

Federal Court



Cour fédérale

Date: 20111124

Docket: T-1263-10

Citation: 2011 FC 1355

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, November 24, 2011

**PRESENT: The Honourable Madam Justice Bédard**

**BETWEEN:**

**AIDA MARIÈME SECK**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review in accordance with section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision by the Public Service Commission (Commission) that Aida Marième Seck (applicant) committed fraud in the course of an appointment process within the Public Service by submitting false references.

[2] For the following reasons, the application for judicial review is dismissed.

## I. Background and decision

[3] In March 2008, the applicant participated in a competition to fill a management and consular officer position within the Department of Foreign Affairs and International Trade (Department). On February 16, 2009, the Commission was informed that there was reason to believe that the applicant had committed fraud in the course of the selection process. The Commission therefore started an investigation pursuant to section 69 of the *Public Service Employment Act*, SC 2003, c 22 (Act), which reads as follows:

<p><b>69.</b> If it has reason to believe that fraud may have occurred in an appointment process, the Commission may investigate the appointment process and, if it is satisfied that fraud has occurred, the Commission may</p>	<p><b>69.</b> La Commission peut mener une enquête si elle a des motifs de croire qu'il pourrait y avoir eu fraude dans le processus de nomination; si elle est convaincue de l'existence de la fraude, elle peut :</p>
<p>(a) revoke the appointment or not make the appointment, as the case may be; and</p>	<p>a) révoquer la nomination ou ne pas faire la nomination, selon le cas;</p>
<p>(b) take any corrective action that it considers appropriate.</p>	<p>b) prendre les mesures correctives qu'elle estime indiquées.</p>

[4] The background that gave rise to the investigation is as follows.

[5] In the course of the selection process in question, the candidates had to provide the names of three people who could give them a reference. The applicant provided three names as references, including that of Rose M'Kounga, who she said had been her supervisor in 2003-2004. When the

Department contacted Ms. M'Kounga to obtain information on the applicant, she indicated that she did not have time to participate in a telephone interview, but offered to answer the questions in writing. She then submitted the reference request form with her answers to the various questions. The answers given by Ms. M'Kounga were exhaustive, detailed and included very positive comments on the applicant's competencies and qualifications.

[6] The Commission had a suspicion that the references had been prepared not by Ms. M'Kounga, but by the applicant and/or her mother, Gisèle Seck, in the following context. The Department of Natural Resources Canada (DNR), where the applicant's mother worked, had carried out an investigation on Gisèle Seck's use of the departmental computer networks. In the course of that investigation, several emails exchanged between the applicant, Ms. Seck and Ms. M'Kounga, related to the references Ms. M'Kounga would provide for the applicant, were intercepted. A DNR manager then sent these emails to the Commission.

[7] In light of these emails, the Commission started an investigation to verify whether the applicant had committed fraud during the selection process. In a report dated April 30, 2010, the person in charge of the investigation found that the applicant had committed the fraud she was suspected of. She found that the evidence demonstrated that Ms. M'Kounga and the applicant had never worked together, that Ms. M'Kounga was therefore not entitled to give a reference for the applicant and that the written reference had been compiled not by Ms. M'Kounga, but by the applicant and/or her mother.

[8] On July 5, 2010, the President of the Commission signed the record of decision, which adopted the findings of the investigation report. The record of decision, which orders three corrective actions, reads as follows:

[TRANSLATION]

...

The investigation found that fraud was committed in the appointment process by Marième Seck, a candidate, and Rose M’Kounga, who gave a false reference for Ms. Seck. Ms. Seck was not appointed to the management and consular officer position. Ms. Seck and Ms. M’Kounga are employees at the Canada Revenue Agency.

In accordance with its authority set out in section 69 of the *Public Service Employment Act* (PSEA), the Commission hereby orders that:

- for a period of three years from the signing of this Record of Decision, Ms. Seck and Ms. M’Kounga obtain written permission from the Commission before accepting a position within the federal public service. If they accept a determinate or indeterminate appointment within the federal public service without first obtaining such permission, their appointment will be revoked;
- a copy of investigation report 2009-EXT-00049.7408, record of decision 10-06-ID-49 and any other relevant information on Ms. Seck and Ms. M’Kounga be sent to the Canada Revenue Agency;
- a copy of investigation report 2009-EXT-00049.7408 and any other relevant information be sent to the Royal Canadian Mounted Police for the purposes of section 133 of the PSEA.

