Pázmány Law Review
4. 2016. • 71–76.

MULTANI V. COMMISSION SCOLAIRE MARGUERITE-BOURGEOYS, SUPREME COURT OF CANADA, 2006

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1. Background

The case was about a 12 years old boy, Gurbaj Singh Multani who attended a school in Quebec, Canada. He and his father Balvar Singh Multani are orthodox Sikhs, so the boy believed that his religion required him to wear a kirpan[1] at all times.

The case started in 2001, when Gurbaj accidentally dropped the kirpan he was wearing under his clothes in the yard of the school he was attending. The school board – as a kind of first instance – sent his parents a letter in which, as reasonable accommodation, it authorized their son to wear his kirpan with certain conditions to ensure that it was sealed inside his clothing. Gurbaj and his parents agreed to this arrangement.

The governing board of the school refused to ratify the agreement on the basis that wearing a kirpan at the school violated art. 5 of the school's Code de vie (code of conduct) which prohibited the carrying of weapons. The school board's council of commissioners upheld this decision and told Gurbaj and his parents that he could wear a symbolic kirpan in the form of a pendant or one made of a material which is harmless.

The father filed in the Superior Court a motion for a declaratory judgment to the effect that the council of commissioners' decision was of no force or effect. The Superior Court granted the motion (2002), declared the decision to be null, and authorized Gurbaj to wear his kirpan under certain conditions.[2] The Superior Court

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1 A kirpan is a religious object that resembles a dagger and must be made of metal. So actually it can be seen as a kind of a weapon.

2 These conditions are the following:
– that the kirpan be worn under his clothes;

noted that the need to wear a kirpan was based on a sincere religious belief held by Gurbaj Singh and that there was no evidence of any violent incidents involving kirpans in Quebec schools.

The next instance, the Court of Appeal set aside the Superior Court's judgment and restored the council of commissioner's decision (2004). The judge also concluded that the decision in question infringed Gurbaj's freedom of religion, but held that the infringement was justified for the purposes of s. 1 of the Canadian Charter of Rights and Freedoms[3] and s. 9.1 of Quebec's Charter of human rights and freedoms[4]. The judge considered that the council of commissioners' decision was motivated by a pressing and substantial objective: to ensure the safety of the school's students and staff. There was a direct and rational connection between the prohibition against wearing a kirpan to school and the objective of maintaining a safe environment. According to the decision, the kirpan was a dangerous object, and the concerns of the school board were not merely hypothetical. Allowing it to be worn, even under certain conditions, would have obliged the school board to reduce its safety standards and would have resulted in undue hardship. The judge stated that she was unable to convince herself that safety concerns were less serious in schools than in courts of law or in airplanes.

2.The decision of the Supreme Court

In the procedure of the Supreme Court, the main question of the dispute was the compliance of the commissioners' decision with the requirements of the Canadian Charter of Rights and Freedoms, especially the requirement of freedom of religion.

Because the council of commissioners' decision was an administrative law decision based on legislation (Code de vie), the standard of review could have been the standard of reasonableness (which was applied by the Court of Appeal) but the Court applied the principles of constitutional justification and held the administrative law standard of review as not relevant. Deschamps and Abella JJ

– that the kirpan be carried in a sheath made of wood, not metal, to prevent it from causing injury;
– that the kirpan be placed in its sheath and wrapped and sewn securely in a sturdy cloth envelope, and that this envelope be sewn to the guthra;
– that school personnel be authorized to verify, in a reasonable fashion, that these conditions were being complied with;
– that the petitioner be required to keep the kirpan in his possession at all times, and that its disappearance be reported to school authorities immediately; and
– that in the event of a failure to comply with the terms of the judgment, the petitioner would definitively lose the right to wear his kirpan at school.

[3] "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[4] "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law."

who wrote concurring reasons to the decision of the Supreme Court argued that the Court should address the issue of justification under s. 1 if the Canadian Charter of Rights and Freedoms only where a complainant is attempting to overturn a normative rule as opposed to a decision applying that rule and not on the decision itself but this argument was rejected. One argument was to avoid the dissolving of constitutional law standards into administrative law standards. Another one was that judicial review may involve a constitutional law component and an administrative law component and the administrative law standard of review is not applicable to the constitutional component of judicial review. The main question was the compliance of the commissioners' decision with the requirements of the Canadian Charter and not the decision's validity from the point of view of administrative law.

