

Federal Court



Cour fédérale

Date: 20140121

Docket: T-1344-12

Citation: 2014 FC 64

Ottawa, Ontario, January 21, 2014

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JOSE S. DIAS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is the judicial review of a decision by the Director of the Investigation Division, Safety Bureau of Passport Canada [Director] denying Mr. Dias passport services for five years.

The reason for the Director's decision is his conclusion that the Applicant was involved in the misuse of his passport by attempting to assist an "improperly documented person" to travel.

II. BACKGROUND

[2] The Applicant is a citizen of Canada and Brazil. On November 9, 2006, he married his wife Danielle, a Brazilian citizen, who also claimed entitlement to New Zealand citizenship through her grandmother.

[3] The Applicant claimed that his wife paid approximately \$5,000 US to a paralegal to obtain her New Zealand citizenship and a New Zealand passport.

[4] On November 3, 2010, the Applicant and his wife travelled to St. Maarten from Brazil and attempted to leave on November 16 to travel to Canada. The couple checked in together, the Applicant proceeded to board but his wife was denied boarding because her New Zealand passport was found to be counterfeit. The Applicant disembarked but eventually returned to Canada.

[5] The Applicant's passport was seized upon his return to Canada. He denies that he knew that his wife's passport was counterfeit. There is no evidence that he was charged, much less convicted, of committing an indictable offence in Canada or any offence in a foreign country.

[6] The Applicant was advised on January 25, 2011 that Passport Canada was investigating him for travelling with an individual who was using a counterfeit passport. The Applicant responded with a statutory declaration of his version of events.

[7] Eventually Passport Canada informed the Applicant that since his passport had expired, revocation of it was moot but that it would be recommending a 5-year refusal of passport services.

[8] In the decision letter of June 15, 2012 where the Director imposed the 5-year refusal of passport services due to misuse of his passport, the Director concluded:

- the Applicant was intercepted while travelling with his spouse who was using a counterfeit New Zealand passport;
- the payment of \$5,000 was an unreasonable price to pay for a legitimate passport;
- the counterfeit passport was issued in the wife's married name almost nine months prior to the marriage; and
- the Applicant's account of how his wife acquired her passport and his unawareness of it being fraudulent was not plausible. This was particularly so since her passport's issue date was four years prior to the date on which the wife submitted the forms to acquire her New Zealand passport.

[9] The Director did allow for the provision of limited passport services to the Applicant based on urgent, compelling and compassionate considerations.

III. ANALYSIS

[10] The key questions in this judicial review are:

- (a) whether the Director had jurisdiction under paragraph 10(2)(b) of the *Canadian Passport Order*, SI/81-86 [Passport Order] to refuse services;
- (b) whether the decision is reasonable; and
- (c) whether the decision resulted in a violation of the Applicant's s 6 *Charter* rights.

[11] The issues of jurisdiction and *Charter* right violation are to be reviewed on a standard of correctness (*Hrushka v Canada (Minister of Foreign Affairs)*, 2009 FC 69, 340 FTR 81 [*Hrushka*]).

The decision on its merits is to be assessed against a standard of reasonableness (*Sathasivam v Canada (Attorney General)*, 2013 FC 419, 230 ACWS (3d) 424).

[12] The operative provisions of the Passport Order are:

10. (2) In addition, Passport Canada may revoke the passport of a person who

...

(b) uses the passport to assist him in committing an indictable offence in Canada or any offence in a foreign country or state that would constitute an indictable offence if committed in Canada;

...

10.3 If a passport issued to a person has expired but could have been revoked on any of the grounds set out in sections 10 and 10.1 had it not expired, Passport Canada or the Minister, as the case may be, may impose a period of refusal of passport services on those same grounds, except for the grounds set out in paragraph 9(g), if the facts that could otherwise have led to the revocation of the passport occurred before its expiry date.

10. (2) Il peut en outre révoquer le passeport de la personne qui :

...

b) utilise le passeport pour commettre un acte criminel au Canada, ou pour commettre, dans un pays ou État étranger, une infraction qui constituerait un acte criminel si elle était commise au Canada;

...

10.3 Dans le cas où un passeport aurait pu être révoqué pour l'un des motifs visés aux articles 10 et 10.1 — à l'exception du motif prévu à l'alinéa 9g) — s'il n'avait pas été expiré, Passeport Canada ou le ministre, selon le cas, peut imposer une période de refus de services de passeport pour le même motif si les faits qui auraient autrement pu mener à la révocation se sont produits avant la date d'expiration.

Section 10 was amended in July 2013. These amendments are inconsequential to the issue at hand.

The above version was in force when the Director issued his decision on June 15, 2012.

