in the hands of the Crown. Without tracing forward from the *Magna Carta*, it is the Crown's powers left over from that which was taken away by Parliament.

[88] Laskin J.A. in *Black* summarizes the nature of the prerogative in the following paragraphs (at paragraphs 25-27):

To put these submissions in context, I will briefly review the nature of the Crown's prerogative power. According to Professor Dicey, the Crown prerogative is "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown": Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan, 1959) at p. 424. Dicey's broad definition has been explicitly adopted by the Supreme Court of Canada and the House of Lords. See *Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269 at pp. 272-73, 59 C.C.C. 301, and *Attorney General v. De Keyser's Royal Hotel*, [1920] A.C. 508 at p. 526, [1920] All E.R. Rep. 80 (H.L.). See also Peter Hogg and Patrick Monahan, *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at p. 15.

The prerogative is a branch of the common law because decisions of courts determine both its existence and its extent. In short, the prerogative consists of "the powers and privileges accorded by the common law to the Crown": Peter Hogg, *Constitutional Law in Canada*, loose-leaf ed. (Toronto: Carswell, 1995) at 1.9. See also *Proclamations Case* (1611), 12 Co. Rep. 74, 77 E.R. 1352 (K.B.). The Crown prerogative has descended from England to the Commonwealth. As Professor Cox has recently observed, "it is clear that the major prerogatives apply throughout the Commonwealth, and are applied as a pure question of law": N. Cox, *The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity*, 14 Australian Journal of Law and Society (1998-99) 15 at 19.

Despite its broad reach, the Crown prerogative can be limited or displaced by statute. See *Parliament of Canada Act*, R.S.C. 1985, c. P-1, s. 4. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The Crown may no longer act under the prerogative, but must act under and subject to the conditions imposed by the statute: *Attorney General v. De Keyser's Royal Hotel*, *supra*. In England and Canada, legislation has severely curtailed the scope of the Crown prerogative. Dean Hogg comments that statutory displacement of the prerogative has had the effect of "shrinking the prerogative powers of the Crown down to a very narrow compass" (*supra*). Professor Wade agrees:

> [I]n the course of constitutional history the Crown's prerogative powers have been stripped away, and for administrative purposes the prerogative is now a much-attenuated remnant. Numerous statutes have expressly

> restricted it, and even where a statute merely overlaps it the doctrine is that the prerogative goes into abeyance.

E.C.S. Wade, *Administrative Law*, 6th ed. (Oxford: Clarendon Press, 1988) at pp. 240-41).

[89] Given its nature as the power not otherwise occupied by statute, it has been held by Justice Bastarache, dissenting on a different issue, in *Ross River Dena Council Band v. Canada*, [2002] 2 S.C.R. 816 that the prerogative can only be taken away by express statutory provisions or by implication, although there is doubt as to the latter method [at paragraph 4]:

There is no doubt that a royal prerogative can be abolished or limited by clear and express statutory provision: see *R. v. Operation Dismantle Inc.*, [1983] 1 F.C. 745, at p. 780, aff'd [1985] 1 S.C.R. 441, at p. 464. It is less certain whether in Canada the prerogative may be abolished or limited by necessary implication. Although this doctrine seems well established in the English courts (see *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.)), this Court has questioned its application as an exception to Crown immunity (see *R. v. Eldorado Nuclear Ltd.*, [1983] 2 S.C.R. 551, at p. 558; S*parling v. Quebec (Caisse de dépôt et placement du Québec)*, [1988] 2 S.C.R. 1015, at pp. 1022-23). Assuming that prerogative powers may be removed or curtailed by necessary implication, what is meant by "necessary implication"? H. V. Evatt explains the doctrine as follows:

> Where Parliament provides by statute for powers previously within the prerogative being exercised subject to conditions and limitations contained in the statute, there is an implied intention on the part of Parliament that those powers can only be exercised in accordance with the statute. "Otherwise," says Swinfen-Eady M.R., "what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on prerogative?" [Emphasis added.]
>
> (H.V. Evatt, *The Royal Prerogative* (1987), at p. 44)