A s. 1. analysis can be used when there is a conflict of fundamental rights but in this case, the Court did not at the outset had to reconcile two constitutional rights, as only freedom of religion was in issue as a fundamental right and on the other side there were the safety concerns. Even like this, the Court held that s. 1. analysis was the most appropriate one to decide this case. According to this the infringement is reasonable and can be demonstrably justified in a free and democratic society if the legislative objective is sufficiently important to warrant limiting a constitutional right and the means chosen by the state authority is proportional to the objective in question. The proportionality analysis has three stages: it must be considered whether the decision has a rational connection with the objective, the infringement can be justified (minimal impairment test) and the deleterious and salutary effects must also be measured.

The Court stated that freedom of religion was not an absolute right, it had internal limits and it could be limited when a person's freedom to act in accordance with his or her beliefs may cause harm to or interfere with the rights of others. Nevertheless, the interference with Gurbaj's freedom of religion was neither trivial nor insignificant, as it had deprived him of his right to attend a public school. The infringement of Gurbaj's freedom of religion could not be justified under s. 1 of the Canadian Charter of Rights and Freedoms. Although the council's decision to prohibit the wearing of a kirpan was motivated by a pressing and substantial objective (to ensure a reasonable level of safety at the school), and although the decision had a rational connection with the objective, it has not been shown that such a prohibition minimally impairs Gurbaj's rights. The absolute prohibition against wearing a kirpan did not fall within a range of reasonable alternatives. The risk of Gurbaj using his kirpan for violent purposes or of another student taking it away from him was very low, especially if the kirpan was worn under conditions such as were imposed by the Superior Court. The Court also stated that Gurbaj had never claimed a right to wear his kirpan to school without restrictions and there were many objects in schools that could be used to commit violent acts and that were much more easily obtained by students, such as scissors, pencils and baseball bats. The evidence also revealed that not a single violent incident related to the presence of kirpans in schools had been reported. Although it was not necessary to wait for harm to be done before acting, the existence of concerns relating to safety must be unequivocally established for the infringement

of a constitutional right to be justified. Nor did the evidence support the argument that allowing Gurbaj to wear his kirpan to school could have a ripple effect.

Lastly, the argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict was not only contradicted by the evidence regarding the symbolic nature of the kirpan, but was also disrespectful to believers in the Sikh religion and did not take into account Canadian values based on multiculturalism. Religious tolerance was a very important value of Canadian society, the very foundation of the Canadian democracy.

A total prohibition against wearing a kirpan to school undermined the value of this religious symbol and sent students the message that some religious practices did not merit the same protection as others. Accommodating Gurbaj and allowing him to wear his kirpan under certain conditions demonstrated the importance that the Canadian society attached to protecting freedom of religion and showed respect for its minorities. The deleterious effects of a total prohibition thus outweighed its salutary effects.

3.Outcomes

Prior to Multani, the approach of the courts to judicial review of Charter questions was inconstant but this case established a rigorous test: an impugned administrative decision that affects Charter rights must be held to the same standard as is a law that affects Charter rights. However, this approach was short-lived. A new framework for analysis was established in Doré v Barreau du Québec (2012).[5] In this decision, the Court cited the critical academic commentary of Multani which generally argued that the use of a strict s. 1. analysis reduced administrative law to having a formal role in controlling the exercise of discretion. Instead of this, Doré suggests that judges should respect the perspectives of administrative officials and reasonableness review shifts the focus to asking whether an administrative official has provided an adequate justification for the outcome.[6]

In Multani, the Court referred the Canadian values based on multiculturalism which has been translated into legal principle by s. 27 of the Canadian Charter of Rights

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[5] Alexander Pless: Judicial Review and the Charter from Multani to Doré. *Working Paper Series*, University of Ottawa, November 2013. 4–5. https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2362924 With Doré, the standard of review for an administrative tribunal's decision is "reasonableness". According to the decision, "when applying Charter values in the exercise of statutory discretion, an administrative decision-maker must balance Charter values with the statutory objectives by asking how the Charter value at issue will best be protected in light of those objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the Charter protection with the statutory objectives".

[6] Matthew Lewans: Administrative Law, Judicial Deference, and the Charter. *Constitutional Forum constitutionnel*, Volume 23, Number 2, 2014. 19–32., especially 28. https://ejournals.library.ualberta.ca/index.php/constitutional_forum/article/viewFile/21938/16372

and Freedoms, although did not give legal affect to the term.[7] Still, this case is an important part of understanding multiculturalism in Canada which contains a broad range of policies and programs adopted by governments in response to diversity. One of the tools used by multiculturalism is the policy of exempting minorities from the application of certain rules and regulations, like from rules banning the carrying of dangerous weapons in public. These exemptions are typically justified on the grounds that the law disproportionately impacts individuals because their religious or cultural affiliations.[8] In Multani, the core question was the possibility of exemption from safety rules: the appellate court privileged the fears of non-Sikh students and staff above the religious beliefs of orthodox Sikhs, implying that those fears were more empirical than religious belief, even when assessed primarily in terms of perception rather than actual fact, the Supreme Court however, rejected the argument that the kirpan posed a threat to school safety, especially when sheathed, and concluded that prohibiting the kirpan from school premises excessively infringed Gurbaj's religious rights. The Court privileged a particular cultural sensibility as rightfully dominant. With this, it emphasized tolerance and pluralism as core Canadian values that school boards have an obligation to promote.[9]

