

Federal Court



Cour fédérale

Date: 20150227

Docket: T-905-14

Citation: 2015 FC 255

Ottawa, Ontario, February 27, 2015

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

AWALO SAIBU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of two decisions of the Passport Program Integrity Branch of Citizenship and Immigration Canada [Passport Program], dated December 24, 2013 [Decisions], which refused the Applicant's passport applications for two of his minor children.

II. BACKGROUND

[2] The Applicant applied for passports for two of his minor children on December 9, 2013. Mustak Patel [Guarantor] acted as guarantor for both of the applications.

[3] A guarantor verification was required for the applications because the forms were altered. The Guarantor told a passport officer that he signed both the forms and the photographs on December 5, 2013 between 11:00 and 12:00 at the Canadian Tire on Fort Road in Edmonton. The Passport Program's notes state that the Applicant told a passport officer that the forms and photographs were signed on December 5, 2013 after lunch when he dropped his children off at the Donald Massey School on 162 Avenue G in Edmonton.

[4] Due to the inconsistency, the passport officer asked the Applicant to submit a sworn statement regarding when the Guarantor signed the forms and the photographs. The Applicant submitted a letter in which he stated (Certified Tribunal Record [CTR] at 66):

I Saibu Awalo wish to state that I met Mustak Patel at Canadian Tire where we bought water together.

I filled two container and Mustak filled three container [sic] around noon where he signed the pictures and the guarantor section of the form on one of the carts and we both drove towards the school by my house for him to pick up the kids.

...All happened on December 5th 2013.

III. DECISION UNDER REVIEW

[5] The Decisions consist of two letters sent to the Applicant on December 24, 2013. The only difference between the two letters is the name of the child and the file number.

[6] The letters state that the Passport Program has the authority to “issue, refuse to issue, revoke, withhold, recover and monitor the use of its passports, including the withholding of any passport services pursuant to the Canadian Passport Order, SI 81-86.” The letters go on to state that the following decisions have been made (CTR at 56-57):

- The Passport Program will not proceed with action under the applicable provisions of the *Order* (Sections 9(a), 10(1) and 10.2).
- The Passport Program will not be proceeding with issuance based on the application dated December 9, 2013.
- This file will be closed and the documentation, including the photographs and passport fees, will be retained by the Passport Program in accordance with the *Passport Services Fees Regulations*.
- You may re-apply for passport services by submitting a new, duly completed application.

[7] The Applicant was invited to submit additional information to contradict or negate the information on file. On March 6, 2014, the Passport Program responded to two letters from the Applicant requesting that the Decisions be reconsidered. The letter states that inconsistencies between the Guarantor’s statements and the Applicant’s statements regarding the paperwork arose during routine verification of the application information. As a result of these inconsistencies, the Passport Program was unable to determine whether the Guarantor signed the

photographs. The letter confirmed the Decisions not to issue the children's passports and stated that the Decisions were final.

IV. ISSUES

[8] The Applicant raises a number of issues in this application. They can be summarized as follows:

1. Whether the Decisions were reasonable;
2. Whether the Decisions breached the Applicant's right to procedural fairness;
3. Whether the Decisions infringe the Applicant's rights under ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11 [Charter]*.

V. STANDARD OF REVIEW

[9] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[10] The Respondent submits that the Decisions should be reviewed on a standard of reasonableness as they involve the review of the Passport Program Officer's factual finding that the authenticity of the Guarantor's signature could not be verified: *Villamil v Canada (Attorney General)*, 2013 FC 686 at para 30 [*Villamil*]; *Kamel v Canada (Attorney General)*, 2008 FC 338 at paras 58-59 [*Kamel*], rev'd on other grounds 2009 FCA 21.

[11] The Court agrees that the jurisprudence is clear that decisions to refuse passport services are highly fact-based and are reviewable on a standard of reasonableness: *Villamil*, above; *Kamel*, above. The second issue raises questions of procedural fairness and will be reviewed on a standard of correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Exeter v Canada (Attorney General)*, 2014 FCA 251 at para 31. The third question raises a question of law for the Court to determine and no standard of review applies.