[90] Justice LeBel, on behalf of the majority, in the same decision, essentially concurred with Justice Bastarache stating [at paragraph 54]:

The royal prerogative is confined to executive governmental powers, whether federal or provincial. The extent of its authority can be abolished or limited by statute: "once a statute has occupied the ground formerly occupied by the prerogative, the Crown [has to] comply with the terms of the statute". (See P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 17; see also, Hogg, *supra*, at pp. 1:15-1:16; P. Lordon, Q.C., *Crown Law* (1991), at pp. 66-67.) In *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C 508 (H.L.), Lord Dunedin described the interplay of royal prerogative and statute, at p. 526:

> Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

Lord Parmoor added, at p. 568: "The Royal prerogative has of necessity been gradually curtailed, as a settled rule of law has taken the place of an uncertain and arbitrary administrative discretion". In summary, then, as statute law expands and encroaches upon the purview of the royal prerogative, to that extent the royal prerogative contracts. However, this displacement occurs only to the extent that the statute does so explicitly or by necessary implication: see *Interpretation Act*, R.S.C. 1985, c. I-21, s. 17; Hogg and Monahan, *supra*, at p. 17; Lordon, *supra*, at p. 66.

[91] The prerogative can only be abolished or exhausted by clear words in a statute or by necessary implication from words in a statute (see sections 2 and 17 of the *Interpretation Act*). There is no such statute at play in this case. The *Canadian Passport Order*, not being a statute, cannot raise the necessary implication that the prerogative has been exhausted.

[92] While the prerogative may not have been exhausted and therefore remained in place, that does not mean that the executive could exercise that prerogative in any manner it chooses. The power is still subject to other legal norms including the Charter and the duty of fairness. As stated by Justice MacKay of this Court in *Vancouver*

Island Peace Society v. Canada, [1994] 1 F.C. 102 [at page 141]:

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

[93] Having determined that the prerogative had not been exhausted or occupied by the *Canadian Passport Order*, the issue remains whether the Minister could exercise the prerogative given that an order in council governed the administration of passports. It seems logical that since Cabinet had devolved some aspects of the prerogative to the Passport Office under the *Canadian Passport Order*, only Cabinet could act to deal with exceptions to the *Canadian Passport Order*.

[94] As indicated in paragraph 80, the power to deal with passports was transferred to the Department of External Affairs where it has remained [now Department of Foreign Affairs and International Trade]. There is nothing in the *Canadian Passport Order*, other than that it emanated from Cabinet, to suggest that this authority had been transferred to the Governor in Council.

[95] In both *Black*, above, at paragraphs 32-34 and in *Schreiber*, above, at paragraphs 27-28, in this Court, the respective courts found that the prerogative could be exercised by either the Governor in Council or by the responsible minister. Indeed, in *Black*, at paragraph 33, there is an outright rejection of the notion that only the Governor in Council could exercise the Crown prerogative.

[96] Where the prerogative can be exercised by other than the Governor in Council, the only issue is which minister or other authority may do so. In this case, it is evident that the Minister is the appropriate Crown minister to exercise that authority. Therefore, to the extent that the prerogative could be exercised, the Minister had the power to do so. Still, it had to be exercised in the proper manner.

[97] The question remains whether the Minister could exercise the power in the manner he did against this applicant. In other words, was the applicant entitled, on grounds of procedural fairness, to have his passport application dealt with by the Passport Office, as stipulated in the *Canadian Passport Order*.

D. Fairness/Legitimate Expectation

[98] The respondent early in this litigation acknowledged that the Minister had breached the duty of fairness, largely by failure to give notice and an opportunity to be heard. While the Court agrees with the respondent, the applicant claims even further breach of the principles of fairness in terms of legitimate expectation, particularly the expectation as to who will make the decision affecting his application.

[99] On the facts of this case, the applicant, and indeed virtually every Canadian citizen, would have expected that the Canadian Passport Office acting on the criteria contained in the *Canadian Passport Order* would deal with and issue or refuse to issue a passport. No previous instance of the Minister's direct intervention in a passport application was cited to the Court.