The Multani case was also part of the unfolding "reasonable accommodation" debate in Canada: not much time after the decision some commentators have pointed this debate as evidence of growing polarization. People, the media and political parties were talking about "excessive" accommodations of minorities, they called for a new, tougher approach to immigrants and minorities.[10] After the Multani decision, 94 percent of French-speaking Quebeckers and 79 percent of non-French speaking Quebeckers were opposed. The people were disappointed because the leading judge of the decision, Justice Louise Charron was a Franco-Ontarian but she took a position in favour of Canadian values based on multiculturalism and religious tolerance (as a

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7 Joan Small: Multiculturalism, Equality, and Canadian Constitutionalism. In: Stephen Tierney (ed.): *Multiculturalism and the Canadian Constitution*. Toronto, UBC Press Vancouver, 2007. 196–211., especially 208. According to s. 27 the Charter shall be interpreted in a manner consistent with the preservation and enhancement of multicultural heritage of Canadians. S. 27 states rather a value than a binding rule, it is in most cases ignored by the Court, if it has some role, it is in the interpretation of s. 15 (equality guarantee) which must be interpreted so as to accommodate distinctions that are permitted by s. 27. Small op. cit. 198., 200.

8 Michael Murphy: *Multiculturalism: A Critical Introduction*. Abingdon, Routledge, 2012. 39. However, there is a disagreement in the academics over whether exemptions support or undermine the principle of equality. Some think that exemptions can be justified as a means of according equal consideration and respect to the identity-related differences of individuals from minority background. Others think that just because a rule has a disproportionate impact for some people, the rule itself is not unfair and an exemption must not be granted, rather the disadvantage created by the law and the purpose of the law must be weighed and sometimes the legitimacy of the law should be questioned rather than granting an exemption. Murphy op. cit. 40–41.

9 Valerie Stoker: Zero Tolerance? Sikh Swords, School Safety, and Secularism in Québec. *Journal of the American Academy of Religion,* Vol. 75, Issue 4, Dec. 2007. 814–839., especially 835.

10 *The Current State of Multiculturalism in Canada and Research Themes on Canadian Multiculturalism 2008–2010.* http://www.cic.gc.ca/english/pdf/pub/multi-state.pdf 16.

core element of multiculturalism) as the very foundation of the Canadian democracy. Gurbaj as a boy, was kept from school for five months over his wearing of a kirpan. Then he won the right at Quebec Superior Court, so he returned to his public school and got shouted at by 300 people – some told him "Go home, Paki". He gave an interview in 2013, when he considered leaving Quebec. There was a proposed bill, the Quebec Charter of Values, trying to end the Quebec controversy on reasonable accommodation. The Charter would have banned the wearing of conspicuous religious symbols in the public-sector workforce and Gurbaj Multani was wearing not only a kirpan but also a turban.[11] In the end, the bill died as of the 2014 elections.

After the decision, a few years later, a research program was launched, focused on diversity and education, the outcomes were published in 2014. One of the core question was, how the elementary school students in New Brunswick might respond to the case that was before the Supreme Court. The result was surprising. Most of the students didn't know the labels "turban" or "hijab". None of them could name the religion that might require these as part of its followers' adherence to their faith. Instead, they suggested that perhaps the boy wearing the turban was having a bad hair day and just didn't want to show his hair. They didn't know what a kirpan was and ideas about safety trumped any right to wear a kirpan, even if the kirpan itself was perfectly safe. For the students, diversity was something that was foreign. The students really saw no reason to accommodate difference because they didn't understand what it was. Most of the students simply didn't understand that a turban is not just a hat, that in some religions, material expressions of one's religious faith are an integral part of one's identity. Although learning outcomes related to diversity were key components of the New Brunswick social studies curriculum, so they were learning about it in school. The author (Associate Professor of Social Studies Education in the Department of Elementary Education at the University of Alberta) fortunately also found some good points: although the students did not demonstrate an understanding for reasonable accommodation, they were not hostile to the idea, their minds were open, they were willing to discuss it and some even tried to come up with possible solutions.[12]

[11] https://goo.gl/YLG7k6

[12] Carla L. Peck: *Hope for Canadian Multiculturalism*. http://www.cea-ace.ca/education-canada/article/hope-canadian-multiculturalism