Date: 20070625

Docket: A-252-06

Citation: 2007 FCA 247

CORAM: **RICHARD C.J.**
LINDEN J.A.
RYER J.A.

BETWEEN:

ELIYAHU YOSHUA VEFFER

Appellant
(Applicant)

and

THE MINISTER OF FOREIGN AFFAIRS

Respondent
(Respondent)

and

CANADIANS FOR JERUSALEM

Intervener

Heard at Winnipeg, Manitoba, on May 8, 2007.

Judgment delivered at Ottawa, Ontario, on June 25, 2007.

REASONS FOR JUDGMENT BY: THE COURT

Date: 20070625

Docket: A-252-06

Citation: 2007 FCA 247

CORAM: **RICHARD C.J.**
LINDEN J.A.
RYER J.A.

BETWEEN:

ELIYAHU YOSHUA VEFFER

Appellant
(Applicant)

and

THE MINISTER OF FOREIGN AFFAIRS

Respondent
(Respondent)

and

CANADIANS FOR JERUSALEM

Intervener

REASONS FOR JUDGMENT OF THE COURT

INTRODUCTION

[1] This appeal concerns the constitutionality of a Passport Canada policy which prohibits Canadian citizens born in Jerusalem from indicating, as other citizens are permitted to do, a country of birth on their passport. The issue is whether that policy infringes paragraph 2(*a*) or subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter"), and if so, whether the infringement is justified under section 1 of the Charter.

[2] The appellant, Mr. Eliyahu Yoshua Veffer, is a Jewish Canadian citizen born in Jerusalem, who requested that the Minister of Foreign Affairs (the "Minister") inscribe on his Canadian passport "Jerusalem, Israel" as his place of birth. The Minister refused that request, and instead issued Mr. Veffer a Canadian passport which indicated "Jerusalem" alone and in full as his place of birth. Mr. Veffer sought judicial review of the Minister's decision in the Federal Court on the basis that the Passport Canada policy violated his Charter rights. His application was dismissed in a judgment dated May 1, 2006 (reported as (2006) 269 D.L.R. (4th) 552, 2006 FC 540). This is an appeal of that judgment.

[3] For the reasons that follow, we are of the view that the appeal must be dismissed.

BACKGROUND

Legal Status of Jerusalem

[4] It is undisputed that Jerusalem has immense historic and religious significance to Jews, Muslims, and Christians throughout the world. It is perhaps because of this that the legal status of Jerusalem remains today a hotly contested issue. For the purposes of this appeal, it is sufficient to say that the United Nations takes the position, and has done so since the adoption of Resolution 181 in 1947, that Jerusalem is not lawfully within the territory of any state. In other words, according to the United Nations, it is a territory without a sovereign. (The details of how and why the United Nations adopted this position are set out in the reasons for the judgment under appeal, and need not be repeated here.)

[5] Consistent with the United Nations' position, Canada does not recognize *de jure* that any part of Jerusalem is a part of the territory of the state of Israel, even though Israel has controlled the western portion of Jerusalem since the early 1950s, and the eastern portion of Jerusalem since the war of 1967. Canada does, however, maintain a diplomatic practice of acknowledging Israel's *de facto* control of the western portion of Jerusalem, but not the eastern portion (see Affidavit of Michael D. Bell, sworn March 22, 2005, at paragraph 26).

Passport Canada Policy Regarding Place of Birth

[6] A passport is an official Canadian document that shows the identity and nationality of a person for the purpose of facilitating travel by that person outside Canada. Every Canadian passport is in a form prescribed by the Minister, issued in the name of the Minister on behalf of the Crown, and at all times remains the property of the Crown (see *Canadian Passport Order,* SI/81-86, sections 2 and 3).

[7] Passport Canada (formerly known as the Passport Office) is a section of the Department of Foreign Affairs which has been charged by the Minister with the issuing, refusing, revoking, withholding, recovery and use of Canadian passports. In carrying out its mandate, Passport Canada has adopted several guidelines, practices and policies respecting the issuance of passports. This appeal concerns Passport Canada's policy on how to signify an applicant's place of birth in his or her Canadian passport.

[8] Prior to 1976, it was Passport Canada's practice to accept as a country of birth the country shown by the applicant. This practice was changed, it was explained, because "some people were for seemingly political reasons" insisting that their place of birth be shown on their Canadian passport in "other than internationally recognized form". A new policy was instituted in 1976, which was "designed to eliminate any political connotations from passports" (see Affidavit of Nicholas Charles Wise, sworn March 24, 2005, at paragraph 11). The policy created a list of correct designations of countries of birth for use by staff of Passport Canada examining passport applications. An External Affairs memorandum, dated April 29, 1976, suggests that the country of birth policy was intended to respond to "rather vociferous elements in the Croatian nationalist group which object to Croatia not being shown in their passports as their country of birth".

