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# Protection, the Right to Travel, and National Security: Passports in the Commonwealth

## 1. Introduction

A number of countries have in recent years been forced to confront the problem of ‘foreign fighters’: individuals who have travelled from those countries to take part in conflicts in (most often) Syria and Iraq and who, if and when they return to their home state, pose a threat to people and property there.<sup>1</sup> The preferred response of these home states has often been to deprive such people of their citizenship and so their right to enter (and return) to the country they left.<sup>2</sup> Where a state – for one of any number of reasons of domestic or international law – cannot withdraw the citizenship of a person it considers to represent a threat to national security or analogous public interests, it will often choose instead to withdraw the person’s passport (or refuse to issue one in the first place), preventing the person from exercising certain of the rights associated with citizenship and so minimising or containing the threat posed by him or her.<sup>3</sup> The modern national security context therefore justifies, even demands, a re-examination of certain fundamental legal issues around passports.

The traditional conception of a passport at (English) common law reflected the protection owed to the holder of a passport by the state that issues it, and the request – which a passport explicitly makes – that other states extend that same protection.<sup>4</sup> Over time, protection has faded from the legal picture, but has not been clearly replaced by any other concept. The most influential modern accounts in fact emphasise the legal insignificance of passports, portraying them as mere administrative documents which facilitate the exercise of rights but do not themselves confer those rights. This claim is at odds with the logic which underpins the use of passports as a tool of national security. Such use relies on the fact that passports – the primary

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<sup>1</sup> For an overview of the phenomenon in the context of the European Union in particular, see Bérénice Boutin et al, *The Foreign Fighters Phenomenon in the European Union Profiles, Threats & Policies*, International Centre for Counter-Terrorism Research Paper (April 2016).

<sup>2</sup> On which see Sangeetha Pillai and George Williams, ‘Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations’ (2017) 66 *ICLQ* 521.

<sup>3</sup> An alternative, more optimistic, explanation is that the states in question recognise it as ‘a more human, large-scale, and temporary measure’: Leslie Esbrook, ‘Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool’ (2016) 37 *University of Pennsylvania Journal of International Law* 1273, 1313. Though this seems unlikely, it is true that the temporary nature of passport revocation is a key point of distinction, while the consequences – no matter how serious – are certainly less severe than those of the deprivation of citizenship, which severs all legal connection between the state and the individual so deprived.

<sup>4</sup> For a consideration of this fact which starts from the concept of protection itself, see Lauren Benton and Adam Clulow, ‘Introduction: The Long, Strange History of Protection’, in Lauren Benton, Adam Clulow, Bain Attwood (eds), *Protection and Empire: A Global History*, Cambridge University Press (2017).

(and sometimes sole) method by which one proves one's identity and nationality in the modern world – are intimately connected to the exercise of rights which one possesses by virtue of one's nationality. Amongst these ranks most prominently what I call here the 'right to travel' – to enter and exit the country of one's nationality. This article, on the basis of a consideration of the law relating to the use of passports as a tool of national security in the United Kingdom, Canada, Australia and New Zealand, challenges the common law conception of passports, showing instead that passports effectively confer rights and so their refusal or withdrawal represents a denial of rights. From this conclusion a number of point flow. Though the significance is greatest for those states – the UK and Canada – in which passports are regulated under the prerogative power, there are implications also for those states – Australia and New Zealand – in which passports have a statutory basis.

## 2. Passports, protection, and the fracture of citizenship

Older accounts of passports in English law were closely tied to questions about to when it was and was not permitted for subject to leave the realm – a point on which there is a lack of certainty in the literature<sup>5</sup> – as well as the distinction between subjects on one hand and, on the other, aliens. Chitty focussed upon the latter, treating passports as an aspect of the Crown's powers in relation to war, and – specifically – the power of the King to take measures to 'prevent the egress or ingress of his enemies out of or into his Majesty's dominions'.<sup>6</sup> To such measures, passports were in effect an exception: the King might permit his enemies 'to come into the country without molestation, by granting to him letters of safe-conduct'.<sup>7</sup> The same point had been made much by Blackstone, who emphasised that friendly aliens – subjects of states with which the Crown was not at war – might enter the realm without permission, but that this was not true of enemy aliens:

[N]o subject of a nation at war with us can, by the law of nations, come into this realm, nor can travel himself upon the high seas, or send his goods and merchandize from one

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<sup>5</sup> See Daniel Turack, 'Early English Restrictions to Travel' in CH Alexandrowicz (ed) *Grotian Society Papers 1968: Studies in the History of the Law of Nations* (The Hague, Martinus Nijhoff, 1970) and 'Freedom of Movement: The Right of a United Kingdom Citizen to Leave His Country' (1970) 31 *Ohio State Law Journal* 247, as well as David W Williams, 'British Passports and the Right to Travel' (1974) *ICLQ* 642, 646.

<sup>6</sup> J Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (London, J Butterworth & Son, 1820) 48.

<sup>7</sup> Chitty (n 6) 48.

place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct.<sup>8</sup>

Chitty, writing in the early nineteenth century, noted that the practice of giving letters of safe conduct was giving way to the issuance of ‘passports under the King’s sign manual or licenses from his ambassador’.<sup>9</sup> Some accounts of the difference between the two distinguish them exactly along the lines Blackstone suggests: passports were given to friends; safe conducts to enemies.<sup>10</sup>

Centuries before Chitty wrote, the status of subjects had been assessed authoritatively by Coke CJ in *Calvin’s Case*. He emphasised the reciprocal nature of the duties owed by Crown and subject: ‘ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them.’<sup>11</sup> The status of aliens was and is different. When war is declared under the king’s prerogative, aliens of the states with whom the Crown was at war become enemy aliens,<sup>12</sup> deprived of access to the courts,<sup>13</sup> their property liable to confiscation and they themselves to detention and deportation.<sup>14</sup> Aliens present in the realm who were subjects of friendly states, on the other hand, owed a ‘local allegiance’ to the Crown – an allegiance, said Blackstone, which ‘ceases the instant such stranger transfers himself from this kingdom to another’.<sup>15</sup> The various powers to which enemy aliens were subject were unavailable as against those in local allegiance, and though in the United Kingdom the Immigration Act 1971 preserves the prerogative as regards aliens generally,<sup>16</sup> it appears that there

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<sup>8</sup> Blackstone, *Commentaries*, I, 251

<sup>9</sup> Chitty (n 6) 48-9.

<sup>10</sup> Wyndham Beawes, *Lex Mercatoria Rediviva OR, THE MERCHANT’S DIRECTORY*, Peter Wilson (1754) 209.

<sup>11</sup> *Calvin’s Case* (1608) Co Rep 1a, 5a.

<sup>12</sup> See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [53].

<sup>13</sup> See, eg, *Amin v Brown* [2005] EWHC 1670 (Ch).

<sup>14</sup> See *R v Vine Street Police Station Superintendent, ex parte Liebmann* [1916] 1 KB 268 and, later, *R v Bottrill, ex parte Kuechenmeister* [1947] KB 41. The status of enemy aliens is discussed most fully in Arnold McNair, *The Legal Effects of War*, 3<sup>rd</sup> ed, Cambridge University Press (1948).

<sup>15</sup> Blackstone, *Commentaries*, I, 370. A resident friendly alien is ‘a subject by local allegiance with a subject’s rights and obligations’. *Johnstone v Pedlar* [1921] 2 AC 262, 276. ‘Allegiance is owed to their sovereign Lord the King by his natural born subjects; so it is by those who, being aliens, become his subjects by denization or naturalization... so it is by those who, being aliens, reside within the King’s realm.’ *Joyce v DPP* [1946] AC 347, 366. Salmond said that subject was a wider category than citizen, distinguishing natural from alien subjects: ‘In English law, subjects, whether natural or alien, are those who owe allegiance to the Crown’ John W Salmond, *Citizenship and Allegiance* (1902) 18 *LQR* 49, 50. The former owed ‘permanent and personal’ allegiance to the Crown, the latter ‘temporary and local’.

<sup>16</sup> Immigration Act 1971, s 33(5).

no longer exists any prerogative power as regards friendly aliens.<sup>17</sup> The basic distinction between subjects and aliens, friendly and enemy, nevertheless holds true in English law today – and has been suggested as a basis for the distinction between those against whom the doctrine of Crown act of state may and may not be pleaded<sup>18</sup> – but has mostly lost its practical significance as the practice of declaring war (and so of moving persons, at a stroke, from the category of friendly to enemy alien) has faded.<sup>19</sup> In the middle of the nineteenth century,<sup>20</sup> reforms to British passports saw them taken on many of their modern features, including being issued ‘only to British subjects, or to such foreigners as may have been naturalized by Act of Parliament or received Letters of Denization’.<sup>21</sup> At this time, there were no barriers to entry to the United Kingdom: the modern system of immigration control was introduced only by the Aliens Act 1905.<sup>22</sup>

For much of the twentieth century, the leading judicial treatment of the British passport was found in a decision of the King’s Bench Division from around the same time. The case related to the charge against two individuals – including the left-wing journalist Henry Brailsford – of conspiracy to obtain a passport by false representations. There, it was said by the court that a passport ‘is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual’s protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named.’<sup>23</sup> These dicta demonstrate the centrality, still in the early twentieth century, of the concept of protection to the understanding of what a passport was, and what it did. The text contained in every British passport – whereby ‘Her Britannic Majesty’s Secretary of State Requests and requires in the Name of Her Majesty all those whom it

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<sup>17</sup> See Christopher Vincenzi, ‘Extra-statutory ministerial discretion in immigration law’ [1992] *PL* 300 and Ian MacDonald, ‘Rights of settlement and the prerogative in the UK - a historical perspective’ (2013) *JLANL* 10.

<sup>18</sup> See, most importantly, *Johnstone v Pedlar* [1921] 2 AC, though the point has never been authoritatively determined. Standard authority for the proposition that Crown act of state is not available as against British subjects is *Entick v Carrington* (1765) 19 State Trials 1029: see the discussion in Paul F Scott, *The National Security Constitution*, Hart Publishing (2018), 270-3.

<sup>19</sup> See *Amin v Brown* [2005] EWHC 1670 (Ch), holding that the objective existence of hostilities is unrelated to the question of whether a state of war exists under the prerogative, as well as the discussion in *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5, [53].

<sup>20</sup> Martin Anderson, ‘Tourism and the Development of the Modern British Passport, 1814–1858’ (2010) 49 *The Journal of British Studies* 258, 262.

<sup>21</sup> *Correspondence respecting passports*, 2356 (1857-58), 1-2.