## II. Issues

[9] This application for judicial review raises the following issues:

A. Did the Commission err by launching an investigation under section 69 of the Act when the applicant was not the successful candidate or appointed at the end of the selection process?

B. Did the Commission breach the rules of natural justice or procedural fairness?

C. Did the Commission err in its assessment of the evidence?

### III. Standard of review

[10] I am of the opinion that the first issue must be analyzed on the standard of reasonableness.

In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 54, [2008] 1 SCR 190, the Supreme Court stated that a decision by a tribunal interpreting its own statute or statutes closely related to its function is usually entitled to deference. In this case, the interpretation and application of section 69 of the Act are at the heart of the Commission's mandate and expertise.

[11] The second issue concerns the Commission's duty to act fairly and this issue must be reviewed on the standard of correctness (*Belzile v Canada (Attorney General)*, 2006 FC 983 at paragraph 33, 306 FTR 39).

[12] The third issue, which raises a question of fact, will be subject to the standard of reasonableness (*Challal v Canada (Attorney General)*, 2009 FC 1251 (available on CanLII)).

### IV. Analysis

A. *Did the Commission err by launching an investigation under section 69 of the Act when the applicant was not the successful candidate or appointed at the end of the selection process?*

[13] The applicant submits that the jurisdiction of the Commission, by virtue of section 69 of the Act, is limited to situations where the person being investigated is the person to be appointed or the

person who was appointed at the end of the process and that the corrective action mentioned in paragraph (b) is incidental to the principal action which is to not make the appointment or to revoke the appointment if already made.

[14] The respondent maintains that the Act must be broad in scope. He relies on the preamble to the Act and on the wording of section 69, which confer on the Commission an investigative authority over “an appointment process”.

[15] I share the respondent’s opinion. First, it is clear in the preamble to the Act and in the Act in its entirety that Parliament conferred on the Commission the responsibility to protect the integrity and impartiality of appointment processes and to support the merit principle. Second, it seems evident in reading section 69 that the Commission’s mandate relates to any fraud that may have been committed in the course of an appointment process instead of only when a person suspected of fraud is the successful candidate. Furthermore, there is no reason to conclude that the possibility for the Commission to “take any corrective action that it considers appropriate” applies only when it first decides to revoke or to not make an appointment. I see nothing to suggest that this authority is dependent on and secondary to an order rendered in accordance with paragraph (a). Instead, I understand from section 69 of the Act that the Commission may not make or revoke an appointment if the person suspected of fraud is the person chosen at the end of the appointment process. If so, the Commission may also take other additional actions that it considers appropriate. When the person concerned is not the successful candidate, the Commission may still investigate and take any corrective action that it considers appropriate. The authority conferred on the Commission is very

broad and gives it the flexibility to adapt the corrective action to the circumstances specific to each file.

[16] I therefore find that the applicant's argument has no merit and that the Commission had the authority to investigate whether the applicant had committed fraud.

*B. Did the Commission breach the rules of natural justice or procedural fairness?*

[17] The applicant submits that the Commission breached its duty of procedural fairness in several respects, namely:

- She criticizes the investigator for prejudging her guilt from the start and being biased during the entire investigation;
- She criticizes the investigator for refusing to disclose the names of the people at the DNR who sent information to the Commission;
- She criticizes the investigator for not disclosing certain elements and documents before the meeting on December 1, 2009. It should be noted that counsel for the applicant was unable to specify to the Court the nature of the elements and documents that the investigator apparently refused to disclose to the applicant;
- She criticizes the investigator for creating confusion during the meeting of December 1, 2009, which was in regard to two different promotion processes.

[18] After reviewing all of the meeting notes, all of the documents and correspondence exchanged, and the investigation report, I am of the view that there is no basis for the applicant's allegations and that the Commission respected its duty to act fairly.

[19] First, the Commission clearly informed the applicant of the nature of the investigation and of the allegations against her at each step of the investigation. Second, at each step of the investigation, the Commission informed the applicant of the elements available to her, and the applicant received, at each step, the opportunity to submit her version of events and to give her point of view. Third, the applicant was represented by counsel during the investigation. However, counsel for the applicant never indicated that the Commission had refused to send his client any document whatsoever or that the investigator had created confusion during the meeting of September 1, 2009. Furthermore, no confusion is apparent in the notes from that meeting.