[9] The current Passport Canada policy is as follows. The inclusion of an applicant's place of birth on his or her Canadian passport is optional. An applicant may choose to have both the city and country name appear, only the city or country name, or may choose to omit that information altogether. Where an applicant's place of birth is "a territory, the sovereignty over which has not been finally settled under international law or that is not recognized by the Canadian government, it will be inscribed as requested by the applicant" (at least insofar as the applicant's chosen country is on Passport Canada's list of correct designations of countries). The applicant's chosen place of birth is "neither an official recognition by the Canadian government of any country nor support by the Canadian government of either faction where the [place of birth] indicated is a territory the sovereignty over which has not been finally settled under international law" (see Passport Canada Policy, Ch. 420 Place of Birth).

[10] The Passport Canada policy explains that the place of birth is "a feature to assist in identifying the bearer of the passport and, for the majority of travelers, may prevent further questioning at entry or exit points". An applicant who omits his or her place of birth is required to sign a statement titled "Request for a Canadian Passport without Place of Birth" and is advised to contact the representatives of the countries to be visited in order to determine if difficulties will be encountered in entering those countries without having that information disclosed in the passport.

[11] A special policy exists as regards persons born in Jerusalem: "[d]ue to the present political situation, Jerusalem must stand alone." In other words, where an applicant was born in Jerusalem, the place of birth must either be omitted, or be inscribed as "Jerusalem" alone and in full with no country code following. An exception is provided where the applicant was born in Jerusalem before May 14, 1948, as Jerusalem was until then contained within the United Kingdom-mandated territory known as "Palestine". In that circumstance, Palestine may be written in place of Jerusalem on the Canadian Passport where requested by the applicant (see JWS Bulletin No. 1, issued January 2002).

[12] Following the publicity surrounding Mr. Veffer's filing of this application for judicial review, Passport Canada conducted a search of all valid Canadian passports indicating Jerusalem as the place of birth. It learned, surprisingly, that 146 passports contained errors in the place of birth inscription. Of those, 2 passports expired almost immediately, 131 passports had "Jerusalem, ISR" inscribed as the place of birth, and 15 passports had "Jerusalem, JOR" inscribed as the place of birth. A recall notice has been issued in respect of these Canadian passports and changes have been made to the passport issuing computer system to prevent similar future errors.

FACTS

[13] With this in mind, we turn to the facts of this appeal. Mr. Veffer, now 19 years of age, was born in a hospital located in the western portion of Jerusalem on December 12, 1987. He eventually became a Canadian citizen, his Commemoration of Canadian Citizenship having been issued to him while he was living in Jerusalem (the certificate bears no date of issuance). Mr. Veffer currently resides in Toronto, Ontario.

[14] Mr. Veffer applied for a Canadian passport at the Canadian Embassy in Tel Aviv, Israel. He indicated on the application form that his place of birth was "Jerusalem, Israel", but, according to the policy, was issued a Canadian passport, on June 25, 2004, which identified his place of birth as "Jerusalem" alone without any specific country designation, as he had sought.

[15] As a result, Mr. Veffer's former counsel wrote a letter to the Department of Foreign Affairs asking that Mr. Veffer's passport be amended to include Israel as his country of birth. The Minister refused that request in a letter dated December 21, 2004, citing the Passport Canada policy respecting Jerusalem as the reason for doing so. On January 26, 2005, Mr. Veffer filed an application with the Federal Court to have that decision judicially reviewed.

[16] Prior to the hearing, a non-profit corporation called "Canadians for Jerusalem" applied to the Federal Court, seeking to be interveners in the proceedings. On August 29, 2005, the Canadians for Jerusalem were granted leave to intervene as a named party in the proceedings to assist the Court by making submissions regarding the historical significance of Jerusalem to various groups, and

addressing international law issues in connection with the status of Jerusalem. This order was endorsed by the Federal Court of Appeal on August 9, 2006.

FEDERAL COURT DECISION

[17] In a judgment dated May 1, 2006, the applications judge dismissed Mr. Veffer's judicial review application. He held that there was no breach of Mr. Veffer's rights respecting freedom of religion under paragraph 2(*a*) of the Charter because Mr. Veffer's passport in no way restricts his right to sincerely believe that Jerusalem is the capital of Israel, to declare this belief openly, and to personally teach and disseminate that belief (paragraph 23). He explained that the passport policy is "neither coercion nor a constraint" (paragraph 24). In addition, the applications judge held that Mr. Veffer has no right under paragraph 2(*a*) of the Charter to compel the Minister to reflect his belief in the passport, which is property of the government and which is intended to be communication between governments (paragraph 24).