<sup>22</sup> Largely in response to Jewish immigration from the Russian Empire at the end of the previous century: B Gainer, *The Alien Invasion: The Origins of the Aliens Act of 1905* (London, Heinemann, 1972). Restrictions had been introduced in the later eighteenth century but later repealed: V Bevan, *The Development of British Immigration Law*, Croom Helm (1986) 58-64.

<sup>23</sup> *R v Brailsford* [1905] 2 KB 730, 745.

may concern to allow the bearer to pass freely without let or hindrance, and to afford the bearer such assistance and protection as may be necessary’ – continues to reflect these dual relationships: one on the domestic plane, between the Crown and subject,<sup>24</sup> the other on the international plane, between the Crown and its counterparts.

The notion of a passport as encapsulating the correlative relationship between allegiance and protection reached its zenith in *Joyce v DPP*,<sup>25</sup> decided by the House of Lords shortly following the conclusion of the Second World War. Joyce – better known as Lord Haw-Haw – had been charged with treason, an offence whose core is the betrayal of an allegiance owed to the Crown. Joyce, however, was not a British citizen but an American one, and so – on the traditional conception – owed no allegiance to the Crown while outside its realms. Nor, for the same reason, did the Crown owe him protection. The complicating factor here was Joyce’s possession of a British passport, acquired under false pretences. It was held by the House of Lords that by possessing that passport Joyce was holding himself out as someone entitled to the protection of the Crown and so he owed it – notwithstanding the underlying factual reality – an allegiance which made it possible for him to commit treason. Harking back to *Brailsford*, Lord Jowitt distinguished between the effect of the possession of a passport by a subject and a non-subject. Of the former, he said that though ‘the possession of a passport by a British subject does not increase the sovereign’s duty of protection’ it will ‘make his path easier.’ For a subject, therefore, it ‘serves as a voucher and means of identification.’<sup>26</sup> On the other hand, ‘the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed’:

It is immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects.<sup>27</sup>

He added:

To me, my Lords, it appears that the Crown in issuing a passport is assuming an onerous burden, and the holder of the passport is acquiring substantial privileges... Armed with

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<sup>24</sup> That is, some non-citizen subjects and non-citizen nationals continue to enjoy the right to a British passport: examples include British Overseas Territories Citizens and British Overseas Citizens.

<sup>25</sup> *Joyce v DPP* [1946] AC 347.

<sup>26</sup> [1946] AC 347, 369

<sup>27</sup> [1946] AC 347, 369-70.

that document the holder may demand from the State's representatives abroad and from the officials of foreign governments that he be treated as a British subject, and even in the territory of a hostile state may claim the intervention of the protecting power.<sup>28</sup>

The decision in *Joyce* was heavily criticised at the time,<sup>29</sup> and no reliance should be placed upon it. Crucially, where issues relating to allegiance and protection (which reveals itself to be a very thin duty owed to the citizen)<sup>30</sup> have been litigated in modern times, the crucial factor has always been taken to be citizenship, rather than possession of a passport.<sup>31</sup> This view is strengthened by the decision in *Pham*,<sup>32</sup> where it was held that it could be 'conducive to the public good' to deprive a person of citizenship on the basis of his past activities, notwithstanding that he – by virtue of his imprisonment abroad – posed no current threat. The relevant legal standard, the Court of Appeal held, might be satisfied in a number of ways, including where the Crown concluded that it 'should not have to provide protection to a person who has in the past so fundamentally repudiated the obligations which he owes as a citizen.'<sup>33</sup> Protection is now unambiguously a function of citizenship, to which the possession of a passport seems to add nothing of (legal) relevance.<sup>34</sup> This approach is clearly preferable. It explains why, in seeking to deal with those of its nationals who pose a threat to national security, the various states' preference is usually to deprive them of citizenship, extricating itself from the legal relationships that subsists between citizen and state.

The question is therefore what, if anything, replaces protection as the legal significance of passports? The most important analysis of the passport in English law in the second half of the twentieth century – that of William Wade – is striking in its claim that the gap left by the concept of protection need not (indeed, cannot) be filled by any other legal claim. Passports, said Wade, have 'no status or legal effect at common law whatever'; a passport is 'simply an administrative document' which 'does not have the slightest effect upon [the individual's] legal rights, whatever they may be, to go abroad and return'.<sup>35</sup> Wade's explicit reference to the common law makes it

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<sup>28</sup> [1946] AC 347, 370-1.

<sup>29</sup> Glanville Williams, 'The Correlation of Allegiance and Protection' (1948) 10 *CLJ* 5.

<sup>30</sup> See Colin RG Murray, 'In the shadow of Lord Haw Haw: Guantanamo Bay, diplomatic protection and allegiance' [2011] *PL* 115, discussing the modern case law on protection.

<sup>31</sup> See, for example, *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, in which it is clear the citizenship is the operative factor.

<sup>32</sup> *Pham v The Secretary of State for the Home Department* [2018] EWCA Civ 2064

<sup>33</sup> [2018] EWCA Civ 2064, [52].

<sup>34</sup> The practical dimension may be different: Lord Goldsmith QC, *Citizenship: Our Common Bond* (2008), [36].

<sup>35</sup> HWR Wade, *Constitutional Fundamentals*, rev ed, Stevens & Sons (1989), 63-4.

necessary to consider what – if any – amendment must be made to this claim in light of the statutory regulation. The answer is dual-pronged. The Immigration Act 1971 is framed so as to ensure that passports are not, as a matter of law, a *sine qua non* of the right to travel (and so, strictly speaking, Wade’s claim holds). In practice, however, they are essential to the individual’s exercise of the right to enter and leave the country. Section 2 provides that all British citizens have the right of abode in the United Kingdom; those who possess such right ‘shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.’ The caveat is unpacked in a schedule to the legislation, which provides (in relation both to those arriving in and departing from the UK) that an immigration officer may require the production of ‘either a valid passport with photograph or some other document satisfactorily establishing his identity and nationality or citizenship’.<sup>36</sup> The effect of this provision is that a person who wishes to exercise the rights consequent upon their right of abode may – notwithstanding its technical legal insignificance – be required to produce a passport: there is no requirement that any immigration officer to accept any alternative documentation,<sup>37</sup> and even such documentation is accepted, it will likely not be accepted by the carrier who must transport the person into or out of the country. In practice, therefore, the distinction between passports as conferring rights and passports as facilitating the exercise of rights breaks down. A person who as a matter of law unambiguously possesses the right of abode will find it almost impossible to leave or enter the country without a passport.<sup>38</sup>

The key developments discussed above predate the emergence of separate citizenships in the Commonwealth. This occurred in the post-war years, when the Dominions’ decision to legislate for their own citizenships prompted the development of a Commonwealth-wide

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<sup>36</sup> Immigration Act 1971, schedule 4, para 4(2).

<sup>37</sup> See the example of the journalist Iain Colvin who – in 1968, and so under a prior but analogous legal regime – sought to board a plane at London Airport without a passport but was refused leave to do so by the Chief Immigration Officer on the basis that none of the alternative documentation he offered was sufficient to establish his right his possession of the relevant rights: See the account in JUSTICE, *Going Abroad – A Report on Passports*, Barry Rose Publishers (1974) [6]-[7]. Asked about the matter, the Home Secretary explained that ‘Mr. Colvin is... well known as a journalist, but none of the documents of identity he produced technically satisfied the Immigration Officer that he is a British subject or a person to whom leave to embark... should be granted, and in the spirit of a test case leave was refused’: HC Deb 23 May 1968, vol 765 c119W.

<sup>38</sup> The relationship between a passport and the right to enter the country were strengthened by an amendment made by the Immigration, Asylum and Nationality Act 2006, providing a person ‘seeking to enter the United Kingdom and claiming to have the right of abode there shall prove it by means of either ‘a United Kingdom passport describing him as a British citizen’ or ‘a United Kingdom passport describing him as a British subject with the right of abode in the United Kingdom’: Immigration Act 1971, s 3(9).

approach.<sup>39</sup> Now, citizenship of the relevant dominion would be shared with the status of British subject, a status also then enjoyed by citizens of the United Kingdom.<sup>40</sup> But the grant of passports by the Dominions had in some cases begun earlier – mostly in and around the First World War, as barriers to international movement were erected, in many cases for the first time. These temporary barriers were made permanent after the end of hostilities, and with them the question of travel becomes central to the nature and effect of passports. In most cases, Dominion passports were, for at least some period after their introduction, available to British subjects generally, rather than merely to citizens of the relevant Dominion, so that – for instance – in Australia, British subjects continued to be entitled to Australian passports for most of the twentieth century.<sup>41</sup> These separate regimes have facilitated a considerable degree of legal divergence: there is now a fundamental distinction between those states in which passports continue to be regulated on a prerogative basis (the United Kingdom and Canada), and those in which the relevant law is statutory (Australia and New Zealand). In the following section, I outline the key features of those regimes and their development, and show that despite this fragmentation, there remains a key sense in which the various regimes continue to reflect their origins in the prerogative powers of the Crown.

### 3. The legal bases of passports

The law of passports in the UK remains essentially unreformed: though a range of ancillary statutory powers has been added, at their heart continues to stand a prerogative core. The situation persists notwithstanding several recommendations to amend it. In 1976, the British Section of the International Commission of Jurists issued a report examining legal questions around passports, recommending ‘as a basic constitutional necessity, the early enactment of a brief statute conferring upon all citizens the legal right to a passport.’<sup>42</sup> Moreover, it concluded that ‘the right of movement is of such cardinal libertarian importance, and that the danger of

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<sup>39</sup> The Canadian Citizenship Act of 1946 was followed by the Commonwealth Conference on Nationality and Citizenship of February 1947 and the enactment of the British Nationality Act of 1948: see Jatinder Mann, ‘The evolution of Commonwealth citizenship, 1945–1948 in Canada, Britain and Australia’ (2012) 50 *Commonwealth & Comparative Politics* 293.

<sup>40</sup> See, at the relevant time, British Nationality Act 1948, s 1. The relevant legal category was that of ‘citizens of the United Kingdom and the Colonies’. British subjects, whether CUKCs or Commonwealth citizens, enjoyed until the early 1960s what we would now call a right of abode in the United Kingdom: *DPP v Bhagwan* [1972] AC 60. That position was brought to an end by the Commonwealth Immigrants Act 1962.

<sup>41</sup> Under the Australian Passport Act 1920. The category of British subject was not removed from Australian law until the enactment of the Australian Citizenship Amendment Act 1984.