[20] The applicant also criticizes the Commission for concluding its investigation without questioning Ms. Seck, who was an important witness. The Court notes that the investigation report indicates that Ms. Seck had not been questioned because it was impossible to reach or locate her. It is also noted that the applicant apparently indicated that Ms. Seck had been in Africa, where she had had to take care of family business. It would have been relevant for the applicant to try to contact her if she found it important that her mother give testimony in the course of the investigation. However, nothing in the file indicates that the applicant had been unable to contact her mother while she was in Africa or that she tried to contact her.

*C. Did the Commission err in its assessment of the evidence?*



[21] I believe that the Commission's decision is reasonable and that it is based on the evidence gathered during the investigation. It was entirely reasonable for the Commission to find that the evidence did not demonstrate that the applicant and Ms. M'Kounga had worked together during the 2003-2004 period and that, as a result, Ms. M'Kounga was not entitled to give a reference for the applicant. The versions given by the applicant and Ms. M'Kounga contained numerous contradictions and inconsistencies.

[22] First, the applicant indicated that Ms. M'Kounga had been her supervisor in 2003-2004. She then indicated that she had made a mistake in indicating that Ms. M'Kounga had been her supervisor. Second, the written reference given by Ms. M'Kounga was detailed and very specific with respect to the applicant's qualifications and tasks. However, when questioned by the investigator, Ms. M'Kounga was very vague regarding the work the applicant had performed for her. She did not seem to specifically recall when and where the applicant had worked under her supervision. She stated that she believed that it was in 2003-2004 at the Correctional Service of Canada. These answers are completely inconsistent with the level of detail contained in the reference given by Ms. M'Kounga. The applicant was just as vague. She indicated that she thought she had worked for Ms. M'Kounga for a few months at the Treasury Board Secretariat. However, Ms. M'Kounga's curriculum vitae indicates that she was working at Agriculture Canada in 2003-2004 and that she had never worked for the Treasury Board Secretariat. Faced with such inconsistencies, it was completely reasonable for the Commission to find that Ms. M'Kounga was not the applicant's supervisor in the 2003-2004 period.

[23] It was also reasonable, in light of the evidence, to find that Ms. M’Kounga had not herself prepared the written reference that she submitted with respect to the applicant and that it was instead prepared by the applicant and her mother. The investigation report contains the following table showing email exchanges between the applicant, Ms. Seck, Ms. M’Kounga and Nancy Doyle, who the reference was sent to:

[TRANSLATION]

Date\time	From	To	Subject line	Content
<b>Email #1</b> 08/12/2008 3:45 p.m.	Marième Seck	Rose M’Kounga	Info	[TRANSLATION] “Has DFAIT contacted you regarding my references for the MCO-AS-04 by any chance? Someone named Lydia Camille.”
<b>Email #2</b> 08/13/2008 3:51 p.m.	N. M-Doyle (DFAIT)	Rose M’Kounga (CRA)	Reference Materials- Management and Consular Affairs Officer (MCO)- AS-04	[TRANSLATION] “Hello Rose: As per our discussion, please find attached the questions concerning Aïda Seck. Attachments: AS-04 Reference CheckGuide for Referee.doc.”
<b>Email #3</b> 08/13/2008 3:59 p.m.	Rose M’Kounga	Marième Seck	Re: Info	[TRANSLATION] “Here you go. Work on it and send it back to me. Attachments: AS-04 Reference CheckGuide for Referee.doc.”
<b>Email #4</b> 08/18/2008 10:50 a.m.	Marième Seck	Rose M’Kounga		Attachments: AS-04 Reference CheckGuide for Referee(2).doc-MCO-DOC.
<b>Email #5</b> 08/18/2008 11:57 a.m.	Marième Seck	Rose M’Kounga	[TRANSLATION] The final thing	Attachments: AS-04 Reference CheckGuide for Referee-MCO fin.doc.
<b>Email #6</b> 08/19/2008 8:32 a.m.	Marième Seck (CRA)	Gisèle Seck (NRCAN)	[TRANSLATION] Questions for review	
<b>Email #7</b> 08/19/2008 11:18 a.m.	Gisèle Seck	Marième Seck	[TRANSLATION] Re: Questions for review	[TRANSLATION] “Hello my dear, here you go. GS. Att: Revised AS-04 Reference

				CheckGuide for Referee-MCO fin.doc”
<b>Email #8</b> 08/19/2008 1:28 p.m.	Rose M’Kounga	N. M. Doyle (DFAIT)	FW: Reference Materials- Management and Consular Affairs Officer (MCO)- AS-04	[TRANSLATION] “Hello Nancy, I apologize for the delay, but like I told you, I was working on an urgent project that I was only able to deliver about 2 hours ago. . . . I hope this is OK and that it will help you make the right decision with respect to Ms. Seck. She is a very efficient person and I am sure that no one in our team at that time could forget that young woman. She was enthusiastic at work, had a sense of humour and would often make us laugh with her absolutely unbelievable jokes.”