[18] The applications judge further held that there was no breach of Mr. Veffer's equality rights under section 15 of the Charter. While he agreed with Mr. Veffer that the Passport Canada policy draws a formal distinction between Mr. Veffer and others on the basis of place of birth, an analogous ground, he was not convinced that the distinction amounted to discrimination. The applications judge reasoned that the nature of Mr. Veffer's interest affected is minimal, given that he is still able to travel without any restriction. In addition, whatever value one might attach to the right to be able to indicate the country in which one is born on his or her passport, "there is no

evident nexus from an objective perspective to one's dignity or religion" (paragraph 46). As well, the applications judge explained (at paragraph 49):

> The policy behind the passport was adopted for geopolitical reasons and not in order to target any group. It also does not have the effect of doing so. There is simply nothing in the policy or the passport issued pursuant thereto that can be interpreted as relating to stereotyping, groups or personal characteristics. By no stretch of any reasonable imagination can the policy or a passport be interpreted as a ruling, a statement, or even an observation on the passport holder in terms of value or recognition as a human being. In short, there is nothing in the policy or the passport issued pursuant to it that in any objective way can be linked to the Applicant's dignity

[19] Having found no breach of paragraph 2(*a*) or section 15 of the Charter, the applications judge refrained from conducting a section 1 analysis.

ISSUES

[20] This appeal raises the following four issues:

A. Is there a justiciable issue?

B. Did the applications judge err in finding there was no breach of Mr. Veffer's rights respecting freedom of religion under paragraph 2(*a*) of the Charter?

C. Did the applications judge err in finding there was no breach of Mr. Veffer's equality rights under subsection 15(1) of the Charter?

D. If there is a Charter violation, is it a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the Charter?

ANALYSIS

A. Is there a justiciable issue?

[21] As a preliminary matter, the intervener argues that the Passport Canada policy with respect to Jerusalem is not reviewable because the underlying fact that forms the basis of that policy is the legal status of Jerusalem. The intervener argues that the status of Jerusalem is fundamentally a question of international law, an issue which is not justiciable in this Court. The proper forum for resolving that issue would be the United Nations Security Council, the International Court of Justice, or a similar international body. This issue appears not to have been raised before the applications judge.

[22] In our view, this argument is flawed for two reasons. First, Mr. Veffer is not asking this Court to decide the legal status of Jerusalem, nor to interfere with Canada's foreign policy choices respecting Jerusalem. Accordingly, the non-justiciability doctrine is not engaged. As Justice Wilson explained in *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, the doctrine is concerned with the appropriate role of the courts as the forum for the resolution of moral or political disputes (paragraphs 38 and 52). No such dispute arises in this case.

[23] Second, there is no question that the Passport Canada policy is subject to Charter scrutiny, even though the issuance of passports is a royal prerogative. As stated by Justice Laskin in *Black v. Chrétien et al.* (2001), 54 O.R. (3d) 215, at paragraph 46:

> By s. 32(1)(a), the Charter applies to Parliament and the Government of Canada in respect of all matters within the authority of Parliament. The Crown prerogative lies within the authority of Parliament. Therefore, if an

> individual claims that the exercise of a prerogative power violates that individual's Charter rights, the court has a duty to decide the claim.

[24] Accordingly, we are of the view that this argument has no merit.

B. Did the applications judge err in finding there was no breach of Mr. Veffer's rights respecting freedom of religion under paragraph 2(*a*) of the Charter?

[25] Paragraph 2(*a*) of the Charter states:

Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; …	Chacun a les libertés fondamentales suivantes : *a*) liberté de conscience et de religion; …

[26] In *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Chief Justice Dickson defined the individual right of freedom of religion, as follows (at paragraphs 94 and 95):

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom

> means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> [Emphasis added]

[27] A similar statement was made by Chief Justice Dickson in *R v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at page 759:

> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs in turn govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be prescribed by s. 2(a) it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practicing or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314.
>
> [Emphasis added]

[28] To summarize, freedom of religion encompasses the right to entertain the religious beliefs that a person chooses, and the right to practice or teach those beliefs and declare them openly. It is characterized by the absence of coercion, constraint, or other interference, either directly or indirectly, with an individual's "profoundly personal beliefs". This is not to say that freedom of religion prohibits all forms of government interference, or that the government is required to take positive action to endorse an individual's religious beliefs. As indicated in *Edwards Books*, therefore, freedom of religion does not protect against burdens or impositions on religious practice that are "trivial" or "insubstantial". It protects religious beliefs only to the extent that they may "reasonably or actually be threatened".