<sup>42</sup> JUSTICE (n 37) [48].

unreviewable maladministration in the application of the four imprecise criteria for refusal is so great, that the right to a passport should be absolute.<sup>43</sup> Without denying that the executive might legitimately wish to prevent citizens from leaving the country, it argued that it should do so only ‘by open and judicially-acknowledged means’, potentially by seeking to persuade a court to grant a writ of *ne exeat regno*, the persistence of which was at that point in time uncertain.<sup>44</sup> Ultimately, however, no attempt was made to alter the legal underpinnings of passports: though a number of bills were introduced over the years, none made significant progress.<sup>45</sup> The Government in its most recent statement of policy on its exercise of its powers in this area described the position as follows:

There is no entitlement to a passport and no statutory right to have access to a passport. The decision to issue, withdraw, or refuse a British passport is at the discretion of the Secretary of State for the Home Department (the Home Secretary) under the Royal Prerogative.<sup>46</sup>

This might be a tolerable situation were the claims made by Wade – that a passport is ‘simply an administrative document’ which does not have ‘the slightest effect’ upon the legal rights of a UK national<sup>47</sup> – valid. But, as noted above, that characterisation misleads: the possession of a passport effectively determines the enjoyment of the right to travel. It is therefore, to put the point briefly, unacceptable that those rights are given, and taken away, at the discretion of the Home Secretary. Some of the most important consequences of the legal position have, though, been ameliorated by developments elsewhere. Historical accounts of the prerogative included the claim – present in Blackstone – that the prerogative was an essentially arbitrary power: recourse for its misuse could only be political, never legal.<sup>48</sup> The implications of this position – reflected in the proposition that though the courts were able to rule on the existence (and scope) of the prerogative, they could not review its exercise – were spelled out in Parliament in the late 1950s: the Minister, being probed about accountability for the withdrawal of passports, was asked whether he was implying ‘the only action open to one aggrieved would be in fact to defeat the

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<sup>43</sup> JUSTICE (n 37) [51].

<sup>44</sup> JUSTICE (n 37) [55].

<sup>45</sup> See Scott (n 18) 173-4.

<sup>46</sup> Theresa May, ‘The issuing, withdrawal or refusal of passports’, HC Deb 25 April 2013 vol 561 col 68WS.

<sup>47</sup> Wade (n 35).

<sup>48</sup> Blackstone, *Commentaries*, I, 243-4.

Government?’ His response was that was ‘a very difficult but not unknown process.’<sup>49</sup> Against this background, William Wade and Bernard Schwartz once said that the power to refuse or cancel passports was ‘perhaps the only really objectionable arbitrary power which the Crown still claims’.<sup>50</sup> The decision in the *GCHQ* case, according to which some facets of the prerogative could be subject to judicial review, provides a more practicable alternative to bringing down the government.<sup>51</sup> The logic which in the *GCHQ* applied to the management of the Civil Service was held, in *Everett*,<sup>52</sup> to encompass also passports, and so Wade and Schwartz’s claim no longer holds.

As in the United Kingdom, the legal basis of passports in Canada continues to be the prerogative.<sup>53</sup> Unlike the United Kingdom, however, the prerogative has been codified in law, and the relevant rules are now found in a piece of prerogative legislation – the Canadian Passports Order of 1981 – enacted by the Governor General in Council.<sup>54</sup> The effect is that the Canadian regime sits somewhere between the ‘pure’ prerogative of the United Kingdom on one hand and the statutory regulation of passports in Australia and New Zealand on the other. The Order provides only that ‘any person who is a Canadian citizen under the Act *may* be issued a passport’<sup>55</sup> and that ‘[n]o passport shall be issued to a person who is not a Canadian citizen under the Act.’<sup>56</sup> It therefore creates a direct link between citizenship and passport, without going so far as to grant citizens an explicit right to a passport. And, though enacted under the prerogative, the Order does not exhaust the legal regulation of passports, but (now) explicitly provides that prerogative over passports is in no way limited or affected by it.<sup>57</sup>

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<sup>49</sup> HL Deb 16 June 1958, vol 209 col 862.

<sup>50</sup> B Schwartz and HWR Wade, *Legal Control of Government: Administrative Law in Britain and the United States*, Oxford University Press (1972) 63.

<sup>51</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>52</sup> *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811.

<sup>53</sup> On which in Canada see Craig Forcese, ‘The Executive, The Royal Prerogative, and the Constitution’ in Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers, *The Oxford Handbook of the Canadian Constitution*, Oxford University Press (2017).

<sup>54</sup> Previously, passports were regulated by the Canadian Passport Regulations, CRC, c 641. The regulations were made under the Department of External Affairs Act 1970, though Arkelien notes that ‘[w]hether that statute, which nowhere provides in express terms either for regulations in general or for passport administration in particular, was adequate authority for the old Regulations was always dubious.’ A J Arkelien, ‘The Right to a Passport in Canadian Law’ (1983) 21 *Canadian Yearbook of International Law* 284, 284 fn 2.

<sup>55</sup> Canadian Passports Order (SI/81-86) para 4(1) (emphasis added).

<sup>56</sup> SI/81-86, para 4(2).

<sup>57</sup> SI/81-86, para 4 (3).

The Commonwealth of Australia, federated in 1901, began to directly regulate passports only following the outbreak of the First World War. It did so via regulations under the War Precautions Act 1914, intended in large part to prevent men of military age from leaving the country.<sup>58</sup> These temporary restrictions were made permanent by the Passports Act 1920.<sup>59</sup> The Passports Act 1938, the legislation which regulated the grant of passports form most of the twentieth century, replaced it for a variety of reasons: in part to address uncertainties as to the bases upon which a passport might be refused;<sup>60</sup> in part in order to ‘bring Australian legislation into conformity with the ordinary conception of a passport’ articulated in the passage of *Brailsford* quoted above;<sup>61</sup> and, imminently, to address the problem of Jewish refugees in the Commonwealth who would be unable to acquire a passport under the law as it then existed.<sup>62</sup> Into the twenty-first century, this remained the basic form of the statutory rule: a discretionary power possessed by the Minister rather than a right belonging to the individual citizen. Though the Passports (Amendment) Act 1979 made various changes,<sup>63</sup> the aim being ‘to provide a proper legislative basis for the passport policy as well as a clear legislative framework for the exercise of ministerial discretion’, it left that discretion in place as ‘the cornerstone of the administration in the field’.<sup>64</sup>

The 1938 Act was eventually superseded by the Australian Passports Act 2005, which replaced that discretion with a right, providing in section 7(1) that ‘[a]n Australian citizen is entitled, on application to the Minister, to be issued with an Australian passport by the Minister.’ That right is made subject to the need to prove citizenship and identity,<sup>65</sup> and to the various grounds that are specified as justifying the refusal to issue an Australian passport.<sup>66</sup> Notwithstanding these carve outs, the Act, in creating a legal entitlement to a passport, comes closer than do the other jurisdictions under consideration to recognising the connection which exists between possession of passport and the ability to enter, remain in, and leave, the country

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<sup>58</sup> See Jane Doulman and David Lee, *Every Assistance & Protection: A History of the Australian Passport*, The Federation Press (2008), chapter 2. Essentially equivalent considerations have been identified as motivating the restrictions on travel which appear to have existed in mediaeval England: see the texts cited at n 5 above.

<sup>59</sup> See Doulman and Lee (n 58) chapter 3.

<sup>60</sup> Enacted largely in response to the judgment of the High Court of Australia in *R v Paterson, ex parte Purves* (1937) 10 ALJR 468; [1937] ALR 144, discussed below: see Doulman and Lee (n 58) chapter 4.

<sup>61</sup> Robert S Lancy, ‘The Evolution of Australian Passport Law’ (1982) 13 *Melbourne University Law Review* 428, 439.

<sup>62</sup> Doulman and Lee (n 58) 119.

<sup>63</sup> On which see Gary Heilbronn, ‘New (and more restrictive) passports legislation’ (1980) 5 *Legal Service Bulletin* 225.

<sup>64</sup> Lancy (n 61) 443.

<sup>65</sup> Australian Passports Act 2005 (Cth), s 7(2) and 8.

<sup>66</sup> APA 2005, s 7(2) and Division 2.

of which one is a citizen. This substantive point augments those benefits which derive from the very form of the legal rules governing passports: that, being statutory in nature, the rules have an exhaustive quality that the UK and Canadian equivalents lack. They are also more likely, as a result of their form, to meet basic rule of law criteria such as stability and clarity.

New Zealand began to regulate passports at much the same time as did Australia. Regulations made by Order in Council in 1916 – later continued in force by statute<sup>67</sup> – required those over the age of 15 to provide a passport on arrival in New Zealand.<sup>68</sup> The Passports Act 1934 gave the rule a primary legislative basis, but without yet regulating the grant of passports by New Zealand itself. Such grant was first provided for by the Passports Act 1946, but – as in Australia – passports could be issued to any British subject.<sup>69</sup> The current passport regimes is found in the Passports Act 1992, which provides that ‘[e]xcept as provided in this Act, every New Zealand citizen is entitled as of right to a New Zealand passport’<sup>70</sup> and that, subject to specified exceptions, the most important of them discussed below, the relevant Minister ‘shall issue a New Zealand passport to every New Zealand citizen who makes an application, or on whose behalf an application is made, for a New Zealand passport.’<sup>71</sup> The legal entitlement to a passport is therefore a strong one, and the discretion to deny a passport to a citizen very limited.<sup>72</sup>

Despite the distinctive legal frameworks which now apply, however, passports in the Commonwealth still demonstrate the legacy of the ambiguous position they enjoy in the United Kingdom. That is, in none of the jurisdictions are they acknowledged as repositories of legal rights, but rather in each case effectively constituted as artefacts which facilitate the exercise of independently existing rights. This is mostly obviously true of Australia, in which no statute explicitly confers upon citizens the right of abode; not even one whose exercise is contingent

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<sup>67</sup> War Regulations Continuance Act 1920, s 4 and schedule 2.

<sup>68</sup> Additional War Regulations made by Order in Council (21 August 1916), regulations 3 and 4. The parent act was the War Regulations Act 1914.

<sup>69</sup> Passports Act 1946, s 3(1). New Zealand citizenship as a legal category was first created by the British Nationality and New Zealand Citizenship Act 1948, later replaced by the Citizenship Act 1977.

<sup>70</sup> Passports Act 1992, s 3.

<sup>71</sup> PA 1992, s 4(1).