[12] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": see *Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]. Put another way, the Court should intervene only if the Decisions were unreasonable in the sense that they fall outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[13] The following provisions of the Act are applicable in this proceeding:

**Extraordinary remedies,
federal tribunals**

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[...]

Powers of Federal Court

18.1 (3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

**Recours extraordinaires :
offices fédéraux**

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

[...]

Pouvoirs de la Cour fédérale

18.1 (3) (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[14] The following provisions of the *Canadian Passport Order*, SI/87-86 [*Canadian Passport Order*] are applicable in this proceeding:

**REFUSAL OF PASSPORTS
AND REVOCATION**

**REFUS DE DÉLIVRANCE
ET RÉVOCATION**

9. Without limiting the generality of subsections 4(3) and (4) and for greater certainty, the Minister may refuse to issue a passport to an applicant who

9. Sans que soit limitée la généralité des paragraphes 4(3) et (4), il est entendu que le ministre peut refuser de délivrer un passeport au requérant qui :

(a) fails to provide the Minister with a duly completed application for a passport or with the information and material that is required or requested

a) ne lui présente pas une demande de passeport dûment remplie ou ne lui fournit pas les renseignements et les documents exigés ou demandés

(i) in the application for a passport, or

(i) dans la demande de passeport, ou

[...]

[...]

VII. ARGUMENT

A. *Applicant*

[15] The Applicant submits that the Canadian government has improperly profited by keeping the application fees and his children's photographs. He says the government should not be entitled to profit when it has not proven that the signatures were forged beyond a reasonable doubt: *R v Lifchus*, [1997] 3 SCR 320. The Applicant says that because he was not charged with a criminal offence, the government has profited on the basis of an accusation. The Applicant says that his family will be seriously affected by this accusation.

[16] The Applicant also submits that the Passport Program erred in finding an inconsistency between the Guarantor's and the Applicant's recollections of when the paperwork was signed. The Applicant submits that the Passport Program erred by not considering that it is impossible for something written to look exactly the same every time. The Applicant says that the Guarantor's declaration should have been sufficient to satisfy the Passport Program that he did in fact sign the photographs.

[17] The Applicant also submits that he was denied procedural fairness. He says that it is not fair that the Decisions are based on the fact that the passport officer did not understand his statement. As the Passport Program is responsible for selecting the officer to verify the record, it is not fair that the Passport Program has profited by selecting an officer who did not understand the Applicant.

[18] The Applicant asks that the application fees and his children's photographs be returned. He asks that the allegations of forgery on the passport files be removed. The Applicant also asks that a letter of apology be issued and included in the passport files. The Applicant also seeks indemnity for the cost of a missed flight due to the Passport Program's failure to issue the passports, pre- and post-judgment interest, and costs in this proceeding.

B. *Respondent*

[19] The Respondent argues that this judicial review should be dismissed on three grounds: the Applicant is not entitled to the relief that he seeks on judicial review; the application is moot; and, the Decisions are reasonable.

[20] The Respondent says that there is no basis under the Act for the remedies that the Applicant seeks. Damages are not available on judicial review. Further, the application fees are not paid for the receipt of a passport; rather, the fees are paid for the service of submitting an application. There is no basis in the *Passport and Other Travel Document Services Fees Regulations*, SOR/2012-253 [*Passport Fee Regulations*] to refund the fees of an unsuccessful passport applicant. Further, the Applicant is not entitled to the cost of a flight for his son for two reasons: the application did not indicate a travel date; and, the Applicant was informed that he could reapply for passports on January 2, 2014, however he did not reapply until late March 2014.

[21] The Respondent submits that the Applicant is not entitled to have Passport Canada alter his file or issue a letter of apology. The Applicant did not request the performance of either of

these actions prior to instituting the judicial review application so they cannot be framed as actions that Passport Canada has unlawfully failed or refused to perform. The Respondent also says that the Passport Program's files do not accuse the Applicant of forgery. Rather, the Passport Program found that there were discrepancies on the file such that the passport officer was unable to confirm that the Guarantor signed the forms and photographs. Further, these are not remedies that the Court is empowered to order on judicial review.

[22] The Respondent also submits that the application for judicial review is moot. A decision in this proceeding will have no practical effect on the rights of the parties as the Applicant's children have already been issued passports.

