



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

5 JUNE 2024

MEDIA RELEASE

A (SC 70/2022) v MINISTER OF INTERNAL AFFAIRS

[2024] NZSC 63 (open) and [2024] NZSC 64 (closed)

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's open judgment. It does not comprise part of the reasons for that judgment. The full judgments with reasons are the only authoritative documents. The full text of the open judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

SUPPRESSION, CLASSIFIED SECURITY INFORMATION AND CLOSED COURT PROCEDURE

The High Court order made in [2020] NZHC 2782 prohibiting publication of the name, address or identifying particulars of the appellant remains in force.

Parts of the evidence and argument in this case contained classified security information. As in the hearings in the High Court and Court of Appeal, these aspects of the case were heard in closed court and in accordance with statutory procedure and the agreed protocol for closed material procedures (the Protocol). A special advocate was appointed to represent the appellant's interests at this closed hearing.

This procedure is extremely rare in New Zealand's court system. The principle of open justice can only be overridden in limited circumstances, including where the matter concerns national security. It is the first time this procedure has been used by the Supreme Court.

The Supreme Court has delivered two judgments, an open judgment and a closed judgment. The open judgment, [2024] NZSC 63, publicly records the Court's reasons as much as is possible. The closed judgment, [2024] NZSC 64, addresses classified information and cannot be disclosed except in very limited circumstances, which are described in cl 12 of the Protocol.

What this judgment is about

This case concerns the lawfulness of a decision by the Minister of Internal Affairs (the Minister) to cancel the appellant's passport on terrorism-related grounds. Cancelling a citizen's passport is a serious intrusion on that person's rights. In that context, the open

judgment addresses the process that the Minister must follow, as well as the standard required for the briefing paper from officials that contained the information relied upon by the Minister in coming to his decision to cancel the appellant's passport.

Background

In May 2016, Te Pā Whakamarumarū | the New Zealand Security Intelligence Service (NZSIS) produced a briefing paper advising the Minister that the appellant intended to travel to Syria to join the Islamic State of Iraq and the Levant (ISIL) for the purpose of engaging in or facilitating a terrorist act. It detailed the appellant's previous attempt to travel to Syria to join ISIL and her intention to *hijrah* (which the NZSIS understood to mean travelling to live under ISIL) and marry an ISIL fighter. She had also been translating and disseminating what the NZSIS thought to be ISIL propaganda. The briefing paper also attributed to her an online account responsible for numerous pro-ISIL posts. The fear was that, if she travelled to ISIL-controlled territory, she would provide practical support and technical knowledge to ISIL, and she would also be able to contribute more directly and in a manner less subject to legal constraints. The Minister was advised that cancelling her passport, which would prevent her from travelling there, would prevent or effectively impede her ability to facilitate terrorist acts.

The NZSIS provided the Minister with the briefing paper and a short oral briefing. The NZSIS recommended that the Minister cancel the appellant's New Zealand passport for 12 months. He did so under cl 2(2) of sch 2 to the Passports Act 1992 (now repealed). For the purposes of this case, that provision required the Minister to believe on reasonable grounds that:

- (a) the appellant was, at the time of the decision, a danger to the security of a country other than New Zealand because the person intended to facilitate a terrorist act (as defined in s 5 of the Terrorism Suppression Act 2002);
- (b) that danger could not be effectively averted by other means; and
- (c) cancelling the appellant's passport would prevent or effectively impede her ability to carry out the intended action.

The appellant challenged the cancellation of her passport by way of an application for judicial review. The most notable issues on appeal were:

- (a) Did the Minister have reasonable grounds to believe the requirements of cl 2(2), as listed above, were satisfied?
- (b) Did the Minister fail to address whether his decision was a reasonable limit on the appellant's rights under the New Zealand Bill of Rights Act 1990 (the Bill of Rights), and, if so, what are the consequences of that?
- (c) Was the process adopted by the Minister unfair or unreasonable?

Procedural history

The High Court dismissed the appellant's application for judicial review. The Court of Appeal dismissed the appellant's appeal. The Supreme Court granted the appellant leave to appeal on the question of whether the Court of Appeal was correct to dismiss the appeal.

Supreme Court decision

The Supreme Court has unanimously allowed the appeal.

Intention to facilitate a terrorist act

The Court first focused on what it means for someone to intend to “facilitate” a terrorist act. The appellant and special advocate argued that it requires a stronger level of connection with or contribution to a terrorist act. However, the Court determined that the phrase “facilitate a terrorist act” is to be read as a whole in the ordinary way, but with awareness of the severe impact that comes from cancelling someone’s passport.

Differing from the High Court and Court of Appeal, the Supreme Court concluded that the Minister lacked the reasonable grounds necessary to believe the appellant intended to facilitate a terrorist act. The legislative history of cl 2(2) reveals that Parliament did not intend to enact a travel ban. Therefore, there needed to be evidence that the appellant intended not only to travel to ISIL’s caliphate but also to act in a way that facilitated the commission by ISIL of a terrorist act.

The Court found (in its closed judgment) that the Minister did not have reasonable grounds to believe the appellant intended to facilitate a terrorist act.

Bill of Rights

This Court also disagreed with the approach taken by the High Court and Court of Appeal regarding the Bill of Rights. Although the Bill of Rights constrains the outcome a decision-maker may reach, that decision-maker must also engage with whether the decision’s limits on the affected person’s rights are reasonable. The Minister, and his advisers, failed to do so in this case.

Process adopted by the Minister

Finally, the Court analysed whether the process adopted by the Minister was unfair or unreasonable. The Court agreed with the parties, and the High Court and Court of Appeal, that the briefing paper must be fair, accurate and adequate. However, what is “fair, accurate and adequate” depends on the context. In this case, this requirement is more stringent because of the significant consequences that come from cancelling a person’s passport, the fact that the person is not informed of the proposed decision before it is made, and the issues of fairness that arise when classified information is withheld from the person. Therefore, the NZSIS was required to ensure the information contained in the briefing paper was verified, comprehensive and included all material information, including information that suggested it was not necessary to cancel the person’s passport. This required the NZSIS to carefully scrutinise the briefing paper throughout its preparation and after its completion.

The Court found (in its closed judgment) that the briefing paper was not fair, accurate and adequate.

Appropriate remedy

The Court declared that the Minister’s decision to cancel the appellant’s passport was unlawful and invalid from the date it was made. The appellant was also awarded costs.

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