


PASSPORTS, THE RIGHT TO TRAVEL, AND NATIONAL SECURITY IN THE COMMONWEALTH

PAUL F. SCOTT* 

Abstract This article, on the basis of a consideration of the development 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, arguing that passports effectively confer rights and so, consequentially, that the refusal or withdrawal of a passport represents a denial of rights. From this conclusion a number of points flow. Though these consequences are most acute for the United Kingdom and Canada, in which passports remain regulated by, and are issued under, prerogative powers, there are also a number of points of significance for Australia and New Zealand, where passports have a statutory basis.

Keywords: comparative law, public international law, passports, Commonwealth, national security, travel, citizenship, protection.

I. INTRODUCTION

In recent years a number of countries have 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, may pose a threat to people and property there.¹ The preferred response of these home States has often been to deprive such people of their citizenship and so of their right to enter (and return to) the country which they left.² 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 to analogous public interests, it will often choose instead to withdraw the person’s passport

* Lecturer in Public Law, University of Glasgow, paul.scott@glasgow.ac.uk. A version of this article was presented at the Public Law Conference in Melbourne in 2018—I am grateful to the organisers and to those who heard and commented on the article. Thank you to Dean Knight for comments on an earlier draft and to the ICLQ’s reviewers for their excellent comments.

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

² On which see S Pillai and G Williams, ‘Twenty-First Century Banishment: Citizenship Stripping in Common Law Nations’ (2017) 66 ICLQ 521.

(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 which they pose.³ The modern national security context therefore justifies, even demands, a re-examination of certain fundamental legal issues concerning 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 to its bearer.⁴ Over time, the idea of protection has faded, but it 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 (and sometimes sole) means 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 is here called 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, demonstrating that passports effectively confer rights and so their refusal or withdrawal represents a denial of rights. From this conclusion a number of points 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.

II. PASSPORTS, PROTECTION, AND THE FRACTURE OF CITIZENSHIP

Older accounts of passports in English law were closely tied to questions concerning when it was and was not permitted for a subject to leave the

³ An alternative, more optimistic, explanation is that the States in question recognise it as 'a more human, large-scale, and temporary measure': L 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.

⁴ See L Benton and A Clulow, 'Introduction: The Long, Strange History of Protection' in L Benton, A Clulow and B Attwood (eds), *Protection and Empire: A Global History* (Cambridge University Press, 2017).

realm—a point on which there is a lack of certainty in the literature⁵—as well as the distinction between subjects and 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'.⁶ 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'.⁷ The same point had earlier been made 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 place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct.⁸

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'.⁹ 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.¹⁰

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.'¹¹ The status of aliens was and is different. When war was declared under the king's prerogative, aliens of the States with whom the Crown was at war became enemy aliens,¹² deprived of access to the courts,¹³ their property liable to confiscation and they themselves to detention and deportation.¹⁴ Aliens present in the realm who were

⁵ See D Turack, 'Early English Restrictions to Travel' in CH Alexandrowicz (ed), *Grotian Society Papers 1968: Studies in the History of the Law of Nations* (Martinus Nijhoff 1970) and 'Freedom of Movement: The Right of a United Kingdom Citizen to Leave His Country' (1970) 31 OhioStLJ 247, as well as DW Williams, 'British Passports and the Right to Travel' (1974) ICLQ 642, 646.

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

⁷ *ibid* 48.

⁸ Blackstone, *Commentaries*, I, 251

⁹ Chitty (n 6) 48–9.

¹⁰ W Beawes, *Lex Mercatoria Rediviva Or, The Merchant's Directory* (Peter Wilson 1754) 209.

¹¹ *Calvin's Case* (1608) Co Rep 1a, 5a.

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

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

¹⁴ 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 A McNair, *The Legal Effects of War* (3rd edn, Cambridge University Press 1948).

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’.¹⁵ 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,¹⁶ it appears that there no longer exists any prerogative power as regards friendly aliens.¹⁷ 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 pleaded¹⁸—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.¹⁹ In the middle of the nineteenth century,²⁰ reforms to British passports saw them taking 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’.²¹ 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 1905.²²

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 that time. The case related to the charge against two individuals—

¹⁵ 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.’ JW Salmond, *Citizenship and Allegiance* (1902) 18 LQR 49, 50. The former owed ‘permanent and personal’ allegiance to the Crown, the latter ‘temporary and local’.

¹⁶ Immigration Act 1971, section 33(5).