<sup>72</sup> All of the circumstances in which a passport might be refused create a discretion: PA 1992, ss 4(3). The only exception is where a court has made an order that a person must be issued to a person for a specified period. Where such an order is in force, the minister must not issue a passport to its subject: PA 1992, s 4(4).

upon the ability to produce proof of citizenship in the form (probably) of a passport.<sup>73</sup> The rules are found in the Migration Act 1958, which requires both citizens and non-citizens entering Australia to clear immigration, meaning in the case of the citizen, *inter alia*, to present without unreasonable delay one's 'Australian passport or prescribed other evidence of the person's identity and Australian citizenship'.<sup>74</sup> As in the United Kingdom, therefore, the passport is made the primary (though not, at least in theory, exclusive) means by which an individual demonstrates an entitlement to enter the country: entering without a passport remains possible as a matter of law. Against this background, the Australian Security Intelligence Organisation ('ASIO'), at whose behest the cancellation of passports on national security grounds will usually take place, has asserted that the right to enter the country is unaffected by the cancellation of a passport:

The cancellation of a passport does not affect an Australian citizen's right of return to Australia. The Department of Foreign Affairs (DFAT) can issue temporary documents to facilitate the return of an Australian citizen whose passport has been cancelled while the holder is overseas.<sup>75</sup>

This assertion relies on the same thin distinction between the existence of the right and its exercise which we have already called into question in the United Kingdom context. The cancellation of a passport does not as a matter of strict law, it is true, affect the right of return. It does, though, effectively prevent the exercise of that right: if it did not, there would be no need for the issue of temporary documents. Better, therefore, given the centrality of passports to the process by which the citizen enters Australia, to agree with Sangeetha Pillai's conclusion that the various caveats to the general right to a passport in Australian law, together with the possibility of cancelling a passport once issued, effectively permit the citizen to be prevented not only from travelling abroad,<sup>76</sup> but also from entering the country.<sup>77</sup> The same evidential requirements as

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<sup>73</sup> Though Helen Irving has argued that the one true and absolute distinction between citizens and aliens is that the former, and not the latter, enjoy a right of abode which is 'conceptually inseparable from citizenship' and 'embedded in the constitutional concept of citizenship.' Citizens owe allegiance to the Commonwealth and, in return, Irving claims, they enjoy a right of abode: Helen Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30 *Sydney Law Review* 133, 141 and 150.

<sup>74</sup> Migration Act 1958, s 166.

<sup>75</sup> Australian Security Intelligence Organisation, *ASIO Report to Parliament* (2014-15), 21. See also Fabian Di Lizia, 'More Than Just a Humble Abode: The Implications of Constitutional Citizenship Rights for Passport Law' [2018] *UWALR* 30 116, 122-124.

<sup>76</sup> Sangeetha Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37 *Melbourne University Law Review* 736, 760-1.

<sup>77</sup> 'If a person's passport is cancelled while they are overseas, the cancellation would, in a practical sense, deprive them of the capacity to re-enter Australia. This suggests that while regulation of the entry rights

apply to entry into Australia as apply to departure from it, though here there is no obligation to present one's passport (or 'prescribed other evidence' of identity and citizenship. Instead, a clearance officer may require its presentation.<sup>78</sup>

In Canada, statute provides that 'every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada'.<sup>79</sup> In addition, '[e]very Canadian citizen within the meaning of the Citizenship Act... has the right to enter and remain in Canada in accordance with this Act and an officer shall allow the person to enter Canada if satisfied following an examination on their entry that the person is a citizen or registered Indian.'<sup>80</sup> A right of abode (though not under that name) is therefore explicitly granted but – as in the United Kingdom – can be enjoyed only subject to an examination aimed at establishing citizenship. Though the statute does not make it a prerequisite (and indeed says nothing about how exactly one might prove one's identity and nationality) citizenship is likely to be established in the first place by producing a valid Canadian passport, creating the same link between passport and the exercise (though not the existence of) the right of abode as in the UK and Australia. In Canada, however, the right is more strongly protected than in the United Kingdom (where it takes statutory form, and so is as a matter of domestic law subject to legislative abrogation) and in Australia (where no such explicit right exists at all). The Canadian Charter of Rights and Freedoms provides, in section 6(1), that '[e]very citizen of Canada has the right to enter, remain in and leave Canada', adding to the citizen's statutory rights a constitutional right to leave the country. These rights, like the other Charter rights, are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'<sup>81</sup> Unlike most of the rights therein guaranteed, however, the right in section 6 cannot be displaced by a legislative declaration that some statute (or some provision thereof) is to operate 'notwithstanding' the inclusion of the right in question in the Charter.<sup>82</sup> This provision increases the possible bases of a challenge to the refusal of a passport.

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of non-citizens might be more common as a matter of everyday practice, citizens are not immunised through legislation against exclusion from Australian territory.' Pillai (n 76) 761.

<sup>78</sup> Migration Act 1958, s 175(1)(a)(i).

<sup>79</sup> Immigration and Refugee Protection Act, s 18(1).

<sup>80</sup> IRPA, s 19(1).

<sup>81</sup> Constitution Act 1982 s 1.

<sup>82</sup> Constitution Act 1982 s 33(1).

In New Zealand, finally, the Immigration Act 2009 provides that ‘every New Zealand citizen has, by virtue of his or her citizenship, the right to enter and be in New Zealand at any time’,<sup>83</sup> but that ‘to establish his or her right to enter New Zealand, a New Zealand citizen must prove his or her citizenship and establish his or her identity by complying with border requirements.’<sup>84</sup> Those requirements might be met before or upon entering New Zealand. In the form which apply to the latter scenario, the 2009 Act exempts – from the general duty to apply for entry permission – those persons who are New Zealand citizens who hold and produce a New Zealand passport, imposing on such persons the separate duty to ‘comply with any requirements prescribed for the purpose of confirming the person’s status as a New Zealand citizen.’<sup>85</sup> Though the latter does not explicitly require the production of a passport, the fact that the former exempts only those who produce such a passport means that the New Zealand regime comes closer than do any of the others under consideration to making a passport a legal (rather than practical) precondition of entry into the country. Moreover, the New Zealand Bill of Rights Act 1990 provides for a right to freedom of movement. For present purpose, the key elements of that right are the assertion that ‘[e]very New Zealand citizen has the right to enter New Zealand’ and ‘[e]veryone has the right to leave New Zealand.’<sup>86</sup> Like all of the rights asserted therein, these may be ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’<sup>87</sup>

#### **4. Passports and national security**

As a matter of law, therefore, all of the jurisdictions at issue decline to make the possession of a passport an express precondition of the possession of a right to travel, in effecting perpetuating the United Kingdom’s approach whereby a passport facilitates the exercise of a right whose existence is independent of it, protected by ‘ordinary’ law and, perhaps, a regime of fundamental rights protection. And yet each of the jurisdictions has in recent years made use of passports as a tool with which to protect the public interest generally, and that of national security specifically – an approach which is possible only because the practical reality differs from the formal legal position.

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<sup>83</sup> Immigration Act 2009, s 13(1).

<sup>84</sup> IA 2009, s 13(2).

<sup>85</sup> IA 2009, s 99(1).

<sup>86</sup> New Zealand Bill of Rights Act 1990, s 18(2) and (3).

<sup>87</sup> NZBORA 1990, s 5.

In 1958, a statement made in the House of Lords by the Parliamentary Under-Secretary of State for Foreign Affairs, the Earl of Gosford, outlined the government's position on how the power to refuse or withdraw passports would be used. Included was the category of 'persons whose activities are so notoriously undesirable or dangerous that Parliament would be expected to support the action of the Foreign Secretary in refusing them a passport or withdrawing a passport already issued in order to prevent their leaving the United Kingdom.'<sup>88</sup> In response to questioning the Earl noted that the process had been going on 'for many years' and that '[t]he number of passports withheld annually is one or, at the most, two, as against the many millions which are issued.'<sup>89</sup> The number seems to have risen, however, through the 1960s and 70s, particularly in the context of the phenomenon of British mercenaries leaving to fight in conflicts in Africa.<sup>90</sup> As this was happening, the criteria for the withdrawal of passports were being softened. A 1974 statement provided that passports might be withdrawn from those 'past or proposed activities are so demonstrably undesirable that the grant or continued enjoyment of passport facilities would be contrary to the public interest.'<sup>91</sup> Over time, however, the use of passports to this end appears to have tapered off, and it appears that no passports were withdrawn on these grounds in the entirety of the 1980s.

The return of the power to prominence in all the jurisdictions at issue is a result, in the first place, of the new national security era brought about by the attacks of September 11 2001 and, later, the emergence of the phenomenon of 'foreign fighters'. But in the United Kingdom, a more specific turning point appears to be the election of the Conservative-Liberal Democrat coalition government in 2010 and the publication by it of an amended policy for the exercise of the withdrawal power in April 2013.<sup>92</sup> The 2013 statement remains the authoritative guide to how the power might be used. For present purposes the key situation in which revocation or refusal might take place is in relation to 'a person whose past, present or proposed activities, actual or suspected, are believed by the Home Secretary to be so undesirable that the grant or continued enjoyment of passport facilities is contrary to the public interest.'<sup>93</sup> In the period thereafter for which statistics are available, the power was used to revoke a passport or to refuse

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<sup>88</sup> HL Deb 16 June 1958, vol 209 col 860.

<sup>89</sup> HL Deb 16 June 1958, vol 209 col 863.

<sup>90</sup> See Lord Diplock, *Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries*, Cmnd 6569 (1976) and the discussion in Scott (n 18) 175-7. Lord Diplock had earlier produced an important consideration of the international law elements of passports: Kenneth Diplock, 'Passports and Protection in International Law' (1946) 32 *Transactions of the Grotius Society* 42.

<sup>91</sup> HC Deb 24 June 1974, vol 875 col 357W. Wade described this as 'a polysyllabic way of describing any one whose activities are disapproved of by the government.' HWR Wade (n 35) 63.

<sup>92</sup> May (n 46).

<sup>93</sup> May (n 46). As elsewhere, the decision to refuse or withdraw must be necessary and proportionate

an application for one on national security grounds up to 24 times in a year in the following years.<sup>94</sup>

There are therefore two notable elements to the modern British practice in this area: the first the reformulation of the grounds upon which revocation of a passport might take place, the second the increase in the use to which the power has been put. Though the former reflects the legal form of passports in the United Kingdom – the government being capable of unilaterally rewriting the policy – the latter does not: not only might a statutory power similarly have been used more frequently than in the past, but a statutory power might in fact have been used more frequently than has been the prerogative power, which the executive would seem incentivised to use carefully, so as not to draw attention to the weaknesses of the legal regime. Most fundamentally, however, this practice reflects the (trivially correct) belief that refusal or withdrawal of passports works to limit one’s ability to travel abroad. In recent case law, it has been repeatedly held that the cancellation of a passport represents an interference with EU law rights of free movement. At one point, the Government was poised to argue otherwise, but the court held that it was correct to drop that argument, for ‘the avowed aim of the cancellation was to make it very difficult for [the passport holder] to travel abroad, and it is clear that it would have that effect.’<sup>95</sup> Despite the emphasis placed in *Brailsford* and *Joyce* on the question of protection, therefore, the modern practice of issuing (or otherwise) passports reflects instead the relationship between passports and the ability to travel abroad.