[100] The duty of procedural fairness, as discussed in *Baker*, has been further summarized by the Chief Justice in *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 S.C.R. 227, at paragraph 39 as follows:

The content of the duty of procedural fairness depends on a number of factors, including: the "nature of the decision

being made and the process followed in making it"; the "nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'"; the "importance of the decision to the individual or individuals affected"; the "legitimate expectations of the person challenging the decision"; and the requirement to "respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances": *Baker*, at paras. 22-27.

[101] Of those factors, the two most critical in this instance are "the importance of the decision to the individual or individuals affected" and "the legitimate expectations of the person challenging the decision".

[102] The respondent argued that the use of the word "may" in the *Canadian Passport Order* gave a wide discretion. As such, a significantly reduced level of procedural fairness is warranted in respect of passport issuance and control. Read in context I cannot agree that "may" has this effect.

[103] The word "may" appears three times in the *Canadian Passport Order* as it stood at the time of Khadr's passport application; once in subsection 4(1) and once more in section 9 and again in section 10. For this case, the relevant sections are sections 4 and 9. Subsection 4(1) states that "Subject to this Order, any person who is a Canadian citizen under the Act may be issued a passport" [emphasis added]. Section 9 then states that "The Passport Office may refuse to issue a passport to an applicant who [list of seven grounds for refusal]" [emphasis added].

[104] Section 11 of the *Interpretation Act* states that "'shall' is to be construed as imperative" and "'may' as permissive". If section 4 of the *Canadian Passport Order* used the word "shall", it would have the effect of requiring that every Canadian have a passport.

[105] In my view, it is more consistent with the purpose and intent of the *Canadian Passport Order* to read the verb "may" as granting permission to Canadian citizens to be issued a passport. The effect of the section is to exclude non-Canadians from the entitlement to a passport.

[106] Section 9 of the *Canadian Passport Order*, on the other hand, permits the Passport Office, in cases where an applicant falls into one of the enumerated circumstances (paragraphs 9(*a*)-(*g*)), to refuse to issue a passport. I agree with the respondent's argument that the authority granted by the "may" is exhausted by the grounds listed in section 9 for the refusal of a passport.

[107] Characterizing "may" as permissive implies that it imports discretion upon the person it grants the permissive authority. Although this implication of discretion arises, it is not in itself conclusive. In *R. v. S.(S.)*, [1990] 2 S.C.R. 254, at pages 273-274, Dickson C.J. indicates that, although "may" implies discretion, it does not preclude obligation. In *R. v. S.(S.)*, Dickson C.J. refers to the judgment of Lord Cairns in the House of Lords case of *Julius v. Lord Bishop of Oxford and another*, [1874-80] All E.R. Rep. 43 where a distinction was drawn between a power coupled with a duty and a complete discretion. The relevant portion of this judgment is as follows [at pages 47, 49]:

[The words "shall be lawful"] confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. . . .

. . .

. . . where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.

[108] The Nova Scotia Court of Appeal, in *Brown v. Metropolitan Authority* (1996), 150 N.S.R. (2d) 43, fully

adopted the reasoning in *Julius*, holding that once the conditions were met (conditions as set out in a particular statute imposing a duty on the Metropolitan Authority to pay compensation for damages that arose out of its actions), a duty arose to exercise this power in spite of the fact that the words empowering the Authority were "may pay".

[109] Section 9 does not create an obligation to issue a passport if certain criteria is met. Instead it states that the Passport Office may refuse a passport to an individual who falls into one of the listed categories. The obligation imported by the "may" is one of refusal. The Order, as appears to have been accepted by the respondent's officials, is to be read as giving to the Passport Office the power, coupled with the duty, to refuse a passport to a person who falls into one of the conditions enumerated.

[110] Subsection 4(1), however, reads quite differently. It states that a Canadian citizen may be issued a passport. Although silent on who will do the actual issuing, reference to the interpretation section of the Order (section 2) reveals that it would be the Passport Office. The "Passport Office" therein is described as "a section of the Department of External Affairs, wherever located, that has been charged by the Minister with the issuing, revoking, withholding, recovery and use of passports".

