

# Poshteh v. Canada (Minister of Citizenship and Immigration), 2005 FCA 121 (CanLII)

Date: 2005-04-08  
Docket: A-207-04  
Parallel citations: (2005), 252 D.L.R. (4th) 335  
URL: <http://www.canlii.org/en/ca/fca/doc/2005/2005fca121/2005fca121.html>

[Reflex Record](#) (noteup and cited decisions)

A-207-04

2005 FCA 121

**Piran Ahmadi Poshteh** (*Appellant*)

v.

**The Minister of Citizenship and Immigration** (*Respondent*)

and

**Canadian Foundation for Children, Youth and the Law** (*Intervener*)

Indexed as: Poshteh v. Canada (Minister of Citizenship and Immigration) (F.C.A.)

Federal Court of Appeal, Rothstein, Noël and Malone JJ.A.--Ottawa, April 8, 2005.

*Citizenship and Immigration -- Immigration Practice -- Motion for reconsideration under Federal Courts Rules, r. 397 of paragraph in Court's reasons for judgment -- Appellant, minor, found to be inadmissible by Immigration Division of Immigration and Refugee Board on security grounds under Immigration and Refugee Protection Act (IRPA), s. 34(1)(f) -- Primary issue in appeal whether person's status as minor relevant consideration under s. 34(1)(f) dealing with membership in terrorist organization -- Respondent submitting sentence in paragraph 63 of reasons stating appellant may invoke IRPA, s. 34(2) to try to satisfy Minister presence in Canada not detrimental to national interest inconsistent with prior judgment of Court stating ministerial exemption not available once finding of inadmissibility made -- Prior judgment rendered under former Immigration Act, s. 19(1)(l) exempting from prohibition against admission persons who "have satisfied" Minister admission not detrimental to national interest -- Use of past tense indicating ministerial exemption needed before decision on admissibility made -- As IRPA, s. 34(2) using present tense i.e. "who satisfies" no temporal restrictions on Minister's discretion to grant ministerial exemption under IRPA, s. 34(2) -- Motion denied.*

statutes and regulations judicially

considered

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

*Federal Courts Rules*, SOR/98-106, rr. 1 (as am. by SOR/2004-283 , s. 2), 397.

*Immigration Act*, R.S.C., 1985, c. I-2, s. 19(1)(l) (as am. by S.C. 1992, c. 49, s. 11).

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 34(1)(f),(2).

cases judicially considered

considered:

*Canada (Minister of Citizenship and Immigration) v. Adam*, 2001 CanLII 22027 (F.C.A.), [2001] 2 F.C. 337; (2001), 196 D.L.R. (4th) 497; 11 Imm. L.R. (3d) 296; 266 N.R. 92 (C.A.).

referred to:

*Klockner Namasco Corp. v. Federal Hudson (The)*, [1991] F.C.J. No. 1073 (T.D.) (QL); *Smerchanski v. Minister of National Revenue*, [1979] 1 F.C. 801; [1977] C.T.C. 283; (1977), 77 DTC 5198; 16 N.R. 38 (C.A.); *Chénier (Re)* (1991), 136 N.R. 377 (F.C.A.); *Twinn v. Canada (No. 3)* (1987), 12 F.T.R. 136 (F.C.T.D.); *Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd.*  reflex, (1990), 28 C.P.R. (3d) 564 (F.C.T.D.).

MOTION for reconsideration under rule 397 of the *Federal Courts Rules* of a paragraph in the reasons for judgment of this Court in this matter (2005 FCA 85 (CanLII), [2005] 3 F.C.R. 487; (2005), 331 N.R. 129; 2005 FCA 85) because of an alleged inconsistency with a prior judgment of the Court. Motion denied.

written representations by:

*Avi J. Sirlin* for appellant.

*Stephen H. Gold* for respondent.

solicitors of record:

*Avi J. Sirlin*, Toronto, for appellant.

*Deputy Attorney General of Canada* for respondent.

*The following are the reasons for order on motion for reconsideration rendered by*

The Court:

[1]This is a motion by the Minister of Citizenship and Immigration for reconsideration under rule 397 of the *Federal Courts Rules*, SOR/98-106, r. 1 (as am. by SOR/2004-283, s. 2), of a paragraph in the reasons for judgment of this Court in this matter ([2005] 3 F.C.R. 487). The Minister submits that a sentence in paragraph 63 of the reasons is inconsistent with a prior judgment of the Court and the point in the sentence was not argued on the appeal. Unless paragraph 63 is amended, clarified or explained, the Minister says that confusion will result regarding the jurisdiction of members of the Immigration Division of the Immigration and Refugee Board.