A. *Jurisdiction*

[13] The Respondent grounds its jurisdiction in paragraph 10(2)(b). The authority to revoke a passport under this paragraph is predicated upon the commission of an indictable offence. The Director never said which indictable offence the Applicant committed, although the Respondent argued in this application that it was an offence under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], s 117 (as it was at the relevant time):

<p>117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.</p>	<p>117. (1) Commet une infraction quiconque sciemment organise l'entrée au Canada d'une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada.</p>
<p>(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable</p>	<p>(2) L'auteur de l'infraction visant moins de dix personnes est passible, sur déclaration de culpabilité :</p>
<p>(a) on conviction on indictment</p>	<p>a) par mise en accusation :</p>
<p>(i) for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both, or</p>	<p>(i) pour une première infraction, d'une amende maximale de cinq cent mille dollars et d'un emprisonnement maximal de dix ans, ou de l'une de ces peines,</p>
<p>(ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to</p>	<p>(ii) en cas de récidive, d'une amende maximale de un million de dollars et d'un</p>

a term of imprisonment of not more than 14 years, or to both; and

emprisonnement maximal de quatorze ans, ou de l'une de ces peines;

(*b*) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

b) par procédure sommaire, d'une amende maximale de cent mille dollars et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines.

Note s 117 was amended slightly later but is not material to this case.

[14] In interpreting paragraph 10(2)(*b*), the power to revoke is dependent on the commission of an indictable offence in Canada or an offence of similar type in another country. The words “in committing an indictable offence” mean that a precondition to revocation or service denial is the commission of an indictable offence by the subject person.

[15] There was no finding of the commission of an indictable offence. Not only did the Director not say so (he only referred to misuse of a passport), the Director has no jurisdiction to make such a finding. That type of finding is a matter of criminal law to be determined by a judge, not by a government official. The constitutional prohibition on the executive branch of government to find someone guilty of an indictable offence is too settled to require further elaboration.

[16] It is noteworthy that paragraph 10(2)(*b*) is not couched in terms of “has reason to believe” or “there are grounds to believe that an offence may have been committed” or other such words used in various other immigration provisions. Such language might well have invested the Director with the jurisdiction he thought he had. However, in the absence of such wording, the Director did not have the authority to find that an indictable offence had occurred.

[17] In addition to the above issue, in this case the Director did not identify the provision of IRPA which was to form the basis of the indictable offence. It was Respondent's counsel who argued that s 117 was the relevant provision. The Director only said that the Applicant misused his passport. That is not *per se* an indictable offence.

[18] The Applicant was entitled to know what indictable offence was being cited against him. Failure to do so is a breach of natural justice and procedural fairness. It is no answer that the Applicant should have known IRPA s 117 was the relevant provision. It is not the only provision of IRPA which could be in play (see, for example, s 118 and s 122). Moreover, the indictable offence which grounds paragraph 10(2)(b) need not be under IRPA – any indictable offence is sufficient.

[19] Lastly, on this point, the place of the offence may be critical when referring to an indictable offence. If committed in Canada, the offence must be indictable to trigger paragraph 10(2)(b). If committed outside of Canada, the act must be an offence in the country where it was committed and that offence must be indictable in Canada. The use of the Applicant's passport appears to be in St. Maarten. There is no evidence that what the wife or the Applicant did is an indictable-like offence in that jurisdiction.

B. *Reasonableness of Decision*

[20] Even if the Respondent was correct on his jurisdictional arguments, this decision does not satisfy the reasonableness criteria. Consideration of this issue includes the failure of the Director to identify the provisions of the legislation at issue.

[21] Based on the facts elicited here, the Respondent's officials had good grounds to be suspicious. The dates of the passport and the name used raise serious questions. However, the finding in respect to payment of \$5,000 fails to recognize that it was also paid to obtain citizenship not just a passport.

[22] However, even if IRPA s 117 was the applicable indictable offence found by the Director, there is inadequate analysis justifying the conclusion that the Applicant had aided and abetted the wife's attempt to enter Canada on false documents.

[23] The Director's approach was to assume that Passport Canada had a free-standing discretion to deal with misuse of passports through revocation or service denial. Such discretion has been found not to exist by Justice Hansen in *Hrushka*.

[24] Without identifying which offence is claimed to be in issue, it is not possible for the Director to show his reasons to be reasonable.

C. Charter

[25] I will follow the Supreme Court's admonition to courts not to decide *Charter* issues where it is not necessary to do so. However, I do note that the Director did ameliorate the severity of the penalty by providing limited services for urgent and compassionate circumstances. The Court was advised that the Applicant used these services from time to time to visit his wife.

IV. CONCLUSION

[26] This judicial review will be granted and the decision quashed with costs. As this was not an application before the Respondent or Passport Canada, there is nothing to remit back for reconsideration. Likewise, there is nothing to prevent Passport Canada from taking enforcement action on a properly grounded basis.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the decision is quashed with costs. As this is not an application before the Respondent or Passport Canada, there is nothing to remit back for reconsideration. Likewise, there is nothing to prevent Passport Canada from taking enforcement action on a properly grounded basis.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1344-12

STYLE OF CAUSE: JOSE S. DIAS v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 24, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** PHELAN J.

DATED: JANUARY 21, 2014

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