¹⁷ See C Vincenzi, ‘Extra-statutory Ministerial Discretion in Immigration Law’ [1992] PL 300 and I MacDonald, ‘Rights of Settlement and the Prerogative in the UK – a Historical Perspective’ (2013) JIANL 10.

¹⁸ 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 PF Scott, *The National Security Constitution* (Hart Publishing 2018) 270–3.

¹⁹ 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].

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

²¹ HM Government, *Correspondence Respecting Passports*, 2356 (1857–58) 1–2.

²² 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* (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.

including the left-wing journalist Henry Brailsford—of conspiracy to obtain a passport by false representations. The court said 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.’²³ These dicta demonstrate the centrality, in the early twentieth century, of the concept of protection to an 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 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,²⁴ 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*,²⁵ 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, 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 *R v 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.’²⁶ 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’:

²³ *R v Brailsford* [1905] 2 KB 730, 745.

²⁴ 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.

²⁵ *Joyce v DPP* [1946] AC 347.

²⁶ [1946] AC 347, 369

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.²⁷

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 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.²⁸

The decision in *Joyce* was heavily criticised at the time,²⁹ 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)³⁰ have been litigated in modern times, the crucial factor has always been taken to be citizenship, rather than possession of a passport.³¹ This view is strengthened by the decision in *Pham v Secretary of State for the Home Department*,³² 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'.³³ Protection is now unambiguously a function of citizenship, to which the possession of a passport seems to add nothing of (legal) relevance.³⁴ 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 waning of the concept of protection need not (indeed, cannot) be filled by any other legal claim.

²⁷ [1946] AC 347, 369–70.

²⁸ [1946] AC 347, 370–1.

²⁹ G Williams, 'The Correlation of Allegiance and Protection' (1948) 10 CLJ 5.

³⁰ See CRG Murray, 'In the Shadow of Lord Haw Haw: Guantánamo Bay, Diplomatic Protection and Allegiance' [2011] PL 115, discussing the modern case law on protection.

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

³² *Pham v The Secretary of State for the Home Department* [2018] EWCA Civ 2064.

³³ [2018] EWCA Civ 2064 [52].

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

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’.³⁵ Wade’s explicit reference to the common law makes it necessary to consider what—if any—amendment must be made to this claim in light of subsequent 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’.³⁶ The effect of this provision is that a person who wishes to exercise the rights consequent upon their right of abode may—withstanding its technical legal insignificance—be required to produce a passport: there is no requirement for any immigration officer to accept any alternative documentation,³⁷ and even if such documentation is accepted, it is unlikely to 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.³⁸

³⁵ HWR Wade, *Constitutional Fundamentals* (rev edn, Stevens & Sons, 1989) 63–4.

³⁶ Immigration Act 1971, sched 4, para 4(2).

³⁷ 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 Publisher 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.

³⁸ 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, section 3(9).

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 approach.³⁹ 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.⁴⁰ 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.⁴¹ 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). The following section outlines the key features of those regimes and their development, and shows that despite this fragmentation, in a key sense these various regimes continue to reflect their origins in the prerogative powers of the Crown.

III. THE LEGAL BASES OF PASSPORTS

The law concerning passports in the UK remains essentially unreformed: although a range of ancillary statutory powers has been added, at their heart continues to stand a prerogative core, notwithstanding several recommendations for amendment. In 1976, the British Section of the International Commission of Jurists issued a report examining legal questions concerning passports, recommending 'as a basic constitutional necessity, the early enactment of a brief statute conferring upon all citizens the legal right

³⁹ 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 J Mann, 'The Evolution of Commonwealth Citizenship, 1945–1948 in Canada, Britain and Australia' (2012) 50 *Commonwealth & Comparative Politics* 293.

⁴⁰ See, at the relevant time, British Nationality Act 1948, section 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.

⁴¹ 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.

to a passport.⁴² Moreover, it concluded that ‘the right of movement is of such cardinal libertarian importance, and that the danger of unreviewable maladministration in the application of the four imprecise criteria for refusal is so great, that the right to a passport should be absolute.’⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶

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 national⁴⁷—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, however, 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.⁴⁸ 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 that ‘the only action open to one aggrieved would be in fact to defeat the Government?’ His response was that this was ‘a very difficult but not unknown process’.⁴⁹ 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

⁴² JUSTICE (n 37) [48].

⁴³ JUSTICE (n 37) [51].

⁴⁴ JUSTICE (n 37) [55].

⁴⁵ See Scott (n 18) 173–4.