In Australia, the Passports Amendment Act 1979 inserted new provisions into the Passports Act 1938 specifying – for the first time – circumstances in which a passport would not be issued and creating a discretionary power to cancel a passport where the Minister or an officer became ‘aware of circumstances which, if they had existed immediately before the passport was issued, may have, or would have prevented the issue of the passport’.<sup>96</sup> One of the new specific grounds inserted permitted cancellation or refusal of a passport to a person where the Minister had formed the opinion ‘if an Australian passport were issued to the person, the person would be likely to engage in conduct outside Australia that might prejudice the security of, or disrupt public order in, a country other than Australia or would endanger the health or welfare of

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<sup>94</sup> HM Government, *Transparency Report 2018: Disruptive and Investigatory Powers*, Cm 9609 (2018), [5.5]. The power was used against six individuals in 2013, 24 in 2014, 23 in 2015, 17 in 2016 and 14 in 2017.

<sup>95</sup> *R (MR) v Secretary of State for the Home Department* [2016] EWHC 1622 (Admin), [15]–[16].

<sup>96</sup> Passports Act 1938, s 8(1A).

persons in a country other than Australia<sup>97</sup> and considered that ‘in the circumstances, action to prevent that person engaging in that conduct should be taken by way of not issuing an Australian passport to that person’.<sup>98</sup>

The 1938 Act’s replacement, the Australian Passports Act 2005, widens out the category of persons who might instigate the refusal or cancellation of a passport. It was enacted shortly after the power had been employed in order to cancel the passport of Mamdouh Habib, a dual Australian and Egyptian national who was held in Guantanamo bay in the years following the September 11 attacks – one of 16 cancelled in the year to February 2005.<sup>99</sup> A ‘competent authority’ may make a ‘refusal/cancellation request’ in relation to a person where that authority ‘suspects on reasonable grounds’ that if a passport were to be issued to that person, ‘the person would be likely to engage in conduct that... might prejudice the security of Australia or a foreign country’<sup>100</sup> or ‘might endanger the health or physical safety of other persons (whether in Australia or a foreign country)’ and ‘the person should be refused an Australian travel document in order to prevent the person from engaging in the conduct’.<sup>101</sup> The new formulation therefore strengthened the link between the apprehended future conduct and the refusal of the passport, such that a passport cannot be refused where there is no logical or causal connection between the refusal and the ability to carry out the conduct in question.<sup>102</sup> Moreover, the 2005 Act explicitly foresees that the security which might justify a refusal or cancellation is that not of Australia but of a foreign state. Where such a request is made, the Minister may refuse to issue a passport.<sup>103</sup> One ‘competent authority’ for the purpose of the act is (now) the Director General

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<sup>97</sup> Passports Act 1938, s 7E(1)(a).

<sup>98</sup> Passports Act 1938, s 7E(1)(b).

<sup>99</sup> Commonwealth of Australia, *Parliamentary Debates: House of Representatives*, 14 February 2005, 24 (Alexander Downer).

<sup>100</sup> In relation to the latter, see the discussion by Jake Blight of the Office of the Inspector-General of Intelligence and Security: ‘In the Passports Act you can cancel a passport on two grounds: either it is something that might prejudice the security of Australia, in which case the recommendation needs to come from a person—a specific individual such as the Director-General: or currently, if the minister was inclined to suspend a passport on the ground that it could prejudice security of a foreign country, if you scroll through the various options there is an option for a non-corporate Commonwealth entity to make that recommendation. So it is a little obscure but there is a way—if it was about a foreign country, not about Australia’s security—someone could ask ASIO the entity for a recommendation.’ Commonwealth of Australia, *Official Committee Hansard: Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 2 October 2014, 5-6.

<sup>101</sup> Australian Passports Act 2005, s.14(1). On the interpretation of that phrase, see *BLBS v Director-General of Security* [2013] AATA 820, [77]-[85].

<sup>102</sup> *BLBS v Director-General of Security* [2013] AATA 820, [86].

<sup>103</sup> Since 2014 there has existed a separate power to suspend a passport for up to 14 days at the request of the Director-General of Security, where it is suspected that the person may leave Australia ‘to engage in conduct which might prejudice the security of Australia or a foreign country’ and the person’s travel documents should be suspended to prevent the conduct in question; APA 2005, s 22A(2)(a). The creation

of ASIO, the Australian Security Intelligence Organisation,<sup>104</sup> which is empowered by statute to provide security assessments.<sup>105</sup> ASIO figures show that the number of passports subject to adverse security assessments has risen from less than ten in the years 2009-10, 2010-11 and 2011-12, to 93 in the year 2014-15,<sup>106</sup> and then falling to 62 in 2015-16, ‘largely due to fewer Australians seeking to travel to conflicts in Syria and Iraq’.<sup>107</sup> In March 2017 the Minister for Foreign Affairs – Julie Bishop – told the House of Representatives that she had, since September 2014, cancelled 165 passports on national security grounds, and suspended 36 more.<sup>108</sup> Almost a year later, she told the House that she had as Foreign Minister ‘cancelled the passports of about 230 Australians who we believe pose a national security threat and were seeking to join the terrorist organisation ISIS or affiliates in the Middle East.’<sup>109</sup> The Counter-Terrorism (Temporary Exclusion Orders) Act 2019 provides another means by which restrictions on the possession of an Australian passport might be imposed.<sup>110</sup>

The (New Zealand) Passports Act 1980 made provision for the refusal of a passport or its recall (and possible cancellation), but none of the specified grounds related directly to security.<sup>111</sup> The position under its successor, the Passports Act 1992, has developed over time.

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of the power was recommended by the Independent National Security Legislation Monitor: Brett Walker SC, *Annual Report*, 28 March 2014, 46-8.

<sup>104</sup> Australian Passports Determination 2015 s 14(2)(a)

<sup>105</sup> Australian Security Intelligence Organisation Act 1979, s 37(1).

<sup>106</sup> ASIO, *Report to Parliament 2014-15* (2015), 22 (table 1).

<sup>107</sup> ASIO, *Report to Parliament 2015-16* (2016), 50-51. Subsequent report to not provide equivalent figures.

<sup>108</sup> Commonwealth of Australia, *Parliamentary Debates: House of Representatives* (1 March 2017) 1954. One cancellation in particular has been the source of controversy in Australia. In 2006, Australia and Timor-Leste signed a treaty reflecting the need to update international agreements in light of Timor-Leste’s independence, achieved in 2002. In 2012 it was revealed by a whistleblower within the Australian Secret Intelligence Service (known as ‘Witness K’) that ASIS had installed listening devices in the premises of Timor-Leste’s government in order to acquire an advantage in negotiations. Timor-Leste initially sought to have the Treaty nullified by the Permanent Court of Arbitration, though the case was later dropped. At the domestic level, however, there were two key responses. One was the raid, by ASIO, of the Australian lawyer acting for East Timor. The other was the cancellation Witness K’s passport, alleged by some to be an attempt to prevent him giving evidence in the case against Australia. In 2016 the Foreign Minister refused to issue Witness K a new passport on the grounds that a competent authority suspected that ‘if an Australian passport were issued to you, you would be likely to engage in conduct that might prejudice the security of Australia’, though it was unclear which was the authority in question: See Bernard Collaery, ‘National security, legal professional privilege, and the Bar Rules’, Address at the Australian National University (11 June 2015). ASIS is not permitted to collect information on persons in Australian territory and ASIO, its domestic counterpart, had suggested to Witness K that it had no objection to his possessing a passport: Commonwealth of Australia, *Official Committee Hansard: Senate*, Foreign Affairs, Defence and Trade Legislation Committee (1 June 2017), 31-2.

<sup>109</sup> Commonwealth of Australia, *Parliamentary Debates: House of Representatives* (27 February 2018), 2067.

<sup>110</sup> Counter-Terrorism (Temporary Exclusion Orders) Act 2019, s 10(6). The Parliamentary Joint Committee on Intelligence and Security recommended that

<sup>111</sup> Passports Act 1980, s 4(2).

Originally, it provided for neither refusal nor cancellation on grounds directly related to security,<sup>112</sup> though provision was made for requiring the surrender of a passport by a person of whom the Minister intended to make an order depriving citizenship.<sup>113</sup> Only with the Passports Amendment Act 2005 were powers of cancellation and refusal made available.<sup>114</sup> Most of these changes to the 1992 Act have, however, now been overtaken by those made by the Intelligence and Security Act 2017, which creates a single, broader, power to refuse or recall (and then cancel or retain) a passport.<sup>115</sup> This power in the first place replicates that introduced a decade earlier, applying where it is reasonably believed that a person is a danger to the security of New Zealand on one of three grounds, and subject to what are effectively requirements of necessity and proportionality: the relevant action (be it refusal or cancellation) will be effective in impeding the person's ability to carry out the relevant activities, and the danger cannot be effectively averted by other forms of action.<sup>116</sup> A second – and new – power, however, permits the same actions, where the Minister has reasonable cause to believe that a person is a danger to the security not of New Zealand, but to another country,<sup>117</sup> with the relevant forms of danger more limited than

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<sup>112</sup> Passports Act 1992, s 4(3) and 8.

<sup>113</sup> PA 1992, s 12.

