

**Date: 20090123**

**Docket: T-2193-07**

**Citation: 2009 FC 69**

**Ottawa, Ontario, January 23, 2009**

**PRESENT: The Honourable Madam Justice Hansen**

**BETWEEN:**

**DAVID ALLAN HRUSHKA**

**Applicant**

**and**

**THE MINISTER OF FOREIGN AFFAIRS  
AND PASSPOST CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**Introduction**

[1] A Passport Canada Adjudicator ordered that passport services be withheld from the Applicant for a period of three years. In these reasons, I conclude that the decision must be set aside.

## **Facts**

[2] As the determinative issue centres on the authority of the Adjudicator to make such an order, only a brief summary of the facts is necessary. Passport Canada issued a passport to the Applicant on October 23, 2002. In June 2005, the United States Secret Service alerted Passport Canada that copies of the Applicant's passport were found in the possession of an individual being investigated for fraud. In June 2007, law enforcement officials in Ireland reported that copies of the Applicant's passport had been used by an individual attempting to commit acts of fraud. In July 2007, the Canadian Border Services Agency notified Passport Canada that copies of the Applicant's passport had been found on a laptop seized from an individual who had entered Canada illegally.

[3] In July 2007, the Applicant submitted an application to renew his passport that was due to expire on October 23, 2007. On August 22, 2007, the Security Bureau of Passport Canada (Bureau) informed the Applicant that he was the subject of an investigation relating to the posting of the biographical information page (the bio-page) of his passport on a website.

[4] Subsequent correspondence between the Applicant and Passport Canada reveals that the Applicant had been mugged in April 2000 and his identification was stolen. The Applicant then encountered difficulties with the fraudulent use of his identification. The Applicant claims he was advised by a lawyer to post copies of his personal identification including the bio-page of his passport on his website in an attempt to thwart further episodes of identity theft.

[5] As a result of its investigation, the Bureau forwarded the file for adjudication to the Passport Canada Adjudicator on October 15, 2007. The Bureau recommended to the Adjudicator that the Applicant's passport be revoked pursuant to paragraph 10(2)(c) of the Canadian Passport Order, SI/81-86 (Order) and that passport services be withheld from the Applicant for five years.

[6] In his November 6, 2007 decision, the Adjudicator determined that although the grounds to revoke the passport had been met, the Bureau's recommendation in this regard had been rendered moot in light of the expiration of the passport. However, based on the circumstances of the case, he ordered that passport services be withheld from the Applicant for three years.

[7] In written submissions and at the outset of the hearing, the Respondent took the position that the application should be struck based upon the absence of a proper evidentiary record. After hearing the submissions of the parties, I was satisfied that a complete record was before the Court and that the Respondent was not prejudiced by the deficiencies in the Application Record. I advised the parties that I would hear the application on its merits.

### **Issue**

[8] The determinative issue in this proceeding is whether in ordering that passport services be withheld from the Applicant for three years the Adjudicator acted beyond his authority.

### **Submissions of the Parties**

[9] The Applicant's primary argument is that the Adjudicator lacked authority in ordering that passport services be withheld from the Applicant.

[10] The Respondent's position may be summarized as follows. The Respondent disputes the Applicant's assertion that Passport Canada's authority is limited to either a refusal to grant a passport under section 9 of the Order or to revoke a passport under section 10 of the Order. Relying on section 2 of the Order, the Respondent submits that Passport Canada has been charged by the Minister of Foreign Affairs and International Trade with "the issuing, refusing, revoking, withholding, recovery and use of passports." The Respondent argues that further support for this broader authority is found in the fact that passports remain the property of Her Majesty the Queen in Right of Canada and are issued on the conditions that the passport holder properly use and safeguard the passport.

[11] As the Adjudicator determined that there were grounds to revoke the passport pursuant to paragraph 10(2)(c) of the Order, the expiration of the passport prior to the Adjudicator's decision did not limit Passport Canada's authority to withhold passport services.

[12] The Respondent maintains that the authority to withhold passport services flows logically from the authority to revoke a passport in order to give practical effect to the revocation. The Respondent submits that determining an individual's entitlement to passport services is not a singular occurrence. Rather, the authority of Passport Canada to exercise the powers described in

section 2 of the Order permits assessment of an individual's entitlement to passport services on an ongoing basis. Finally, in contrast to the authority of issuing, refusing to issue, and revoking a passport, the authority of withholding passport services found in section 2 of the Order is not limited to any specific circumstances.

### **Standard of Review**

[13] The parties agree and I accept that the standard of review in relation to Passport Canada's authority to impose a particular sanction is correctness.