[29] In this appeal, Mr. Veffer argues that his right to freedom of religion has been violated by the Passport Canada policy, and the Minister's decision to deny his request to include "Jerusalem, Israel" as his place of birth in his Canadian passport. He explains most eloquently in his affidavit, sworn February 23, 2005:

> I take pride that I was born in Jerusalem, Israel. My religion teaches me that Jerusalem is the capital of Israel. This is an integral part of my religious belief and my personal identity.
>
> When I am not allowed to have Israel in my passport, even though I was born in Israel, I feel that the Government of Canada is refusing to allow me to express my identity as a member of the Jewish people; I feel that the Government is rejecting and denying my religious belief in the significance of Jerusalem to the Jewish religion. When I see that other people are allowed to have the city and country of their birth in their passport and I am not, I feel that I am the victim of discrimination in a matter that touches me deeply. When the Canadian government does not allow me to put in my passport that I am born in Jerusalem, Israel, they are denying me the truth of who I am.

[30] In *Syndicat Northcrest v. Amselem,* [2004] 2 S.C.R. 551, the Supreme Court of Canada outlined the approach to be taken in determining whether there has been an infringement of a claimant's rights under paragraph 2(*a*) of the Charter. Justice Iacobucci, writing for the majority, explained (at paragraphs 56 and 57):

> Thus, at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.
>
> Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the implicated right so as to

> constitute an infringement of freedom of religion under the Quebec (or the Canadian) *Charter*.

[31] In this case, the religious belief which Mr. Veffer argues is interfered with is that Jerusalem is the capital of Israel. *Anselem* instructs that this Court is not to decide the validity of Mr. Veffer's religious belief, but is only qualified to inquire into the sincerity of the belief (*Anselem,* at paragraphs 50 and 51). The applications judge did not question the sincerity of Mr. Veffer's religious belief, and Mr. Veffer's credibility was not put at issue in this appeal. Therefore, the first two requirements of the freedom of religion test are met.

[32] Nevertheless, we are not persuaded that there has been enough of an interference with the exercise of Mr. Veffer's rights so as to constitute an infringement of his freedom of religion under paragraph 2(*a*) of the Charter. Some of the types of interference which have been found to constitute a violation of freedom of religion include by-laws which prevented Orthodox Jews from setting up succahs on balconies of their co-owned property (*Anselem*), government authorization of a blood transfusion to a child whose parents were Jehovah's Witnesses (*Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315), a school board decision which denied a Sikh boy from wearing his kirpan to school (*Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6), and provincial legislation which required the Hutterian Brethren to have their photographs taken for the purpose of drivers' licenses (*R v. Hutterian Brethren of Wilson Colony*, 2007 ABCA 160). In all of the above cases, government action or legislation substantively interfered with the claimants' religious beliefs.

[33] When one compares Mr. Veffer's complaint with the above examples, it becomes abundantly clear that there is no violation of freedom of religion in this case. The applications judge was correct to conclude that the Passport Canada policy in no way threatens, inhibits or constrains Mr. Veffer's ability to believe that Jerusalem is the capital of Israel, to declare this belief openly and publicly, and to teach and disseminate that belief. In addition, the policy cannot be said to interfere with his religious identity, or impose an expression of religious identity which is not true to Mr. Veffer. In our view, any effect that the Passport Canada policy may have on Mr. Veffer's freedom of religion right is negligible, and is not prohibited by the Charter, which requires the imposition of a burden that is substantial in order to apply.

[34] Mr. Veffer submits that there is a basic human right to preserve one's identity. In support, he refers to Article 8(1) of the *United Nations Convention on the Rights of the Child*, [1992] Can. T.S. No. 3 (the "*Convention*"), which reads: "State Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference". We understand Mr. Veffer's argument to be that the right to preserve one's identity encompasses the right to compel the state to reflect that identity in state-issued identity documents. In this case, it is argued, the Minister's refusal to recognize an element fundamental to his religious identity in an identity document is denying to Mr. Veffer "the truth of who I am". This, it is said, is an interference with his right to preserve his identity, and consequently, his freedom of religion rights under paragraph 2(a) of the Charter.

[35] We are unable to accept this argument. There exists no freestanding right to preserve identity in Canadian law, either at common law or in a statute. Although Canada is a signatory to the *Convention,* it has not implemented the rights articulated in Article 8(1) into Canadian legislation. What Mr. Veffer is effectively asking for is the right to communicate or broadcast his religious beliefs and national origin in a government document. We agree with the applications judge that no such right exists under paragraph 2(a) of the Charter.

[36] For these reasons, we would dismiss this ground of the appeal.

C. Did the applications judge err in finding there was no breach of Mr. Veffer's equality rights under subsection 15(1) of the Charter?