<sup>114</sup> Passport Act 1992, s 4A, as inserted by the Passports Amendment Act 2005. In each case the specific grounds were the same: the Minister believed on reasonable grounds that the person was a danger to the security of New Zealand because he intended to engage in or facilitate one of three types of activity, the danger to New Zealand could not be averted effectively by other means, and the refusal or cancellation would 'prevent or effectively impede' the person's ability to carry out the relevant activity. The three activities in question were: 'a terrorist act within the meaning of section 5 of the Terrorism Suppression Act 2002'; 'the proliferation of weapons of mass destruction'; and 'any unlawful activity designed or likely to cause devastating or serious economic damage to New Zealand, carried out for purposes of commercial or economic gain': PA 1992, s 4A(1)(a). A further relevant provision was inserted into the 1992 Act by the Passports Amendment Act 2015, providing that – in relation to a number of cancellation powers, amongst them that relating to security – the Minister may cancel a New Zealand passport or other travel document 'by electronically recording the cancellation... on a New Zealand travel document database': Passports Act 1992, s 27I(1), as inserted by the Passports Amendment Act 2015. The 2015 Act was spun out of the Countering Terrorist Fighters Legislation Bill of 2014. In its report on the 2014 Bill, the Foreign Affairs, Defence and Trade Committee noted confusion which had arisen as regards passports: 'We would like to address two concerns raised by a number of submitters regarding the effect of denial of a passport. The first is that where the passport of a person outside New Zealand is denied or cancelled the person concerned might be stranded with no way home. This is not the case; in this situation the Minister must upon application issue a journey-specific emergency travel document to the person so they could re-enter New Zealand. The second concern is that the denial of a passport would render a person 'Stateless'. This is also not the case; denial of a passport affects only a person's freedom to travel, it does not affect their nationality or citizenship.' Foreign Affairs, Defence and Trade Committee, *Countering Terrorist Fighters Legislation Bill - Government Bill (1-2)* (2 December 2014), 3.

<sup>115</sup> Some provisions of the 2017 Act make permanent earlier, temporary, rules originally inserted in the 1992 Act by the Passports Amendment Act 2014.

<sup>116</sup> PA 1992, s 27GA(1).

<sup>117</sup> PA 1992, s 27GA(2).

apply where the security at issue is that of New Zealand.<sup>118</sup> Though the New Zealand Security Intelligence Service has acknowledged in the past that it has recommended the cancellation of passports ‘of a number of individuals who had expressed intent to travel to the Middle East for the purposes of joining terrorist organisations such as Al Qa’ida’<sup>119</sup> it did not give precise figures. Figures given by the Department of Internal Affairs (in recent years only) show the following pattern: 1 use of the national security power in 2014-15,<sup>120</sup> 5 in 2015-16,<sup>121</sup> 2 in 2016-17,<sup>122</sup> and none in 2017-18 or 2018-19.<sup>123</sup> One case in particular has attracted significant public attention: that of a New Zealand citizen living in Melbourne, Australia, whose passport was cancelled on international security grounds (being, that is, a threat to a country other than New Zealand) and has repeatedly – and so far unsuccessfully – sought to challenge the decision.<sup>124</sup>

Well into the post-9/11 era, the Order regulating passports in Canada did not explicitly provide for the withdrawal or refusal of passports on security grounds. The point was highlighted by *Khadr v Canada*.<sup>125</sup> The applicant, a Canadian citizen, had been detained in Afghanistan and Guantanamo Bay before being released and taken to Bosnia, from where he sought to return to Canada. Based, apparently, on concerns about Canada-US relations, he was refused a passport. Two problems with that refusal were addressed in subsequent litigation. The first was that the refusal was the Minister’s, yet the Order – as it then stood – empowered only the Passport Office to refuse passports, not reserving any power to the Minister. The second was that the Passport Order – again, as it then stood – contained a seemingly exhaustive list of grounds upon which refusal might be happen: that list did not reference national security and none of the stated grounds were applicable. Deciding the case, the Federal Court held that the prerogative was not exhausted by the Passport Order, the rules which have emerged to regulate the relationship between prerogative and statute being of no application in a case where there

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<sup>118</sup> Though the ‘terrorist act’ and weapons of mass destruction grounds are included, that of ‘other unlawful activity designed or likely to cause serious economic damage’ and which is ‘carried out for the purpose of commercial or economic gain’ is excluded.

<sup>119</sup> New Zealand Security Intelligence Service, *Annual Report for the year ended 30 June 2014*, G. 35 (2014), 4-5. At 10, the report noted that ‘[b]y preventing these individuals travelling to engage in violent extremism, the NZSIS assesses that there is a real likelihood that the lives of these individuals may have been saved. In addition, had they managed to get to Syria and fight, the NZSIS has prevented the risk of battle-hardened individuals returning and compromising New Zealand’s security.’

<sup>120</sup> Department of Internal Affairs, *Annual Report 2014-15*, G.7 (2015), 166.

<sup>121</sup> Department of Internal Affairs, *Annual Report 2015-16*, G.7 (2016), 166.

<sup>122</sup> Department of Internal Affairs, *Annual Report 2016-17*, G.7 (2017), 183.

<sup>123</sup> Department of Internal Affairs, *Annual Report 2017-18*, G.7 (2018), 185 and *Annual Report 2018-19*, (2019), 188.

<sup>124</sup> See *A v Minister of Internal Affairs* [2017] NZHC 746, and Andrew Geddis, ‘The bizarre case of the NZ court case hidden from public and media scrutiny’, *The Spinoff* (2 March 2018).

<sup>125</sup> *Khadr v Canada (Attorney General)* 2006 FC 727

was no statute in play.<sup>126</sup> It also held, however, that the applicant had a legitimate expectation as to the criteria which would be employed in determining his passport application. That expectation was not met here. The court concluded its consideration of the issue by saying that ‘[i]n 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.’<sup>127</sup>

The lacuna identified in *Khadr* had been filled by the time judgment was given. On 1 September 2004 the Governor General in Council amended the Passport Order to state that the Order did not limit the royal prerogative over passports and to provide 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.’<sup>128</sup> This provision was amended in 2015 and now reads as follows:

Without limiting the generality of subsections 4(3) and (4) and for greater certainty, the Minister of Public Safety and Emergency Preparedness may decide that a passport is not to be issued or is to be revoked if he or she has reasonable grounds to believe that the decision is necessary to prevent the commission of a terrorism offence, as defined in section 2 of the Criminal Code, or for the national security of Canada or a foreign country or state.<sup>129</sup>

There remains the question of whether revocation or withdrawal might take place on other grounds than those specified. Though the provision is expressly without prejudice to the passport prerogative (which is now, unlike in the version at issue in *Khadr*, explicitly preserved) the reasoning of the court in *Khadr* would seem to retain some force. An individual who applies for, or possesses a passport, should be able to rely upon the content of the Order as to what activities might lead to his passport being refused or withdrawn. The attempt to preserve executive discretion is more problematic here than in the British context, in which the non-statutory status of the applicable policy as to how the prerogative will be exercised as regards

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<sup>126</sup> 2006 FC 727, [91].

<sup>127</sup> 2006 FC 727, [128].

<sup>128</sup> Inserted by Order Amending the Canadian Passport Order SI/2004-113.

<sup>129</sup> Canadian Passport Order SI/81-86, s 10.1 (as amended). Passport facilities may be denied on the same grounds for a maximum of 10 years, while an equivalent power permits the Minister to cancel, rather than revoke, a passport: SI/81-86, s 11.1(1). In the latter case, the passport holder may request reconsideration of the decision within 30 days: SI/81-86, s 11.3(1).

passports makes it less reasonable to think that one might be able to rely on it to be exhaustive, stable, and prospective. Despite being less of a challenge to the rule of law in a general sense, the Canadian situation is, in this particular fashion, a threat to it, exemplifying a problem which can only exist where there is an underlying prerogative layer.

The power appears to have been used with a degree of frequency in the modern context,<sup>130</sup> but the Canadian authorities have argued that it is inadequate to address the problem of ‘foreign fighters’:

...passport revocation is a potentially critical tool in dealing with foreign fighters. Why it is not a sufficient tool is a matter of speculation. The answer may be, simply, that passport revocation may make a ‘prison’ of Canada, but that prison is not sufficiently confined to comfort security officials. Put another way, enough people may have slipped from Canada that revocation has proven ineffectual. Alternatively, if deterred from travelling, a person may be redirected at domestic terrorism...<sup>131</sup>

Long before the modern national security era, it was argued that, by virtue of the necessity of a passport to the exercise of a right to travel, the fact that the passport regime was based on absolute discretion and so able to be administered arbitrarily, the absence of a legal right to a passport and the lack of legal redress available to the citizen, ‘the existing passport regime is unconstitutional and should be replaced by a new regime that would remove passports forever from the realm of prerogative.’<sup>132</sup> The fact that – post-*Khadr* – the executive was able to unilaterally rewrite the order in order to further its national security ends and to retrospectively reserve to itself a power to exercise the prerogative which the Passport Order had not previously contained suggests this point remains true. As in the United Kingdom, the case in favour of statutory regulation of passports is compelling, particularly when added to the issue of the problematic relationship between the possession and the exercise of the right to travel. As the Australian example shows, however, introducing a statutory regime does not by itself resolve this

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<sup>130</sup> Though no figures appear to be available, and the government has at times declined to provide them: see Citizenship and Immigration Minister David Alexander, quoted in Stewart Bell, ‘Canadian government begins invalidating passports of citizens who have left to join extremist groups’ *National Post* (20 September 2014): “‘Yes, I think it’s safe to say that there are cases of revocation of passports involving people who’ve gone to Syria and Iraq already,” Mr. Alexander said. “I just don’t want to get into the numbers, but multiple cases.”

<sup>131</sup> Craig Forcese and Ani Mamikon, ‘Neutrality Law, Anti-Terrorism and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies’ (2015) 48 *UBC Law Review* 305.

<sup>132</sup> AJ Arkelian, ‘Freedom of Movement of Persons Between States and Entitlement to Passports’ (1984-85) 49 *Saskatchewan Law Review* 15, 31.

tension, which will always persist while the true nature of a passport as an effective repository of rights is denied.

## **5. From protection to the right to travel**

The legal effect of passports in the common law world has, we have seen, shifted over time. Where once passports derived their significance by demonstrating the protection owed by the Crown to the subject (or to a friendly alien in temporary allegiance thereto), passports' primary significance is now owed instead to their implications for the right to travel. As seen in the previous section, they have in each of the relevant jurisdictions been operationalised in a fashion to which this shift is vital. But the legal frameworks which apply have not kept pace, failing in almost all cases to make plain the relationship between passports and the right to travel, and so to protect to an appropriate degree the individual's right to a passport. New Zealand is an outlier: it comes closest to recognising the inherent (rather than merely contingent) link between passports and the right to travel and, in turn, possesses a law of passports which, in both form and substance, reflects an ideal to which the other states under discussion should look.