⁴⁶ T May, ‘The Issuing, Withdrawal or Refusal of Passports’, HC Deb 25 April 2013, vol 561 col 68WS.

⁴⁷ Wade (n 35).

⁴⁸ Blackstone, *Commentaries*, I, 243–4.

⁴⁹ HL Deb 16 June 1958, vol 209 col 862.

claims'.⁵⁰ The decision in *Council of Civil Service Unions v Minister for the Civil Service* ('GCHQ'), according to which some exercises of the prerogative could be subject to judicial review, provides a more practicable alternative to bringing down the government.⁵¹ The logic which in the GCHQ applied to the management of the Civil Service was held, in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*,⁵² 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.⁵³ 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.⁵⁴ 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'⁵⁵ and that '[n]o passport shall be issued to a person who is not a Canadian citizen under the Act'.⁵⁶ 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.⁵⁷

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.⁵⁸ These temporary

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

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

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

⁵³ On which in Canada see C Force, 'The Executive, The Royal Prerogative, and the Constitution' in P Oliver, P Macklem and N Des Rosiers, *The Oxford Handbook of the Canadian Constitution* (Oxford University Press 2017).

⁵⁴ 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'. AJ Arkelien, 'The Right to a Passport in Canadian Law' (1983) 21 Canadian Yearbook of International Law 284, 284 fn 2.

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

⁵⁶ SI/81-86, para 4(2).

⁵⁷ See J Doullman and D Lee, *Every Assistance & Protection: A History of the Australian Passport* (The Federation Press, 2008) Ch 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.

restrictions were made permanent by the Passports Act 1920.⁵⁹ The Passports Act 1938, the legislation which regulated the grant of passports for most of the twentieth century, replaced it for a variety of reasons: in part to address uncertainties concerning the bases upon which a passport might be refused;⁶⁰ in part in order to 'bring Australian legislation into conformity with the ordinary conception of a passport' articulated in the passage from *Brailsford* quoted above;⁶¹ and, imminently, to address the problem of Jewish refugees in the Commonwealth who were unable to acquire a passport under the law as it then existed.⁶² 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,⁶³ 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'.⁶⁴

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,⁶⁵ and to the various grounds that are specified as justifying the refusal to issue an Australian passport.⁶⁶ 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 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 statute⁶⁷—required those over the age of 15 to provide a passport on

⁵⁹ See Doulman and Lee (n 58) Ch 3.

⁶⁰ 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) Ch 4.

⁶¹ RS Lancy, 'The Evolution of Australian Passport Law' (1982) 13 MULR 428, 439.

⁶² Doulman and Lee (n 58) 119.

⁶³ On which see G Heilbronn, 'New (and more restrictive) passports legislation' (1980) 5 Legal Service Bulletin 225.

⁶⁴ Australian Passports Act 2005 (Cth), sections 7(2) and 8.

⁶⁵ *ibid* section 7(2) and Division 2.

⁶⁶ War Regulations Continuance Act 1920, section 4 and sched 2.

⁶⁷ Lancy (n 61) 443.

arrival in New Zealand.⁶⁸ 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.⁶⁹ 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’⁷⁰ 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’.⁷¹ The legal entitlement to a passport is therefore a strong one, and the discretion to deny a passport to a citizen very limited.⁷²

Despite the distinctive legal frameworks which now apply, however, passports in the various Commonwealth States 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 upon the ability to produce proof of citizenship in the form (probably) of a passport.⁷³ 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’.⁷⁴ 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,

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

⁶⁹ Passports Act 1946, section 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.

⁷⁰ Passports Act 1992, section 3.

⁷¹ *ibid* section 4(1).

⁷² All of the circumstances in which a passport might be refused create a discretion: Passports Act 1992, section 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: Passports Act 1992, section 4(4).

⁷³ 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: H Irving, ‘Still Call Australia Home: The Constitution and the Citizen’s Right of Abode’ (2008) 30 SydLR 133, 141 and 150.

⁷⁴ Migration Act 1958, section 166.

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.⁷⁵

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,⁷⁶ but also from entering the country.⁷⁷ The same evidential requirements as apply to entry into Australia also 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.⁷⁸

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'.⁷⁹ 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'.⁸⁰ 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

⁷⁵ Australian Security Intelligence Organisation, *ASIO Report to Parliament* (2014–15), 21. See also F Di Lizia, 'More Than Just a Humble Abode: The Implications of Constitutional Citizenship Rights for Passport Law' [2018] UWALR 30 116, 122–4.

⁷⁶ S Pillai, 'The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis' (2014) 37 MULR 736, 760–1.

