

Date: 20060601

Docket: T-100-06

Citation: 2006 FC 676

Ottawa, Ontario, June 1, 2006

Present: The Honourable Mr. Justice Harrington

BETWEEN:

FATEH KAMEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Kamel is a Canadian. Passport Canada refused to issue him a passport based on national security concerns. He therefore filed an application for judicial review of that decision. He alleges that his freedom of movement under the Canadian Charter of Human Rights and Freedoms was violated and that the relevant provisions of the *Canadian Passport Order* (SI/81-86) as amended by the *Order Amending the Canadian Passport Order* (SI/2004-113) are invalid.

[2] This review involves section 317 of the *Federal Courts Rules*. This rule provides that Mr. Kamel can request all the material in the possession of the tribunal not in his possession. Pursuant to this rule, Mr. Kamel asked that Passport Canada give him all of his documents.

[3] Under section 318, Passport Canada had 20 days to produce the material in question. If Passport Canada were to dispute the request, it had to inform the applicant as well as the Court of the reason for its objection so that the Court would be able to issue directions regarding the procedure for deciding the issue.

[4] Passport Canada then produced a set of documents with an accompanying note stating the following: [TRANSLATION] “Attached please find a certified copy of the documents in Passport Canada’s possession regarding the above-mentioned individual. These documents are filed under the Rules of practice of the Federal Court of 1998, sections 317 and 318. . . .”

[5] In short, Mr. Kamel claims that the disclosed material is not the material in its entirety. In his opinion, the entire record is necessary to the litigation since many essential elements were missing, such as:

- Passport Canada’s correspondence dated August 5, 2005;
- Passport Canada’s correspondence dated October 28, 2005;
- The notes, documents and recommendations by the Investigations Section in regard to identifying the grounds justifying the refusal of the passport;
- The reference to the Minister;
- The recommendations of the Security Bureau;

- The notes or documents relating to the decision to recommend that the Minister decide the passport application rather than an adjudicator;
- The grounds or other documents considered by the Minister.

[6] Mr. Kamel made an application for the production of these documents. His application was dismissed by a Prothonotary who determined that:

Finally, the applicant's motion record does not really establish the relevance of any document sought vis-à-vis the substantive reasons set out in the notice of application for judicial review and the affidavit filed by the applicant on April 3. In these documents, the applicant challenged first and foremost the institutional process – which he is familiar with – followed by Passport Canada rather than the prejudicial content of the information that may or may not have been brought to the attention of the decision-maker (See *Beno, supra*, at paragraph 15).

[7] This is an appeal from that decision.

ANALYSIS

A priori, I find that the Prothonotary's order is not discretionary. Therefore *Merck & Co., Inc. v. Apotex Inc.* 2003 FCA 488 (F.C.A.), [2004] 2 F.C.R. 459 (QL) – which stipulates that the discretionary order of a prothonotary is reviewable de novo only when the prothonotary has erred in law (a concept in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where the issues raised are vital to the final issue of the case – does not apply. I perceive the order in this case as purely a question of legal interpretation. However, if I am wrong on this point, the refusal to grant Mr. Kamel's request underscored fundamental issues and was based on an improper principle of law.

[8] Passport Canada was entitled to challenge the request for production of documents on the basis that it lacked relevance, that it was not before the decision-maker, or even for any other

reason. This did not however entitle Passport Canada to act as though the documents did not exist. Pursuant to subsection 318(2), Passport Canada was supposed to inform Mr. Kamel and the Court, in writing, of the reasons for its objection. Something that it did not do.

[9] Passport Canada therefore obliged Mr. Kamel to bring a motion, only to contest it like it should have done in the first place. The prothonotary's position was that the motion's dismissal was justified by Passport Canada's argument to the effect that it did not have to produce the documents that Mr. Kamel already had in his possession. This is true. Passport Canada did not produce the two letters to Mr. Kamel, one dated August 5, 2005 and the other October 28, 2005, signed by Michel Leduc and Jody Thomas. It is important to note that Ms. Thomas is the same person who signed the letter denying the passport application.

[10] Nevertheless, with all due respect to the prothonotary, what is important in this case is not the two letters dated August 5 and October 28, but rather the documents referred to therein. Specifically, the letter dated August 5 states that [TRANSLATION] "your eligibility for a Canadian passport is the subject of an administrative investigation" by Passport Canada and the letter dated October 28 states that [TRANSLATION] "according to the information in your file, in France you were convicted for a terrorist offence and passport fraud in support of terrorist activities". These documents were not included in the material sent to Mr. Kamel.

[11] While the two above-mentioned letters were not provided to Mr. Kamel, the letters that he had sent to Passport Canada were provided to him.

[12] The documents referred to in the letters dated August 5 and October 28 are clearly relevant. These letters were referred to up until the proceeding leading to the tribunal's decision to deny Mr. Kamel's passport. It would be absurd to allege that the documents referred to in the letters dated August 5 and October 28 were not before the decision-maker. Even if the documents were not before the decision-maker, they should have been, see *Tremblay v. Canada (Attorney General)*, 2005 FC 339, [2005] F.C.J. No. 421 (QL), *Association des crabiers acadiens v. Canada (Attorney General)*, 2006 FC 222, [2006] F.C.J. No. 294 (QL) at paragraphs 13 and 14 and *Cooke v. Canada (Correctional Service)* 2005 FC 712, [2005] F.C.J. No 886 (QL).

[13] Further, Mr. Kamel responded to the letters dated August 5, 2005 and October 28, trying to appease and respond to the potential concerns mentioned in those letters. It is therefore obvious, according to the documents produced, that the decision-maker had taken into account the documents referred to in the letters. As stated in *Haghighi v. Canada Minister of Citizenship and Immigration* (C.A.), [2000] 4 F.C. 407; *Ali v. Canada Minister of Citizenship and Immigration* [1998] F.C.J. 468 (QL); and *Mazumder v. Canada Minister of Citizenship and Immigration* 2005 FC 444, decision-makers who have concerns regarding extrinsic evidence must advise the applicant of their concerns. Although this matter was not heard in the context of an immigration application, the principle of natural justice nevertheless applies. The decision-maker had in his possession documents which had been requested by Mr. Kamel. Passport Canada therefore had an obligation to produce them. How is it possible for this Court to assess the scope of the refusal without the documents which were or had been in the decision-maker's possession? See *Alwan v. The Minister of Citizenship and Immigration* 2006 FC 665.

[14] In such circumstances, I would make a parallel with *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2005] 1 F.C.R. 171 (F.C.A.). In that case, the Federal Court of Appeal determined that the Federal Court judge hearing a judicial review involving a confidentiality order made by an Immigration Division member would have an opportunity to review the confidential information and in camera evidence that was before the member. In other words, that confidential information that was before the Immigration Division automatically became part of the record on judicial review. Given that the documents that were assessed by the Minister in order to deny Mr. Kamel's passport were included in what the Minister considered, those very documents are part of the record and must be produced.

ORDER

THE COURT ORDERS that:

1. The appeal is allowed, with costs; and
2. Without prejudice to any rights the respondent may have to object to the production of documents under the *Canada Evidence Act* or any other legal provisions, the Court orders that the material sought by the applicant be produced in its entirety.

“Sean Harrington”

Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-100-06

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