[2]In his written submissions, the Minister observes that "rule 397 does not contemplate the amendment of reasons, only the amendment of judgments." However, the Minister cites some examples of the Court issuing supplemental reasons, an "Appendix" or "further explanation" to deal with matters not dealt with in the original reasons, patent errors in the original reasons or to avoid misunderstandings arising from an error in the original reasons: *Klockner Namasco Corp. v. Federal Hudson (The)*, [1991] F.C.J. No. 1073 (T.D.) (QL); *Smerchanski v. Minister of National Revenue*, [1979] 1 F.C. 801 (C.A.); *Chénier (Re)* (1991), 136 N.R. 377 (F.C.A.); *Twinn v. Canada (No. 3)* (1987), 12 F.T.R. 136 (F.C.T.D.); and *Procter & Gamble Co. v. Kimberly-Clark of Canada Ltd.*  reflex, (1990), 28 C.P.R. (3d) 564 (F.C.T.D.).

[3]It is not necessary in this case to resort to any such procedures because I am satisfied, upon reading the Minister's submissions, that the sentence of concern to the Minister is not incorrect in law.

[4]The primary issue in the appeal was whether a person's status as a minor was a relevant consideration under

paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, dealing with membership in a terrorist organization. One of the arguments of the appellant, Piran Ahmadi Poshteh, was that pursuant to "principles of fundamental justice" under section 7 of the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], the "liability of a minor cannot simply mirror that of an adult but rather must provide special treatment." In rejecting this argument, paragraph 63 of the reasons states that what is being determined under paragraph 34(1)(f) is whether Mr. Poshteh is inadmissible on the grounds of his membership in a terrorist organization and that the authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 Charter rights.

[5]Paragraph 63 then continues:

A number of proceedings may yet take place before he reaches the stage at which his deportation from Canada may occur. For example, Mr. Poshteh may invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest. Therefore, fundamental justice in section 7 of the Charter is not of application in the determination to be made under paragraph 34(1)(f) of the Act. [Emphasis added.]

[6]It is the underlined sentence that is of concern to the Minister. The Minister says that in *Canada (Minister of Citizenship and Immigration) v. Adam*, 2001 CanLII 22027 (F.C.A.), [2001] 2 F.C. 337, this Court determined that once a finding of inadmissibility is made, a ministerial exemption is no longer available. As there has been a finding of inadmissibility by the Immigration Division, he submits that this Court was wrong in paragraph 63 to imply that after a finding of inadmissibility under paragraph 34(1)(f), Mr. Poshteh could still invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest.

[7]*Adam* was a decision under the former *Immigration Act*, R.S.C., 1985, c. I-2, as amended. The relevant provision was paragraph 19(1)(l) [as am. by S.C. 1992, c. 49, s. 11] which provided:

**19.(1)** No person shall be granted admission who is a member of any of the following classes:

...

(l) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systemic or gross human rights violations or war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the *Criminal Code*, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest. [Emphasis added.]

[8]The Minister's argument in that case was that a ministerial exemption would have to have been granted before a decision on admissibility was made by a visa officer. The Court accepted this argument at paragraph 7:

I am of the view that these submissions are well founded. As I read the paragraphs in issue, once it is determined that the respondent's husband held the position of cabinet minister in the Somalian government of Siad Barre, he fell within paragraph 19(1.1)(b) and thereby became inadmissible to Canada under paragraph 19(1)(l) unless the Minister had excepted him from the application of that paragraph. The presence of the words "have satisfied" in the excepting language suggest to me that a ministerial exception is to be made prior to the decision of the visa officer. As the respondent's husband failed to seek a ministerial exception in a timely fashion, such an exception is no longer available to him. [Emphasis added.]

The Court's decision was based on the tense of verbs "have satisfied" in paragraph 19(1)(l).

[9]Subsection 34(2) is not worded in the past tense. It provides:

**34.** . . .

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

[10]There is simply no temporal aspect to subsection 34(2). Nothing in subsection 34(2) appears to fetter the

discretion of the Minister as to when he might grant a ministerial exemption. Because the decision in *Adam* was based on a different tense of verbs in a different provision, *Adam* is not authority for the interpretation the Minister places on subsection 34(2).

[11]The motion for reconsideration should be dismissed with costs.

---

[Scope of Databases](#) | [RSS Feeds](#) | [Terms of Use](#) | [Privacy](#) | [Help](#) | [Contact Us](#) | [About](#)

by  for the  Federation of Law Societies of Canada