⁷⁷ '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 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.

⁷⁸ Migration Act 1958, section 175(1)(a)(i).

⁷⁹ Immigration and Refugee Protection Act 2002, section 18(1).

⁸⁰ *ibid* section 19(1).

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'.⁸¹ 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.⁸² This provision increases the possible bases of a challenge to the refusal of a passport.

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',⁸³ 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'.⁸⁴ 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'.⁸⁵ 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 purposes, 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'.⁸⁶ Like all of the rights asserted therein, these may be made 'subject' only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.⁸⁷

⁸¹ Constitution Act 1982, section 1.

⁸² Constitution Act 1982, section 33(1).

⁸³ Immigration Act 2009, section 13(1).

⁸⁴ *ibid* section 13(2).

⁸⁵ *ibid* section 99(1).

⁸⁶ New Zealand Bill of Rights Act 1990, sections 18(2) and (3).

⁸⁷ *ibid* section 5.

IV. 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 effect 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.

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'.⁸⁸ 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'.⁸⁹ The number seems to have risen, however, through the 1960s and 1970s, particularly in the context of the phenomenon of British mercenaries leaving to fight in conflicts in Africa.⁹⁰ 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 whose 'past or proposed activities are so demonstrably undesirable that the grant or continued enjoyment of passport facilities would be contrary to the public interest'.⁹¹ 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 to prominence of the power 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 11 September 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

⁸⁸ HL Deb (16 June 1958) vol 209 col 860.

⁸⁹ HL Deb (16 June 1958) vol 209 col 863.

⁹⁰ 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: K Diplock, 'Passports and Protection in International Law' (1946) 32 *Transactions of the Grotius Society* 42.

⁹¹ 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.

coalition government in 2010 and the publication by it of an amended policy for the exercise of the withdrawal power in April 2013.⁹² The 2013 statement remains the authoritative guide to how that 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’.⁹³ In the period thereafter for which statistics are available—that is, up to the end of 2017—the power was used to revoke a passport or to refuse an application for one on national security grounds up to 24 times in a year in the following years.⁹⁴

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 to be incentivised to use carefully, so as not to draw attention to the weaknesses of the legal regime. Most fundamentally, however, this practice reflects the (obviously correct) belief that refusal or withdrawal of passports limits 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’.⁹⁵ 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—the 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

⁹² May (n 46).

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

⁹⁴ 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.

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

circumstances which, if they had existed immediately before the passport was issued, may have, or would have prevented the issue of the passport'.⁹⁶ 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 persons in a country other than Australia'⁹⁷ 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'.⁹⁸

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 2005.⁹⁹ 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'¹⁰⁰ 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'.¹⁰¹ 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.¹⁰² 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.

⁹⁶ Passports Act 1938, section 8(1A).

⁹⁷ Passports Act 1938, section 7E(1)(a).

⁹⁸ Passports Act 1938, section 7E(1)(b).

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

¹⁰⁰ 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.

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

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

Where such a request is made, the Minister may refuse to issue a passport.¹⁰³ One ‘competent authority’ for the purpose of the act is (now) the Director General of ASIO, the Australian Security Intelligence Organisation,¹⁰⁴ which is empowered by statute to provide security assessments.¹⁰⁵ 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 2014–15,¹⁰⁶ and then falling to 62 in 2015–16, ‘largely due to fewer Australians seeking to travel to conflicts in Syria and Iraq’.¹⁰⁷ 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.¹⁰⁸ 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’.¹⁰⁹ The Counter-Terrorism (Temporary Exclusion Orders) Act 2019 provides another means by which restrictions on the possession of an Australian passport might be imposed.¹¹⁰

¹⁰³ 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; Australian Passports Act 2005, section 22A(2)(a). The creation of the power was recommended by the Independent National Security Legislation Monitor: B Walker SC, *Annual Report* (28 March 2014) 46–8.

¹⁰⁴ Australian Passports Determination 2015 section 14(2)(a).
¹⁰⁵ Australian Security Intelligence Organisation Act 1979, section 37(1).

¹⁰⁶ ASIO, *Report to Parliament 2014–15* (2015) 22 (Table 1).

¹⁰⁷ ASIO, *Report to Parliament 2015–16* (2016) 50–51. Subsequent report to not provide equivalent figures.

¹⁰⁸ 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 of 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 B 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.