[23] The test for mootness asks "whether there is a live controversy between the parties, and if not, whether the Court should nonetheless exercise its discretion to hear the matter": *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]; *Professional Institute of the Public Service of Canada v Canada (Canadian Food Inspection Agency)*, 2012 FCA 19 at para 12. The Respondent says that there is no live controversy between the parties. The children's passports were issued, and an order quashing the initial decisions and sending them back for reconsideration would have no practical effect in these circumstances. The Applicant seeks judicial review of decisions that have already been replaced with the result he seeks.

[24] The Court may exercise its discretion to decide a case which merely raises hypothetical or abstract questions on the consideration of the following factors (*Borowski*, above, at 358-363): the requirement for an adversarial context; concern for judicial economy; and, the need for the

Court to demonstrate a measure of awareness of its proper law-making function. The Respondent says that these factors weigh in favour of the Court not exercising its discretion to hear the present matter. There are no collateral consequences that will arise from a review of the reasonableness of Passport Canada's initial Decisions. While passport applications will continue to come before the Federal Court in the future, no judicial economy will result from hearing this matter.

[25] The Applicant has also failed to establish that the Decisions were unreasonable. The applications were rejected because of the inconsistencies between the Applicant's and the Guarantor's accounts regarding when the Guarantor signed the photographs. There was no allegation that the Applicant forged the Guarantor's signature; rather, the applications were denied because the Passport Program was unable to ascertain whether the Guarantor signed the photographs.

[26] The Passport Program had the authority to seek additional information regarding the Guarantor's signature on the photographs and application forms (*Canadian Passport Order*, above, s. 8). The information provided varied on crucial information which would have allowed for verification of the Guarantor. Maintaining the integrity of the Canadian passport system is of utmost importance, and the Passport Program must be able to confirm that those who apply for passports for children are entitled to do so.

[27] In response to the Applicant's claims, the Respondent submits that the passport application procedure is not a criminal prosecution. The Passport Program was not required to

prove that the Guarantor did not sign the photographs beyond a reasonable doubt. The Respondent also submits that there is nothing to substantiate the Applicant's claim that his family will be harassed because of the potential forgery note on his file. The Respondent notes that there is no indication that the Applicant was mistreated during the processing of the second passport applications. Finally, the Respondent submits that the Decisions do not implicate ss. 7 or 8 of the *Charter*.

[28] The Respondent asks that the judicial review application be dismissed with costs in this proceeding.

VIII. ANALYSIS

[29] The Applicant has misconceived the nature of a judicial review application under s. 18.1 of the *Federal Courts Act*. In effect, he feels he has been badly treated by the Passport Program and wants the Court to punish the Respondent and award him damages for this perceived mistreatment.

[30] To begin with, judicial review of the Decisions in question is now moot. Passports have been issued for the Applicant's children and there is nothing, on these facts, to justify the Court in going further under the *Borowski* principles. This case depends upon its own facts and no judicial economy will be realized by a consideration of hypothetical or abstract questions. There are no collateral consequences that could arise from the initial refusals that require the Court to go further. In fact, at the hearing of this matter, the Applicant conceded that no purpose would be served by quashing these Decisions and sending them back for reconsideration. He told the Court

that his purpose in bringing the application was to obtain the various forms of collateral relief outlined in his written submissions.

[31] There is also no procedural fairness issue. Eventually, after following established procedure, the Risk-Based Intervention [RBI] analyst could not ascertain that the Guarantor had signed the photographs of the children. The Respondent agrees that there were some mistakes, but the central security concern was real, and eventually the RBI analyst decided he could not ascertain that the Guarantor signed the photos. The Applicant disagrees with this decision and says it is a mistake he should not have to pay for, but he has not established that it was unreasonable and falls outside the range set out in paragraph 47 of *Dunsmuir*. A positive decision would also have been reasonable, but that does not make a negative decision unreasonable (*Dunsmuir*, above, at para 47; *Khosa*, above, at para 59).

[32] The remainder of this application is an attempt to have the Court award additional collateral relief for which there is no basis in fact or law.