[37] Subsection 15(1) of the Charter provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[38] Mr. Veffer argues that his equality rights under subsection 15(1) of the Charter are infringed because he has been denied "equal benefit of the law". Specifically, he argues that he has been deprived of the opportunity, which the Passport Canada policy makes available to others, to have his country of birth appear on his Canadian passport. Mr. Veffer argues that this denial is on the basis of his Jewish identity (an enumerated ground) and his place of birth (an analogous ground).

[39] To determine whether a breach of subsection 15(1) of the Charter has occurred, the Supreme Court has identified, in *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at paragraph 88, three requirements which must be met. These requirements were summarized recently by Chief Justice McLachlin in *Gosselin v. Quebec (Attorney General),* [2002] 4 S.C.R. 429, at paragraph 17, as follows:

> To establish a violation of s. 15(1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds.

[40] Recently, in *Auton v. British Columbia,* [2004] 3 S.C.R. 657, Chief Justice McLachlin explained that "There is no magic in a particular statement of the elements that must be established to prove a claim under s. 15(1)…The important thing is to ensure that all the requirements of s. 15(1), as they apply to the case at hand, are met" (at paragraph 23). In addition, whatever framework is used, an overly technical approach should be avoided. A Court must look at the "reality of the situation" and assess whether there has been discriminatory treatment having regard to the purpose of subsection 15(1) (at paragraph 25).

Benefit of the Law

[41] Before addressing whether the three elements required to establish discrimination are present in this case, it is necessary to consider a preliminary issue: does the Passport Canada policy in issue generally confer a "benefit of the law" within the meaning of subsection 15(1) of the Charter? The issue here is not whether the Passport Canada policy is a "law", as it is well

established that laws for the purpose of section 15 include government policies (see *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229, at paragraph 49). Rather, the issue is whether the Passport Canada policy confers a "benefit" on others, which it denies to Mr. Veffer. In our view, it does not. We will explain.

[42] The meaning of the word "benefit" has not been the subject of judicial scrutiny, insofar as it is used in section 15 of the Charter. In fact, the guarantee of "equal benefit of the law" is a relatively new creation. Before the enactment of the Charter in 1982, paragraph 1(*b*) of the *Canadian Bill of Rights* only guaranteed "the right to equality before the law and the protection of the law". It was thought, as a result of the Supreme Court decision in *Bliss v. Canada (Attorney General),* [1979] 1 S.C.R. 183, that the equality guarantee was intended to address burdens imposed by legislation, and not benefits conferred. With the insertion of "equal benefit of the law" in subsection 15(1) of the Charter, Parliament has ostensibly created a broader, more comprehensive, equality guarantee. The guarantee of "equal benefit of the law" has since been used to successfully challenge substantial things like the denial of pension benefits and employment insurance schemes, the provision of medical treatment, and other legislative benefits schemes.

[43] In recent cases, such as *Auton* and *Gosselin,* the Supreme Court has indicated somewhat imprecisely that subsection 15(1) guarantees "equal treatment", which might imply that a claimant need only show a differentiation to engage the equality guarantee. However, it is not just any differential treatment which is sufficient to invoke subsection 15(1). What is significant is treatment which denies "equal protection" or "equal benefit of the law". These words must have a discernible

meaning in our Charter, and it is imperative that a claimant who intends to make a serious allegation of discrimination demonstrate that the so-called treatment complained of falls within the language of the equality guarantee, that is, that equal benefit or equal protection has been denied.

[44] What, then, constitutes a "benefit" for the purposes of subsection 15(1) of the Charter? It is helpful, in deciding this threshold requirement, to review how some other fundamental freedoms of the Charter are understood. As already discussed, the freedom of religion and conscience right in paragraph 2(a) of the Charter protects only government conduct which interferes with the practice or observance of religious beliefs that are substantial.

[45] Consistent with that, the jurisprudence has established that section 7 of the Charter is engaged only where an applicant can demonstrate that government conduct seriously interferes with an individual's "life, liberty and security of the person". To explain, it is not every deprivation of an individual's liberty or security of the person which engages section 7 of the Charter, for almost every piece of government legislation could be said to restrain individuals in one way or another. "Liberty" has been defined, for the purpose of section 7, as freedom from physical restraint, and freedom from state compulsions or prohibitions which affect important and fundamental choices (see *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307, at paragraph 49). Similarly, "security of the person" has been defined as freedom from state interference with bodily integrity and serious state-imposed psychological stress (*Blencoe,* at paragraph 55). While the right to "life" has not been extensively discussed, it surely includes the right to be free from a

risk of death, and free from excessive waiting times for medical treatment in a public health care system (see *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791).

[46] In keeping with this theme, the guarantee of "equal benefit of the law" in subsection 15(1) of the Charter must be understood to refer to benefits which objectively have some meaningful consequence to the individuals affected. In our view, this threshold requirement has not been met in this case.