This unwillingness to recognise explicitly the link between passports and the right to travel – to insist that while passports facilitate the exercise of the right, they do not confer it (and so their withdrawal does not affect that right) – has implications for the law of passports in the UK, Canada, Australia and New Zealand, including the grounds upon which decisions relating to passports can be challenged. Those implications are greatest for the jurisdictions – the UK and Canada – in which passports continue to be regulated as an aspect of the prerogative, for once we accept that the withdrawal of a passport represents an interference with the right to travel, we see that what is taking place is the use of the prerogative to limit a statutory right. In the United Kingdom, we noted above, the Immigration Act 1971 provides that all citizens enjoy the right of abode and that all persons who possess that right shall be free 'to come and go into and from, the United Kingdom without let or hindrance'. When one is refused a passport, or one's passport is withdrawn, the right is being interfered with, and though the 1971 Act caveats that rights by providing 'except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person' the withdrawal of a passport cannot be lawful under either of these headings. Passing the checks under the 1971 Act requires, in practice, that one possesses a passport, while the imposition of new hurdles cannot be lawful if done under the prerogative, whose subordination to statute is

well established in law and practice. As we have seen above, the courts have accepted in other contexts that the withdrawal of a passport does interfere with the right to travel. There can be no reason that what was true in that case of EU law would not also be true of the domestic law right of abode. While the 1971 Act preserves the prerogative, it does not do so generally but only in relation to ‘aliens’ and so what is thereby preserved cannot be used to interfere with the rights of subjects. The use of the passport prerogative to regulate entry and exit from the United Kingdom is therefore, in a modern context in which passports’ legal effect relates to the individual’s right to travel, unlawful.<sup>133</sup>

What is true of the United Kingdom is, however, equally true of Canada, where the prerogative remains the basis of the law of passports, albeit in the form of prerogative legislation.<sup>134</sup> When a passport is withdrawn on the basis of that authority the logic of the United Kingdom context applies equally: a prerogative power is unlawfully being used to interfere with a right protected not only by statute but also by the Charter of Fundamental Rights.<sup>135</sup> The power to grant passports was addressed in *Black v Chrétien*,<sup>136</sup> where the applicant had sued the Prime Minister and the Government of Canada on a variety of grounds arising out of his belief that the Prime Minister had unlawfully advised the Queen not to grant him a life peerage (in anticipation of which he had acquired British citizenship) because the Prime Minister had ‘not been kindly treated’ by a newspaper owned by the applicant.<sup>137</sup> Laskin JA, giving the judgment of the Ontario Court of Appeal, was required to decide whether the prerogative power in question was reviewable. Concluding that it was not, he adopted the approach of the House of Lords in *GCHQ*: what mattered was the subject of a power rather than its source and whether that subject was justiciable. He contrasted the honours prerogative (at the non-justiciable end of the spectrum) with those which lay at the other end of the spectrum, including the grant of passports:

A passport is the property of the Government of Canada, and no person, strictly speaking, has a legal right to one. However, common sense dictates that a refusal to issue

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<sup>133</sup> See Scott (n 18) 181-7.

<sup>134</sup> For the relationship between statute and prerogative in Canada, see Forcese (n 53) 154-8.

<sup>135</sup> The use of the passport power is reviewable in Canadian law: the Federal Courts Act empowers the Federal Courts to undertake judicial review of ‘a decision or an order of a federal board, commission or other tribunal’ which it defines to include ‘any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred... by or under an order made pursuant to a prerogative of the Crown’.

<sup>136</sup> *Black v Chrétien* (2001) 54 OR (3d) 215, 199 DLR (4th) 228 (C.A.).

<sup>137</sup> (2001) 54 OR (3d) 215, [11].

a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable.<sup>138</sup>

Citing liberally from the decision of the High Court in *Everett*, he added that:

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.<sup>139</sup>

Many challenges to acts relating to passports proceed on exactly these bases. In *Kamel v Canada* it was argued that the refusal to grant the applicant a passport breached the requirements of procedural fairness and that it violated sections 6, 7 and 15 of the Charter.<sup>140</sup> In the Federal Court, Noël J allowed the application in part. For present purposes, his treatment of the section 6 issue is key. The Attorney General had argued that section 6(1) was 'limited to guaranteeing citizens the right to enter and leave, and that it [was] intended, for example, to prohibit banishment or exile, or preventing citizens from leaving Canada' and that it did not require the Government to facilitate foreign travel.<sup>141</sup> Moreover, a passport was not necessary for citizen to leave or enter Canada because in order to exercise those rights it was sufficient for an individual to offer proof of citizenship.<sup>142</sup> In rejecting this, the Federal Court took a practical approach, treating a passport as 'an essential tool to which Canadian citizens must have access in order to exercise their mobility rights outside Canada as guaranteed by the Charter' and so held that refusal to issue a passport is an interference with the individual's section 6(1) mobility rights.<sup>143</sup> It

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<sup>138</sup> (2001) 54 OR (3d) 215, [53].

<sup>139</sup> (2001) 54 OR (3d) 215, [54]. As these dicta suggest, it had earlier been decided that exercises of the prerogative are reviewable for their compatibility with the Canadian Charter of Rights and Freedoms: the Charter applies 'to the Parliament and government of Canada in respect of all matters within the authority of Parliament' and the prerogative is within the authority of Parliament: *Operation Dismantle v R* [1985] 1 SCR 441, [50]. For a critique of the approach of the Canadian courts, see Jennifer A Klinck, 'Modernizing Judicial Review of the Exercise of Prerogative Powers in Canada' (2017) 54 *Alberta Law Review* 997.

<sup>140</sup> *Kamel v Canada (Attorney General)* 2008 FC 338, [2009] 1 FCR 59.

<sup>141</sup> 2008 FC 338, [91].

<sup>142</sup> 2008 FC 338, [91].

<sup>143</sup> 2008 FC 338, [112].

is not therefore open to argue that the right to travel is not limited or impinged by the refusal or withdrawal of a passport.<sup>144</sup>

In the Charter context, the dispositive question therefore becomes whether the interferences is justified according to the criteria of section 1, which makes the rights subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’<sup>145</sup> At first instance, Noël J held that these criteria were not fulfilled because the limits imposed by the passport order were not ‘prescribed by law’ in the relevant sense of that requirement: though the Passport Order was suitably accessible, it was vague and overbroad.<sup>146</sup> On appeal, however, the Federal Court of Appeal held that the provision in question was not unconstitutionally vague. The wording ‘is necessary’ provided, as required, the basis for a legal debate, framing and limiting the discretion of the decision-maker.<sup>147</sup> Moreover, in light of an earlier finding by Canadian Supreme Court that ‘danger to the security of Canada’ was suitably precise as to give ‘those who might come within the ambit of the provision fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion,’<sup>148</sup> the Passport Order, which adds a requirement of necessity and so ‘introduces the requirement of a causal connection between national security and the refusal to issue a passport,’ must clearly be similarly precise for the purpose of justifying an interference with the Charter right at issue.<sup>149</sup> Because the requirement of proportionality was also met, the Order was held to be compatible with the Charter.<sup>150</sup>

To be successful on section 6 grounds, a challenge to the refusal or withdrawal of a passport must therefore show either that the requirements of the Passport Order were not met in a particular case or that, notwithstanding the basic compatibility of that Order with the Charter, a particular decision under it was incompatible. This latter point was made in *Abdelrazik v Canada*,<sup>151</sup> which confirms first of all the converse of the point in *Khadr* and *Kamel* – that because a passport is necessary for the practical exercise of one’s Charter rights, the Government of Canada is under a positive obligation to issue an emergency passport to a citizen outside

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<sup>144</sup> 2008 FC 338, [113].

<sup>145</sup> Constitution Act 1982, s 1.

<sup>146</sup> 2008 FC 338, [120].

<sup>147</sup> *Kamel v Canada (Attorney General)* 2009 FCA 21, [28]-[31].

<sup>148</sup> *Suresh v Canada (Minister of Citizenship and Immigration)* 2002 SCC 1, [2002] 1 SCR 3, 208 DLR (4th) 1, 37 Admin LR (3d) 152.

<sup>149</sup> *Kamel v Canada (Attorney General)* 2009 FCA 21, [2009] 4 FCR 449, [30].

<sup>150</sup> 2009 FCA 21, [52]-[68].

<sup>151</sup> 2009 FC 580, [2010] 1 FCR 267.

Canada. Failure to do so must be justified according to the same Charter criteria as apply to the refusal or withdrawal of a passport. The applicant was Canadian-Sudanese and had travelled to Sudan and been detained there, his passport expiring during the period of detention. He later sought shelter in the Canadian Embassy in Khartoum where he made repeated attempts to acquire a passport or other travel document which would allow him to return home. Though he was not successful, no order was made under the Passports Order, with the Canadian government instead providing a number of (sometimes inaccurate) reasons for not issuing an emergency passport. In holding that there was no justification for the interference with Abdelrazik's section 6 rights, the Federal Court held that to refuse a passport to a citizen abroad (and so to prevent a citizen returning to Canada, as is his right under the Charter) would require that it be shown that not only there is a risk to national security if an individual returns to Canada, but that the risk is greater than that the citizen poses when situated abroad: '[i]f he poses no greater risk, what justification can there be for breaching the Charter by refusing him to return home; especially where, as here, the alternative is to effectively exile the citizen to live the remainder of his life in the Canadian embassy abroad.'<sup>152</sup> The Minister having failed to show any such thing, Abdelrazik's section 6 rights had been violated, and he was entitled to a remedy that would put him in the position in which he would have been if not for the violation of his Charter rights, which required, in the first place, that he be provided with an emergency passport.

On the flipside, when Kamel's case returned to the Federal Court following the refusal of his renewed request for a passport, the interference with his section 6 rights was held to be justified. Relevant to that conclusion was the time-limited nature of the refusal (which the Minister stated would apply only for five years) and the ongoing possibility of the applying for a limited validity passport on urgent or compassionate grounds, both of which 'show that the applicant's rights are, to a certain extent, being weighed against the aim of the legislation'<sup>153</sup> and ensure that the infringement 'cannot be characterised as final and irrevocable'.<sup>154</sup> When its processes are followed and its provisions adhered to, the Passport Order therefore shows itself to be entirely capable of advancing the national security objectives in pursuit of which passports have come to be operationalised, and in a fashion which is assuredly constitutional. These questions, however, about the quality of the norm and issues of necessity and proportionality, are logically posterior to the sorts of questions which are raised most directly by the recognition of the nexus between passports and the right to travel. That is, the more fundamental issue is that

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<sup>152</sup> 2009 FC 580.

<sup>153</sup> *Kamel v Canada* 2011 FC 1061, [2011] 4 F.C.R. D-10, [113].

<sup>154</sup> 2011 FC 1061, [125].

when a passport is refused or withdrawn under the Order, a prerogative power is being used to limit a right recognised explicitly in statute: it is therefore, according to well-established principles of the common law, unlawful notwithstanding the objective necessity, or the contingent proportionality, of the limitation.