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

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

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.¹¹¹ The position under its successor, the Passports Act 1992, has developed over time. Originally, it provided for neither refusal nor cancellation on grounds directly related to security,¹¹² 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.¹¹³ Only with the Passports Amendment Act 2005 were powers of cancellation and refusal made available.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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

¹¹¹ Passports Act 1980, section 4(2).

¹¹² Passports Act 1992, sections 4(3) and 8.

¹¹³ Passports Act 1992, section 12.

¹¹⁴ Passports Act 1992, section 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': Passports Act 1992, section 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, section 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.

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

¹¹⁶ Passports Act 1992, section 27GA(1).

security not of New Zealand, but to another country,¹¹⁷ with the relevant forms of danger more limited than apply where the security at issue is that of New Zealand.¹¹⁸ 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’¹¹⁹ 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 2014–15,¹²⁰ 5 in 2015–16,¹²¹ 2 in 2016–17,¹²² and none in 2017–18 or 2018–19.¹²³ 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 who has repeatedly—and so far unsuccessfully—sought to challenge the decision.¹²⁴

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*.¹²⁵ 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 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

¹¹⁷ Passports Act 1992, section 27GA(2).

¹¹⁸ 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.

¹¹⁹ 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.’

¹²⁰ Department of Internal Affairs, *Annual Report 2014–15*, G.7 (2015) 166.

¹²¹ Department of Internal Affairs, *Annual Report 2015–16*, G.7 (2016) 166.

¹²² Department of Internal Affairs, *Annual Report 2016–17*, G.7 (2017) 183.

¹²³ Department of Internal Affairs, *Annual Report 2017–18*, G.7 (2018) 185 and *Annual Report 2018–19* (2019) 188.

¹²⁴ See *A v Minister of Internal Affairs* [2017] NZHC 746, and A Geddis, ‘The Bizarre Case of the NZ Court Case Hidden from Public and Media Scrutiny’ *The Spinoff* (2 March 2018).

¹²⁵ *Khadr v Canada (Attorney General)* 2006 FC 727

prerogative and statute being of no application in a case where there was no statute in play.¹²⁶ 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'.¹²⁷

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'.¹²⁸ 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.¹²⁹

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 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.

¹²⁶ *ibid* [91].

¹²⁷ *ibid* [128].

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

¹²⁹ Canadian Passport Order SI/81-86, section 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, section 11.1(1). In the latter case, the passport holder may request reconsideration of the decision within 30 days: SI/81-86, section 11.3(1).

The power appears to have been used with a degree of frequency in the modern context,¹³⁰ 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 ...¹³¹

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’.¹³² The fact that—post-*Khadr*—the executive was able to unilaterally rewrite the order in order to further its national security 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 tension, which will always persist while the true nature of a passport as an effective repository of rights is denied.

V. FROM PROTECTION TO THE RIGHT TO TRAVEL

As has been seen, the legal effect of passports in the common law world has 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), the primary significance of a

¹³⁰ 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 S 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.”

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

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

passport now lies in 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 it is accepted that the withdrawal of a passport represents an interference with the right to travel, it can be seen that the prerogative is being used to limit a statutory right. In the United Kingdom 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 right 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 has been 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 why what was true in that case of EU law—that withdrawal of a passport represents an interference with free movement rights—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 citizens. The use of the passport prerogative to regulate entry and exit from the United Kingdom is therefore, in the modern context in which the legal effect of a passport relates to the individual's right to travel, unlawful.¹³³

¹³³ See Scott (n 18) 181.

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.¹³⁴ 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.¹³⁵ The power to grant passports was addressed in *Black v Chrétien*,¹³⁶ 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.¹³⁷ 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 a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable.¹³⁸

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.¹³⁹

¹³⁴ For the relationship between statute and prerogative in Canada, see Forcese (n 53) 154–8.

¹³⁵ 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.’

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

¹³⁷ (2001) 54 OR (3d) 215, [11].

¹³⁸ (2001) 54 OR (3d) 215, [53].

¹³⁹ (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

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.¹⁴⁰ 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.¹⁴¹ Moreover, a passport was not necessary for a citizen to leave or enter Canada because in order to exercise those rights it was sufficient for an individual to offer proof of citizenship.¹⁴² 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 a refusal to issue a passport is an interference with the individual’s section 6(1) mobility rights.¹⁴³ It is not therefore open to argue that the right to travel is not limited or impinged by the refusal or withdrawal of a passport.¹⁴⁴

In the Charter context, the dispositive question therefore becomes whether the interference 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’.¹⁴⁵ 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.¹⁴⁶ 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.¹⁴⁷ 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,’¹⁴⁸ 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

the Canadian courts, see JA Klinck, ‘Modernizing Judicial Review of the Exercise of Prerogative Powers in Canada’ (2017) 54 *AltaLR* 997.