[47] Mr. Veffer argues that the "benefit" conferred on others, which is not available to him, is the ability to express an important aspect of his religious identity in a government identity document. While Mr. Veffer may sincerely believe that this amounts to a denial of a "benefit that is conferred on others, we are not persuaded that this is the case. The purpose of a passport is, as already discussed, to identify an individual as a Canadian citizen and to facilitate travel to other countries. Here, Mr. Veffer was issued a passport, the passport identifies him as a Canadian citizen, and there is no evidence that the absence of a country name beside "Jerusalem" hinders his ability to travel in any way. Nor is there any suggestion that the addition of a country name will improve his ability to travel or be identified as a Canadian citizen.

[48] We emphasize that the equality guarantee is one of the most fundamental values protected in the Charter, and an allegation that the government has discriminated against someone must not be taken lightly. By the same token, subsection 15(1) should not be used simply because an individual is displeased with some differential treatment under a government policy. In our view, it would

trivialize the equality guarantee if it were used to attack every situation where an individual subjectively feels annoyed or offended by legislation that affects him differently than others. To engage section 15 of the Charter, an applicant must, therefore, demonstrate that a meaningful "benefit of the law" has been denied. This Mr. Veffer has not done.

Application of the *Law* Test

[49] Having said that, even if Mr. Veffer was denied a "benefit" conferred by the Passport Canada policy to others, we are of the view that Mr. Veffer has not been discriminated against within the meaning of subsection 15(1) of the Charter. More specifically, we are not persuaded that a reasonable person would conclude that the Passport Canada policy denies Mr. Veffer his fundamental human dignity. In the following paragraphs, the three step analysis propounded in *Law* will be undertaken.

Comparator Group

[50] As each of the three inquiries in *Law* proceeds on the basis of a comparison with another relevant group, it is necessary to first determine the group of persons with whom Mr. Veffer can invite comparison (*Auton*, at paragraph 48). In *Hodge v. Canada*, [2004] 3 S.C.R. 357, Justice Binnie explained that the appropriate comparator group is "the one which mirrors the characteristics of the claimant…relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the Charter or omits a personal characteristic in a way that is offensive to the Charter" (paragraph 65).

[51] In this case, Mr. Veffer has identified all Canadian citizens born outside of Jerusalem as the appropriate comparator group, because all other Canadian citizens are allowed to have both the city and country of their birth indicated in their passport. The applications judge agreed with this chosen group, as do we.

[52] While one might argue that the comparator group is only those other citizens born in territories with a disputed sovereign, this group would be artificially small. In fact, when one looks at the reality of how the Passport Canada policy operates, it is only Canadian citizens born in Jerusalem after May 14, 1948 that are not allowed to identify a country of birth. In *Auton,* the Supreme Court emphasized that the comparator group must align with both the benefit sought and the "universe of people potentially entitled" to it and the alleged ground of discrimination (paragraph 53; see also *Hodge,* at paragraphs 25 and 31). In this case, the "universe of people potentially entitled" to identify their country of birth on their passport is all other Canadian citizens.

Is there differential treatment?

[53] Having determined that the comparator group in this case is other Canadian citizens, it is appropriate to consider the first step in the *Law* test: does the Passport Canada policy impose differential treatment between Mr. Veffer and other Canadian citizens, either in purpose or effect? In our view, it does. The Passport Canada policy treats Canadians born in Jerusalem differently from those born elsewhere based on place of birth. Canadian citizens born in Jerusalem after May 14, 1948 cannot choose to have a country of birth specified on their passport, whereas Canadian citizens born in all other countries, including all other disputed territories, can.

[54] Mr. Veffer argues that, in addition to the differential treatment on the basis of place of birth, the Passport Canada policy fails to take into account his already disadvantaged position as a Jewish person born in Jerusalem. Mr. Veffer submits that, while the Jerusalem exception applies equally to all persons born there, it adversely affects him and other Jewish Canadians because it is only Jews who hold, as a matter of religious belief, that Jerusalem is central to Israel. Thus, he says, it is Jewish Canadians born in Jerusalem who are uniquely disadvantaged by the policy prohibiting the issuance of a passport indicating "Jerusalem, Israel" as a place of birth.

[55] While we, like the applications judge, do not doubt the sincerity of Mr. Veffer's religious beliefs, we are unable to accept the argument that Jewish Canadians born in Jerusalem are adversely affected by the Passport Canada policy as compared to all other Canadians born in Jerusalem. It is undisputed that Jerusalem has religious significance to each of the three monotheistic religions that are based there. Accordingly, it is not the place of this Court to debate the relative religious significance of Jerusalem to each of these faiths. It is, for the purpose of this case, sufficient to say we are unable to hold on the record that there is additional differential treatment between Jewish and non-Jewish Canadian citizens who are born in Jerusalem after May 14, 1948.