[111] A proper interpretation of subsection 4(1) would be as follows: "The Passport Office, subject to this Order, may issue a passport to any person who is a Canadian citizen under the Act" [Act meaning *Citizenship Act* [R.S.C., 1985, c. C-29]. Therefore, if an individual meets the two conditions outlined—(1) he or she is a Canadian citizen pursuant to the *Citizenship Act* and (2) nothing in the Order prohibits such issuance—then he or she is entitled to a passport. In light of the principle presented in *Julius*, this "may", as it vests power in a public authority, carries with it an obligation to exercise the power granted to it.

[112] Section 4, read together with sections 9 and 10, mean that the Passport Office has the permission or authority of the Governor in Council to issue passports, and to refuse or revoke passports in accordance with the terms of the Order. No reasonable person reading this Order would conclude that if one otherwise complied with the terms of this Order, the Minister could, and on entirely new grounds, deny one a passport or indeed that the Passport Office could act likewise.

[113] In respect of the two most critical factors referred to in paragraph 101 (the importance of the decision and the legitimate expectations), as discussed in these reasons in respect of section 6 of the Charter, the issuance of a passport in the modern international setting of the world is an aspect of and reflects the Charter value expressed by the mobility rights. That the applicant has no current travel plans (or whether other countries would accept him) is not relevant. As held in *Baker* [at paragraph 25]:

A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

[114] The Government of Canada holds out just how important a passport is. In its Web site display and other publications (some of which are referred to in paragraph 68 of these reasons), the government lays considerable emphasis, to some extent incorrectly, on the necessity of a passport to establish internationally a person's identity and his/her right to return to Canada.

[115] In paragraph 63, the Court has referred to a significant number of countries which require a passport to gain entry. A passport gives true effect to the right to leave Canada as it is the primary means by which to gain entry elsewhere.

[116] In respect of the applicant's legitimate expectations, the Supreme Court has confirmed, in *Baker* and more recently in *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, that this principle is part of the doctrine of fairness or natural justice. It does not create substantive rights. It is for this reason that this Court cannot follow fully the U.K. cases on the subject of passport issuance. As a remedy under U.K. principles on this subject, a court could presumably mandate the issuance of a passport.

[117] The courts have recognized that there may be difficulties trying to distinguish between procedural and substantive relief. In *Mount Sinai Hospital Center*, the Court put emphasis on avoiding formal classifications and categorization of powers. The Court affirmed that broad public policy is a matter for the Minister to determine.

[118] In the present case, the power exercised is not one of broad public policy. The fact that the substantive relief may flow from granting the procedural remedy does not alter the procedural right.

[119] The principle of legitimate expectation requires that government, at a minimum, follow the processes, procedures and regular practices which it has held out to either an individual or the public at large. The principle does not guarantee a particular result. As Madam Justice L'Heureux-Dubé articulated in paragraph 26 of her reasons in *Baker*:

As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 16 (C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D. J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Social Pol'y* 282, at p. 297; *Canada (Attorney General) v. Human Rights Tribunal Panel (Canada)* (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

[120] At the time of Khadr's application, the *Canadian Passport Order* represented that the powers over issuing, revoking, withholding, recovery and use of passports was vested in the Canadian Passport Office. Khadr was informed by the Chief Executive Officer of the Canadian Passport Office, without any indication of ministerial direction, that his passport application was denied.

[121] Based on the Order and the refusal letter, the only reasonable conclusion was that officials of the Canadian Passport Office made the decision. Only well into the litigation and upon receipt of the respondent's responding motion material was the true decision maker revealed. The clandestine decision making was never explained either as to its necessity or how it accords with the principle of procedural fairness.

[122] Knowing who the decision maker is or may be is an important aspect of the rules of natural justice and procedural fairness.

[123] It is an aspect of the principles of natural justice and fairness that one know the case one must meet. As one is entitled to notice of a proceeding, one is entitled to know who will decide and the basis on which the decision can be made.