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

¹⁴¹ *ibid* [91].

¹⁴² 2008 FC 338, [91].

¹⁴³ 2008 FC 338, [112].

¹⁴⁴ *ibid* [113].

¹⁴⁵ Constitution Act 1982, section 1.

¹⁴⁶ *ibid* [120].

¹⁴⁷ *Kamel v Canada (Attorney General)* 2009 FCA 21, [28]–[31].

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

justifying an interference with the Charter right at issue.¹⁴⁹ Because the requirement of proportionality was also met, the Order was held to be compatible with the Charter.¹⁵⁰

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*,¹⁵¹ 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 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 was 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'.¹⁵² 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 applying for a limited validity passport on urgent or compassionate grounds, both of which 'show that the applicant's rights are,

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

¹⁵⁰ 2009 FCA 21, [52]–[68]. ¹⁵¹ 2009 FC 580, [2010] 1 FCR 267. ¹⁵² 2009 FC 580.

to a certain extent, being weighed against the aim of the legislation'¹⁵³ and ensure that the infringement 'cannot be characterised as final and irrevocable'.¹⁵⁴ 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 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,¹⁵⁵ which could 'confirm, modify, or quash the decision that is the subject of the appeal'¹⁵⁶ 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'.¹⁵⁷ The right of appeal in the Passports Act 1992 shares the essential features of that provision.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰

Though there is—presumably as a result of the small numbers of passport cancellations on national security grounds—little litigation in which

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

¹⁵⁴ 2011 FC 1061, [125].

¹⁵⁵ Passports Act 1980, section 9(4).

¹⁵⁶ Passports Act 1992, section 28.

¹⁵⁷ Passports Act 1992, section 29AA(2).

¹⁵⁵ Passports Act 1980, section 9.

¹⁵⁷ Passports Act 1980, section 9(5).

¹⁵⁹ By the Intelligence and Security Act 2017.

substantive challenges to cancellation have been determined,¹⁶¹ we have available Ministry of Justice advice as to the compatibility of some of the relevant legislation with the New Zealand Bill of Rights Act. In relation to both 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’.¹⁶² 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.¹⁶³ 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’.¹⁶⁴

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 rationally connected to this objective. We also consider the

¹⁶¹ 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.

¹⁶² Hon A Adams, *Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Countering Terrorist Fighters Legislation Bill* (12 November 2014); Hon C Finlayson QC, *Consistency with the New Zealand Bill of Rights Act 1990: Passports Amendment Bill* (15 June 2015).
¹⁶³ *Hansen v R* [2007] NZSC 7.
¹⁶⁴ Adams (n 162) and Finlayson (n 162).

safeguards in the Bill mean the right is limited no more than reasonably necessary.¹⁶⁵

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'.¹⁶⁶ 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,¹⁶⁷ including the decisions to refuse or to cancel passports.¹⁶⁸ Also reviewable is the making (by ASIO) of the adverse security assessment which results in the refusal or cancellation of a passport,¹⁶⁹ 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.¹⁷⁰ 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'.¹⁷¹ In such a case the AAT may only make either a decision affirming the Minister's decision vis-à-vis the passport, or one 'remitting the decision to the Minister for reconsideration in accordance with any directions or recommendations of the Tribunal'.¹⁷² 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 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.

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

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

¹⁶⁷ Australian Passports Act 2005, section 50.

¹⁶⁸ *ibid* section 48 (identifying reviewable decisions).

¹⁶⁹ Australian Security Intelligence Organisation Act 1979, section 54.

¹⁷⁰ 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]).

¹⁷¹ Australian Passports Act 2005, section 50(2).

¹⁷² *ibid* section 50(3).

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*,¹⁷³ 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’.¹⁷⁴ 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.¹⁷⁵ 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’.¹⁷⁶ 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’.¹⁷⁷ 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’.¹⁷⁸

VI. CONCLUSIONS

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 by it by the individual in return, 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

¹⁷³ *BLBS v Director-General of Security* [2013] AATA 820.

¹⁷⁴ [2013] AATA 820, [45]–[46].

¹⁷⁶ [2013] AATA 820, [31].

¹⁷⁸ *Di Lizia* (n 75) 133–43.

¹⁷⁵ [2013] AATA 820, [34]–[35].

¹⁷⁷ AAT Act 1974, section 43AAA(3).

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.