Analogous Ground

[56] The second step in *Law* requires the claimant to establish that the differential treatment complained of is on the basis of one or more enumerated or analogous grounds. In this case, it is agreed by the parties that "place of birth" is an analogous ground to those enumerated in subsection 15(1) of the Charter. Place of birth meets the criteria laid out by the Supreme Court in *Corbiere v.*

Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, at paragraph 13, namely that it is an innate, immutable characteristic and is not alterable by conscious action.

Does the differential treatment discriminate?

[57] The third, and most important, step in *Law* is to examine whether the differential treatment created by the Passport Canada policy is discriminatory. It must be said that a finding that government conduct or legislation is discriminatory is a serious matter, and must not be taken lightly. A finding of discrimination has considerable negative connotations, and requires the government to justify its actions under section 1 of the Charter, which is an onerous and costly task.

[58] In making the assessment at this stage, it is important to emphasize that not every distinction which legislation creates is discriminatory. It is only those differences in treatment which are found to violate "essential human dignity" through the imposition of disadvantage, stereotyping, or political or social prejudice, which will transgress the equality guarantees of section 15 of the Charter (*Law,* at paragraph 51). "Human dignity" was defined by the Supreme Court at paragraph 53 of *Law,* as follows:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her

> unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?
>
> [Emphasis added]

[59] More recently, the Supreme Court in *Gosselin* wrote, at paragraph 20:

> The aspect of human dignity targeted by s. 15(1) is the right of each person to participate fully in society and to be treated as an equal member, regardless of irrelevant personal characteristics, or characteristics attributed to the individual based on his or her membership in a particular group without regard to the individual's actual circumstances.
>
> [Emphasis added]

[60] To determine whether the differential treatment in this case is discriminatory, the issue must be approached from an objective perspective, taking into account the particular traits and circumstances of the claimant. The question to be asked is whether the Passport Canada policy would offend the human dignity of a reasonable Canadian citizen born in Jerusalem after May 14, 1948, dispassionate and fully appraised of the circumstances of Mr. Veffer, possessed of similar attributes to, and under similar circumstances as, Mr. Veffer (*Law*, at paragraphs 59 and 60).

[61] In answering this question, *Law* proposes that the following four contextual factors be taken into consideration: (1) pre-existing disadvantage; (2) correspondence between the distinction and the claimant's characteristics or circumstances; (3) the existence of ameliorative purposes or effects; and (4) the nature of the interest affected. These factors are not exhaustive, nor must they all be present to support a finding of discrimination (see *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835, at paragraph 20). We will address each of these factors in turn.

[62] (1) Pre-existing disadvantage. It is not disputed that Mr. Veffer, as a member of the Jewish community in Jerusalem, is a member of a group that has historically been persecuted and disadvantaged. This is not to say that others born in Jerusalem are not also the subject of pre-existing disadvantage, as many undoubtedly are. What is important for the purposes of this case, however, is that the evidentiary record does not suggest that the stereotyping, prejudice, and vulnerability suffered historically by Jews is owing to their place of birth. Accordingly, this factor weighs against a finding of discrimination.

[63] Having said that, we leave open the possibility that persons born in Jerusalem, whether they be Muslims, Christians or Jews, and whatever views they may have on the status of Jerusalem, suffer a disadvantage on account of their place of birth because their claims of sovereignty are not recognized internationally. However, no evidence was presented on this point.

[64] (2) Correspondence. The evidentiary record discloses that Jerusalem is, as a matter of international law, a territory without an internationally recognized sovereign. In addition to that, persons born in and around Jerusalem hold serious competing beliefs as to the legal status of that territory. This is undoubtedly because Jerusalem is a city which has immense historic and religious significance to Jews, Christians and Muslims alike. The Passport Canada policy on Jerusalem merely seeks to reflect international law, recognizing the unique circumstances and sensitivities of all the people who live there. It is not, as Mr. Veffer suggests, “group targeting” or a reflection of arbitrary or stereotypical decision-making.

[65] However, the Passport Canada policy is more than that. It is acknowledgment by the Canadian government of the following direction by former Secretary-General, Kofi Annan, in a statement delivered to an international meeting on the Question of Palestine on March 8, 2005:

> The long cherished dream of a vast majority of Israelis and Palestinians has been to live a normal life in peace and security. At long last, all of us can sense a newfound movement towards that dream. I urge everyone -- the parties and the international community -- to refrain from any actions that would be detrimental to the resumption of negotiations and implementation of the Road Map, or that could prejudge the resolution of final status issues.
>
> [Emphasis added]

While the current political situation in the Middle East may not be the same today as it was when this statement was delivered, the importance of the objective of neutrality and non-interference remains constant.