[24] The applicant argues that the investigator failed to consider the email Ms. M’Kounga sent to Ms. Seck on June 23, 2008, and another email that she herself sent to Ms. M’Kounga on November 22, 2007. In her opinion, these emails show that Ms. M’Kounga did not ask for the references to be prepared in her place, but wanted inspiration from a prior reference that she gave regarding the applicant. The following is the content of those emails.

Email sent by Ms. M’Kounga to Gisèle Seck on June 23, 2008:

[TRANSLATION]

Hello my dear,

Listen, I replied to the reference questions for Marième for that ES-05 competition and they seemed to be OK. At the time, I sent her the email with a copy of what I sent the woman doing the hiring. I am waiting for them to call me for her AS-04. I asked her to find me that document so that I can use the same answers that I had already much improved. . . . I know that you must have it in your system at

home. Please, if you have time, could you find it and send it to me?  
Thank you. . . .

Email sent by the applicant to Ms. M’Kounga on November 22, 2007:

[TRANSLATION]

Hello Auntie Rose,  
Here is what you wrote for my competition last time. You can maybe use it as a basis for answering the questions this time.  
I will call you tomorrow morning at the office.  
Thank you.

[25] With respect, I do not see how these emails render the findings made by the investigator unreasonable. First, these emails change nothing with respect to the logical inferences the Commission drew from the emails mentioned in the table reproduced above.

[26] Furthermore, the investigation report contains, at paragraph 9, examples that illustrate the evolution of the written answers to the reference questions that were drafted and then sent by Ms. M’Kounga:

**Question 2:** How does the candidate act under pressure? / Comment le candidat agit-il lorsqu’il est sous pression?

Email #2 (N. Mastalerz-Dole to Rose M’Kounga)

Blank

Email#3 (Rose M’Kounga to Marième Seck)

Blank

Emails #4 and #5 (Marième Seck to Rose M’Kounga)

[TRANSLATION] “When under pressure, Ms. Seck demonstrates creativity and uses her organizational skills. She prepares the documents required for accomplishing the work in record time.”

Email # 7 (Gisèle Seck to Marième Seck)

[TRANSLATION] “When under pressure, Ms. Seck demonstrates creativity and uses her organizational skills. She remains calm and

patient and never loses sight of the objective. For example, she manages to prepare the documents required for accomplishing the work in record time.”

Email #8 (Rose M’Kounga to N. Mastalerz-Dole)

[TRANSLATION] “When under pressure, Ms. Seck demonstrates creativity and uses her organizational skills. She remains calm and patient and never loses sight of the objective. She establishes her priorities in order of importance and executes her work without panicking. For example, she always manages to prepare the documents required for accomplishing the work in the desired time. Otherwise and when necessary, she asks for help from her colleagues, with whom she always gets along well.”

[27] It is not unreasonable to infer from these emails that the answers evolved and that the applicant and her mother participated in preparing the answers. Ms. M’Kounga also gave different versions of the circumstances in which she said she prepared the reference. In the first version, she stated that she relied on the reference she gave for a prior process. The investigator did not accept this explanation because the questions asked in the prior selection process were different and did not measure the same competencies, and the answers given by Ms. M’Kounga were themselves different. In the second version, Ms. M’Kounga admitted that she had received [TRANSLATION] “input” from someone, but indicated that she had adopted this reference as her own.

[28] I feel that, in light of the evidence as a whole, it was reasonable for the Commission to find that Ms. M’Kounga had never been the applicant’s supervisor and that the reference submitted by Ms. M’Kounga had been written by the applicant and her mother. The Commission’s decision is reasonably supported by the evidence, and the investigation report is intelligible and well articulated. There is therefore no basis for the Court to intervene.

[29] The respondent sought costs and submitted a bill of costs in the amount of \$3,150.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES** that the application for judicial review is dismissed and costs in the amount of \$3,150 are awarded to the respondent.

“Marie-Josée Bédard”

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Judge

Certified true translation  
Janine Anderson, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1263-10

**STYLE OF CAUSE:** AIDA MARIÈME SECK v. ATTORNEY GENERAL  
OF CANADA

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** October 26, 2011

**REASONS FOR JUDGMENT:** BÉDARD J.

**DATED:** November 24, 2011

**APPEARANCES:**

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