[124] Justice MacKay in *Brink's Canada Ltd. v. Canada (Human Rights Commission)*, [1996] 2 F.C. 113 (T.D.), confirmed that knowing who the decision maker will be and the procedures to be followed are aspects of the principles of fairness. He also held that a change in who is the decision maker without any prior indication that such an event could happen would be a violation of the fairness principle.

[125] In the light of the *Canadian Passport Order* and the other promises and procedures held out to the public, the federal government represented that the issuance, refusal and revocation of passports would be determined by the Passport Office based on specific criteria, none of which are in conflict with any other law or statute of Canada. Therefore, a legitimate expectation in regard to the processing of the applicant's passport application must be found to exist.

[126] The Minister's decision is contrary to the fairness principle generally and to that legitimate expectation that the Minister directly and through officials of the Department created. The applicant is entitled to have that legitimate expectation met.

[127] In so saying, the Court is mindful of the applicant's admitted conduct; he would not necessarily qualify as a model citizen but that fact does not disentitle him to the application of fairness and natural justice to his passport application.

[128] In the interests of the protection of national security and the very legitimate public interest in countering terrorism and other threats, a nation which has as a core principle that of the rule of law, must still adhere to the very legal principles that it seeks to protect.

VI. REMEDY

[129] The respondent asks that the Court send the matter back to the Minister, to accord the applicant such procedural rights to notice and evidence as is feasible given the national security concerns, and that the matter be dealt with under the 2004 CPO.

[130] The respondent's proposed remedy would authorize the Minister to decide the passport application on the basis of new criteria not in place at the time Khadr made his filing. This would, in reality, give retrospective effect to the 2004 CPO, something not specifically authorized in that Order. To remit the matter to the Minister on this basis would be to violate the presumption against retroactivity of laws (*Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271).

[131] There is nothing in the 2004 CPO which would suggest that it was to have retroactive effect. The respondent in its own action memorandum confirmed that the then *Canadian Passport Order* did not include, as a grounds for refusal of a passport, the interests of national security. The 2004 CPO was intended to rectify this situation without anything, either in words or by implication, to suggest retroactive application.

[132] The doctrine of legitimate expectation is a significant procedural protection to the public at large from arbitrary government action. It has as its goal to put the person, at least procedurally, in the same position as if the impugned decision or action had not occurred. The only way in which that can occur is to remit the matter back to the Passport Office to be dealt with by it in accordance with the *Canadian Passport Order* as it was when the passport application was submitted.

[133] As indicated earlier, the procedural protection to have a passport decided by the Passport Office under the *Canadian Passport Order* does not necessarily mean that the applicant's passport is immune from the newer

provisions of the 2004 CPO where the circumstances warrant.

[134] For these reasons, the Minister's decision to refuse to issue a passport to the applicant is quashed. In the exercise of the Court's discretion to fashion the appropriate remedy, the passport application is remitted to the Passport Office to be dealt with in an expeditious manner in accordance with the provisions of the *Canadian Passport Order*.

VII. COSTS

[135] The applicant asks for costs on a solicitor-client basis. I reject that request. There is no question of the good faith of the respondent or his officials. They acted as they believed appropriate in the public interest even when acting in a clandestine manner.

[136] The applicant succeeds in this case, not because he is a victim of malicious government abuse, but because of the importance of the principle of fairness and legitimate expectation owed to all Canadian citizens. Citizens must be able to rely upon what the government tells them about how the government will behave toward them. To the extent that the applicant is a genuine concern to national security, there are appropriate measures available.

[137] There is no basis for anything other than the usual award of party-and-party costs.

JUDGMENT

THE COURT ORDERS THAT:

(a) this application for judicial review is granted;

(b) the Minister's decision denying the applicant his passport is quashed;

(c) the passport application is remitted to the Passport Office to be determined by it in an expeditious manner in accordance with the *Canadian Passport Order* as it was at the time that the application was filed; and

(d) the applicant shall have his costs on the usual scale.