[66] The Passport Canada policy is also the result of political sensitivity surrounding the status of Jerusalem, at the domestic and international level. Canada has, in the past, created or proposed policies which have been perceived by some as taking sides in the dispute. For example, in 1979 the Canadian government announced that the Canadian Embassy in Tel Aviv, Israel would be relocated to Jerusalem. This announcement apparently generated immense controversy, both domestically and internationally. It resulted in a study, led by the Right Honourable Robert L. Stanfield, on the spectrum of Canada's relationship with the countries of the Middle East and North Africa, and more specifically, the question of the location of the Canadian Embassy in Israel. Following the release of the Stanfield Report, which recommended against moving the embassy, the Canadian government withdrew its earlier announcement (see Affidavit of Michael D. Bell, at

paragraphs 31 and 32). Of course, this appeal has nothing to do with the location of the Canadian Embassy in Israel.

[67] In sum, we are of the view that the Passport Canada policy is a policy which reflects the truly unique circumstances pertaining to Jerusalem, and respects the human dignity of all persons born and living in Jerusalem. Accordingly, we agree with the applications judge that there is some correspondence between the Passport Canada policy and the particular circumstances of persons born in Jerusalem.

[68] (3) Ameliorative purpose. There is no contention that there is an ameliorative purpose or effect of the Passport Canada policy.

[69] (4) Nature of the interest affected. Mr. Veffer argues that the interest affected is the ability to express his identity in a government-issued identity document. He argues that this right is of fundamental importance to him, because it allows him to express his subjectively held religious and political beliefs about who he perceives himself to be.

[70] In our view, though significant to Mr. Veffer, the interest affected here is of minor objective significance. It is merely the right to display in one's passport the country in which one was born. The interest is declaratory in nature, and has no proven negative effect on the ability of the passport holder to be identified as a Canadian citizen and to travel to other countries, the two purposes for which a passport is issued. While Mr. Veffer may feel that the right to declare his country of birth is

of fundamental importance, we believe a reasonable person in his position would not agree. Mr. Veffer still maintains the freedom to express his faith and his subjectively held views as to the status of Jerusalem; he is just not able to do so in his Canadian passport. He may also have the option open to him, as a person born in Israel, to obtain and carry an Israeli passport which may well describe his place of birth as Jerusalem, Israel.

Conclusion on Discrimination

[71] When taken together, an application of the contextual factors to the circumstances of this case demonstrates that Mr. Veffer has not been discriminated against in that his human dignity has not been invaded. There is no evidence in the record that Mr. Veffer, or persons with similar traits and in similar circumstances, suffer or have historically suffered disadvantage merely on account of place of birth. In addition, there is a correspondence between the Passport Canada policy and the special circumstances pertaining to Jerusalem, and the Canadian citizens born there. The Passport Canada policy not only reflects the status of Jerusalem under international law, it takes account of the highly sensitive situation among the persons born in that territory, and the political delicacy surrounding that conflict at the international level. The third factor, ameliorative purpose, serves no purpose in this appeal. Finally, the nature of Mr. Veffer's interest affected is in our view minimal. The absence of a country of birth printed on a passport has no impact on his ability to travel, or to be fully recognized as a Canadian citizen.

[72] We are of the view, therefore, that a reasonable person in the position of Mr. Veffer would consider the special status of Jerusalem under international law, and would not be offended by the

current Passport Canada policy, and the Canadian passports issued there under, in a way that interferes with human dignity. There is no discrimination here.

CONCLUSION

[73] Having found no *prima facie* violation of the Charter, there is no need to address the fourth ground of appeal, namely, whether any breach of the Charter is justified by section 1.

[74] We would dismiss this appeal, but, in all the circumstances, without costs.

"J. Richard"
C.J.

"A.M. Linden"
J.A.

"C. Michael Ryer"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-252-06
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE VON FICKENSTEIN DATED MAY 1, 2006, NO. T-149-05)	
STYLE OF CAUSE:	ELIYAHU YOSHUA VEFFER - and – THE MINISTER OF FOREIGN AFFAIRS - and – CANADIANS FOR JERUSALEM
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	May 8, 2007
REASONS FOR JUDGMENT OF THE COURT:	Richard C.J., Linden J.A, Ryer J.A.
DATED:	June 25, 2007

APPEARANCES:

David Matas	FOR THE APPELLANT
Sharlene-Telles Langdom Omar Siddiqui	FOR THE RESPONDENT
James Kafieh	FOR THE INTERVENER

SOLICITORS OF RECORD:

David Matas Winnipeg, Manitoba	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT
James Kafieh Almonte, Ontario	FOR THE INTERVENER