[33] The Applicant asks for a letter of apology for what he says were allegations of “forgery” but it is entirely unclear why an apology is required and, in any event, the Court has no power to award such a remedy on judicial review. You do not get an apology just because you do not get what you want, when you want it. In fact, the Applicant has never asked the Passport Program for an apology, so there is nothing to review on this issue. There is also no allegation of forgery on the record. The application was simply refused for legitimate security reasons. The Applicant

says this could affect future dealings. However, this is pure speculation and the Applicant had no problem in securing passports with a new application.

[34] The Applicant asks the Court to award him damages or indemnity for a missed flight. The Court has no power to make such an award on judicial review and, in any case, the Applicant did not indicate any travel date when he made the initial passport applications. He was also very slow in re-applying.

[35] The Applicant asks for pre- and post-judgment interest, but there is no monetary award to attract interest.

[36] The Applicant says that Canada has not proved the signatures were forged and so it is not entitled to keep the initial application fees or his children's photographs. What occurred has nothing to do with forgery or criminal proceedings. There has been no allegation of forgery against the Applicant and there is nothing on the record at the Passport Program to indicate forgery. Discrepancies in passport applications occur all the time. Honest people make mistakes that have to be corrected. That is all that occurred in this case.

[37] The Applicant has provided no legal justification as to why the initial fees or photographs should be returned to him. The passport applications were simply processed and refused. The governing legislation and/or regulations do not say that fees are returnable if an application is refused.

[38] As the Respondent points out:

24. Fees paid by persons making passport applications are not paid for the receipt of a passport. The fees are paid on *request of the service*. There is no basis for refunding fees paid for unsuccessful passport applications.

25. The payment of passport processing fees is governed by the *Passport and Other Travel Document Services Fees Regulations*, SOR/2012-253 (“*Passport Fee Regulations*”). These regulations are made pursuant to the *Financial Administration Act*, RSC 1985, c F-11.

26. Subsection 2(1) of the *Passport Fee Regulations* states:

2(1) Subject to section 3, every person who requests that service set out in column 1 of the schedule be performed must pay the fee set out in column 2.

27. The relevant portions of the *Passport Fee Regulations* Schedule read:

Item	Column 1 Service	Column 2 Fee (\$)
2.	Issuance of a passport to a person less than 16 years of age, other than a passport issued for official purposes, as follows: <i>(a)</i> if the request is made in Canada and the passport is to be delivered in Canada, for a passport with a validity period of 5 years	57

[emphasis added by Respondent, citations removed]

[39] Although the *Passport Fee Regulations* allow for services free of charge in certain circumstances, they are not relevant to this case and there is no basis for refunding application fees for unsuccessful applicants.

[40] The Respondent has asked for costs and the Court attempted to have the Applicant address why, if this application was dismissed, the Respondent should not have costs in the usual way.

[41] The Applicant said that the Passport Program made a mistake in processing the initial passport applications, but even if some mistakes were made, there was a legitimate security concern and I cannot say the Decisions were unreasonable. I think the most that can be said is that there was, perhaps, a misunderstanding and that the Passport Program did not fully understand what the Applicant was saying and opted, for security reasons, to err on the side of caution and request a fresh application.

[42] The Applicant also says that this application assists the public generally because he is challenging an oppressive regime that needs to be challenged. There is nothing to support this contention. The Applicant's initial passport applications were refused for perceived discrepancies. However, he was advised that he could submit fresh applications to overcome the issues in accordance with a system that is there to protect both the public and individual applicants. The Applicant misconceives his role as a public champion taking on an oppressive system.

[43] The Applicant should have taken more care in reviewing whether this application was necessary, given the fact that the passports were issued and there is nothing to suggest he would have any problems in the future as a result of the initial refusal. However, the Respondent concedes that some mistakes were made so that I can understand why the Applicant, who is self-

represented felt the need to place this matter before the Court. He should take more care in the future in bringing an application that is moot or in which the remedies he requests are not available on judicial review. However, I am not persuaded that a case has been made by the Respondent for costs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. No order is made as to costs.

"James Russell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-905-14

STYLE OF CAUSE: AWALO SAIBU v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: EDMONTON, ALBERTA

DATE OF HEARING: DECEMBER 9, 2014

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DATED: FEBRUARY 27, 2015

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ON HIS OWN BEHALF

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