### **Analysis**

[14] Section 2 of the Order, in part, states:

"Passport Canada" means a section of the Department of Foreign Affairs and International Trade, wherever located, that has been charged by the Minister with the issuing, refusing, revoking, withholding, recovery and use of passports. (*Passport Canada*)

[15] Turning first to the language of the provision itself, it is simply descriptive of a section within the Department of Foreign Affairs and International Trade "that has been" charged with certain responsibilities by the Minister. The language does not purport to confer on Passport Canada the authority to take any of the actions enumerated in the provision. Instead, the source of Passport Canada's discretionary authority is found within specific provisions of the Order. For example, Passport Canada's broad authority to require specific documentation or materials relevant to the issuance of a passport or the provision of passport services is provided in sections 6 and 8 of the Order. Similarly, and of particular relevance to the present judicial review, the authority and

the basis upon which Passport Canada may refuse or revoke a passport are described in paragraphs 9 and 10 of the Order, respectively. In contrast, the Order does not explicitly describe the scope or conditions for the proper exercise of the purported authority to withhold passport services as a stand alone sanction. The absence of these details in the Order indicates that Passport Canada has not been empowered to withhold passport services as an independent penalty for misuse of a passport.

[16] Second, the Respondent's argument runs contrary to the use and purpose of statutory definitions and recognized drafting conventions. As stated in *Sullivan and Drieger on the Construction of Statutes*, [Ruth Sullivan, *Sullivan and Drieger on the Construction of Statutes* (Vancouver: Butterworths, 2002), p. 51.] there are two kinds of statutory definitions, exhaustive and non-exhaustive. Exhaustive definitions are normally introduced with the term "means" and serve the following purposes: "to clarify a vague or ambiguous term; to narrow the scope of a word or expression; to ensure that the scope of a word or expression is not narrowed; and to create an abbreviation or other concise form of reference to a lengthy expression." Non-exhaustive definitions are normally introduced by the word "includes" and serve "to expand the ordinary meaning of a word or expression; to deal with borderline applications; and to illustrate the application of a word or expression by setting examples." Thus, it can be seen that a statutory definition does not typically have substantive content. Indeed, the inclusion of substantive content in a definition is viewed as a drafting error. As stated by Francis Bennion in *Statutory*

*Interpretation:*

*Definitions with substantive effect* It is a drafting error (less frequent now than formerly) to incorporate a substantive enactment in a definition. A definition is not expected to have operative effect as an independent enactment. If it is worded in that way, the courts will tend to construe it restrictively and confine it to the proper function of a definition.

[17] Although intended to be used only as a guide, this same view is echoed in the *Drafting Conventions of the Uniform Law Conference of Canada*. Section 21(2) states that “[a] definition should not have any substantive content.”

[18] Accordingly, I reject the Respondent’s argument that Passport Canada’s authority to withhold passport services is found in section 2 of the Order.

[19] As noted above, the Respondent also argues that the authority to withhold passport services flows logically from the authority to revoke a passport in order to give practical effect to the revocation. Without deciding whether this assertion is sound in law, it does not assist the Respondent in the circumstances of the present case. In my opinion, there is a distinction to be drawn between the withholding of passport services for a specified period of time in conjunction with a refusal or a revocation decision and the withholding of passport services as a stand alone sanction. Accordingly, powers associated with revocation may not be relied upon as the source of an independent sanction of withholding passport services.

[20] Finally, the Respondent also argues that the authority to withhold passport services found in section 2 is not limited to any specific circumstance. However, as this argument is reliant upon the assumption that section 2 confers a power to withhold passport services as a stand alone sanction it may be disregarded for the above reasons.

[21] For these reasons, I conclude that the Order does not authorize the imposition of the withholding of passport services as a stand alone sanction.

[22] While I fully appreciate the importance of maintaining the integrity of the passport program, the comments of Justice Phelan in *Khadr v. Canada (Attorney General)* 2006 FC 727, [2007] 2 F.C.R. 218 are equally important. At paragraph 4 he stated:

4 For the reasons which follow, I have concluded that, in this case, every citizen is entitled to be treated, procedurally at least, in the manner in which the government says his or her rights or interests will be dealt with. It is part of our law of procedural fairness that in order to know the case one must meet, one is entitled to know who will decide and on what criteria the decision may be based.

### **Conclusion**

[23] As the Order does not empower the Adjudicator to impose the stand alone sanction of withholding passport services, the decision will be set aside and remitted for a redetermination. While I have concluded that the decision must be set aside, but for the Applicant's conduct during the investigation, the matter may well have been resolved at that stage. Accordingly, in the exercise of my discretion, no costs will be awarded to the Applicant.



**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. The application for judicial review is allowed, the November 6, 2007 decision is set aside, and the matter is remitted for redetermination by a different Adjudicator.
2. No costs are awarded.

“Dolores M. Hansen”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-2193-07

**STYLE OF CAUSE:** DAVID ALLAN HRUSHKA

AND

THE MINISTER OF FOREIGN AFFAIRS AND  
PASSPORT CANADA

**PLACE OF HEARING:** Edmonton, Alberta

**DATE OF HEARING:** September 9, 2008

**REASONS FOR JUDGMENT:** Hansen J.

**DATED:** January 23, 2009

**APPEARANCES:**

Mr. J. Cameron Prowse

FOR THE APPLICANT

Ms. Stacey Dej  
Ms. Yolande Viau

FOR THE RESPONDENTS

**SOLICITORS OF RECORD:**

Prowse Chowne LLP  
Edmonton, AB

FOR THE APPLICANT

John H. Sims, Q.C.  
Deputy Attorney General of Canada  
Ottawa, ON

FOR THE RESPONDENTS