Though the implications of the link between passports and the right to travel are greatest where passports remain an aspect of the prerogative, that link is significant also in the other jurisdictions under consideration. We have already noted, for example that in both jurisdictions in which passports are governed by a statute, there is an explicit legal right to a passport which is absent in prerogative states. There are also variations in the standard of review which applies to passport decisions and it is perhaps unsurprising that the jurisdiction – New Zealand – which comes closest to recognising the centrality of passports to the right to travel is that in which passport decisions are most closely scrutinised by courts. When the power to cancel a passport was introduced in New Zealand, it was accompanied by a right of appeal to the High Court,<sup>155</sup> which could ‘confirm, modify, or quash the decision that is the subject of the appeal’<sup>156</sup> and, where the appeal related ‘to a matter within the discretion of the Minister’ was empowered to ‘substitute its own discretion for that of the Minister.’<sup>157</sup> The right of appeal in the Passports Act 1992 shares the essential features of that provision.<sup>158</sup> Though its core has remained stable, the introduction of powers to cancel passports on, first, national and, later, international security grounds has seen a special regime introduced to govern situations in which the decision is based upon sensitive material.<sup>159</sup> In appeals against specified categories of decision, the court must determine whether ‘the information that led to the decision is credible, having regard to its source or sources’, as well as whether it supports the relevant finding.<sup>160</sup>

Though there is – presumably as a result of the small numbers of passport cancellations on national security grounds – little litigation in which substantive challenges to cancellation have been determined,<sup>161</sup> we have available the Attorney-General’s statements as to the compatibility of some of the relevant legislation with the New Zealand Bill of Rights Act. In relation to both

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<sup>155</sup> Passports Act 1980, s 9.

<sup>156</sup> PA 1980, s 9(4).

<sup>157</sup> PA 1980, s 9(5).

<sup>158</sup> Passports Act 1992, s 28.

<sup>159</sup> By the Intelligence and Security Act 2017.

<sup>160</sup> PA 1992, s 29AA(2).

<sup>161</sup> See *F v The Minister of Internal Affairs* [2013] NZHC 2117, a costs judgment where the applicant had brought a judicial review of the decision to cancel a passport, but the Minister had revoked the cancellation and the substantive issues were not determined.

of the Passports Amendment Acts 2014 and 2015, it was accepted that provisions relating to the cancellation of passports were *prima facie* incompatible with the right, found in section 18 of the Bill of Rights Act, to freedom of movement, but it was argued that the provisions were nevertheless justifiable in accordance with its section 5, which permits ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’<sup>162</sup> To be justified under this provision, a limit must serve a sufficiently important purpose, and must pass a proportionality assessment. This latter requires a rational connection between the limit and the objective, that the limit does not impair the right in question more than is reasonably necessary for sufficient achievement of the objective, and that the limit is in due proportion to the importance of that objective.<sup>163</sup> From the point of view of the specific right to enter New Zealand, both of the assessments emphasise the existence in the 1992 Act of a duty to supply a ‘journey-specific emergency travel document’ to a person who has been refused a passport, or seen his or her passport cancelled, on national security grounds, where ‘the journey-specific emergency travel document is necessary to enable the person to return or come to New Zealand’.<sup>164</sup>

The existence of this provision does two things. First, it demonstrates once again that the link between a passport and the right to travel is effectively absolute, such that where a passport is cancelled that right can be exercised only by a person in possession of a passport substitute. Second, and conversely, it highlights that the absence of an equivalent provision as regards the right to leave New Zealand demonstrates that the cancellation of a passport can in practice be used to impose an absolute (if temporary) bar on the exercise of the right to travel in the form of the right to exit the state. These points were made in relation to the Bill which became the New Zealand Intelligence and Security Act 2017:

The travel restrictions serve a significant and important objective, namely disrupting the movement of foreign terrorist fighters (‘FTFs’) and other persons who may pose a serious risk to national security... The suspension or cancellation of travel documents is

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<sup>162</sup> Hon Amy Adams, *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Countering Terrorist Fighters Legislation Bill* (12 November 2014); Hon Christopher Finlayson QC, *Consistency with the New Zealand Bill of Rights Act 1990: Passports Amendment Bill* (15 June 2015).

<sup>163</sup> *Hansen v R* [2007] NZSC 7.

<sup>164</sup> Adams (n 162) and Finlayson (n 162).

rationally connected to this objective. We also consider the safeguards in the Bill mean the right is limited no more than reasonably necessary.<sup>165</sup>

Citing to one of the Canadian cases discussed above, the document accepted, correctly, that '[t]he right of a citizen to enter New Zealand is illusory without the positive obligation on the Minister to issue an emergency travel document.'<sup>166</sup> Though no court seems yet to have ruled on the specific question of the compatibility of the national security cancellation power with the Bill of Rights Act, it is likely – by analogy with the foreign jurisprudence considered above – that they will at the relevant time agree with this assessment in any cases brought before it.

This account might be contrasted with the position in Australia, where an individual may apply to the Administrative Appeals Tribunal (AAT) for review of decisions made by a Minister,<sup>167</sup> including the decisions to refuse or to cancel passports.<sup>168</sup> Also reviewable is the making (by ASIO) of the adverse security assessment which results in the refusal or cancellation of a passport,<sup>169</sup> though at times challenges to the refusal/cancellation will challenge also the underlying security assessment, with the Minister's decision standing or falling on the strength of the that assessment.<sup>170</sup> The AAT's range of options can be and often will be, however, curtailed in the passports context: the Australian Passports Act permits the Minister to certify, in respect of a decision made under the provision of that statute which allows an authority to request a passport refusal/cancellation request on security grounds, that the decision 'involved matters of international relations or criminal intelligence.'<sup>171</sup> In such a case the AAT may only make either a decision affirming the Minister's decision vis a vis the passport, or one 'remitting the decision to the Minister for reconsideration in accordance with any directions or recommendations of the Tribunal.'<sup>172</sup> National security concerns therefore – assuming, as is almost certainly the case, that they can be legitimately subsumed into the headings of 'international relations' or 'criminal

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<sup>165</sup> Hon Christopher Finlayson QC, *Consistency with the New Zealand Bill of Rights Act 1990: New Zealand Intelligence and Security Bill* (12 August 2016).

<sup>166</sup> Finlayson (n 165) [32], citing *Abdelrazik v Canada* 2009 FC 580.

<sup>167</sup> Australian Passports Act 2005, s 50.

<sup>168</sup> APA 2005, s 48 (identifying reviewable decisions).

<sup>169</sup> Australian Security Intelligence Organisation Act 1979, s 54.

<sup>170</sup> In *TCXG v Director-General of Security* [2013] AAT 284, it was conceded by the applicant (and accepted by the AAT) that if the Tribunal was not persuaded to set aside the adverse security assessment underlying a cancellation, then there could be no basis for setting aside the decision under the Australian Passports Act which reflected that assessment. In *BLBS v Director-General of Security* [2013] AATA 820, the Tribunal decided, after hearing argument on that point, that the concession had represented a misunderstanding of the law ([37]).

<sup>171</sup> APA 2005, s 50(2).

<sup>172</sup> APA 2005, s 50(3).

intelligence’ – come to be reflected not only in the effective standard of review employed in reviewing the decision itself made in pursuit of national security but also in the remedy which might be granted.

Where the making of an adverse security assessment can be challenged *only* by way of review in the AAT, the decision to refuse a passport can be the subject of judicial review proceedings. The approach to the review may differ as between the two decisions at issue in national security cases. In *BLBS v Director-General of Security*,<sup>173</sup> it was held that, in light of the fact that the ASIO Act ‘makes an exception to the principle that liberty is not a gift of the government but a right of the governed’, that ASIO is ‘entitled to make an adverse assessment only if it possesses such relevant and probative material as a reasonable mind would accept to be adequate to support the conclusion(s) arrived at.’<sup>174</sup> Nevertheless, the review is not, despite the identity of the body under review and the nature of the decision made, a mere rubber-stamp. It was argued in *BLBS* that, in regard to the making of the adverse security assessment, the AAT should defer to the judgment of ASIO and its officers. That submission was rejected with reference to the distinctive procedure employed in the AAT when such assessments are being reviewed.<sup>175</sup> If, the Tribunal said, the tribunal was – alongside those special procedures and the disadvantage at which they place the applicant – to agree to ‘defer to the opinions, findings and assessments of the staff of the Organisation whose decisions it is charged with reviewing, the Tribunal’s function would be devalued and its credibility could not be maintained.’<sup>176</sup> In reviewing a security assessment, the Security Division may make findings which supersede an assessment only if the information being superseded is, in the Tribunal’s opinion, ‘incorrect, is incorrectly represented or could not reasonably be relevant to the requirements of security.’<sup>177</sup> Though there is little case law in the Australian context, it has been argued that – by analogy with *Abdelrazik* – a constitutional right of abode should be recognised in Australia and that such a right is likely to be breached by ‘certain passport decisions’, which the Australian Passports Act should therefore be read down ‘so as not to authorise’.<sup>178</sup>

## 6. Conclusions

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<sup>173</sup> *BLBS v Director-General of Security* [2013] AATA 820.

<sup>174</sup> [2013] AATA 820, [45]-[46].

<sup>175</sup> [2013] AATA 820, [34]-[35].

<sup>176</sup> [2013] AATA 820, [31].

<sup>177</sup> AAT Act 1974, s 43AAA(3).

<sup>178</sup> *Di Lizia* (n 75) 133-43.

The law of passports does not generally attract attention commensurate with the importance of passports to the rights of the individual. Where once passports were documentary evidence of the relationship between the allegiance owed to the Crown and the protection owed to it in return by the individual, that link has been weakened if not broken entirely. The correlative relationship between allegiance and protection is a weak one, a function of subjecthood or citizenship to which the possession of a passport is – notwithstanding the decision of the House of Lords in *Joyce* – neither here nor there. Instead in a world in which the right to enter and exit states is heavily regulated – something that only became true around a century ago – passports are intimately tied to the right to travel. The specific nature of the link, however, remains deliberately ambiguous. As a matter of law, the Commonwealth states considered here have been unwilling to break entirely from the British approach, whereby a passport facilitates the exercise of the right to travel but the grant of a passport does not confer that right, and its withdrawal does not therefore extinguish it. This claim, which allowed William Wade to assert the legal emptiness of passports, relies upon a distinction between legal and practical reality which is misleading, distorting the picture in a fashion likely to result in weaker protection for the individual's rights. That the true position has often been recognised – implicitly or explicitly – in litigation arising out of the use of passports as a tool of national security is therefore welcome, but the full implications of that position have yet to make themselves felt.