Federal Court  Cour fédérale

Date: 20200706

Docket: T-1171-19

Citation: 2020 FC 746

Toronto, Ontario, July 6, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

FARIBORZ GHAHRAMAN-EBRAHIMI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated May 21, 2019 [Decision], to revoke the Applicant's passport and refuse the Applicant passport services for four years, due to reasonable grounds to believe the Applicant used his passport while committing an act that could

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be treated as an indictable offence, namely the importation of a controlled substance found in luggage by customs authorities when entering Canada from abroad.

[2] The Applicant argues that the Decision was both unfair and unreasonable. After considering the passport office's conduct, as well as the evidence submitted to it by the Applicant, I find that the review process was fair and the legal analysis reasonable. I will therefore uphold those aspects of the Decision.

[3] I do not, however, arrive at the same outcome for the remedy component due to an unreasonable mistake of fact. That mistaken fact was an important aspect of the four-year suspension on passport services. As a result, I will set aside only this limited aspect of the Decision, and remit the remedy component back for reconsideration. My reasons for this conclusion follow a brief background about the case.

II. Background

[4] The Applicant, now 75 years of age, was born in Iran and moved to Canada in 1986, subsequently becoming a Canadian citizen. On January 12, 2018, he travelled from Georgia to Toronto, using his Canadian passport. He was pulled aside for an examination of his luggage. A customs officer at secondary inspection found a substance mixed with coffee grounds in one of the Applicant's suitcases. The Applicant was arrested by the Royal Canadian Mounted Police [RCMP] for the importation of heroin, which Health Canada later tested and found to be a

combination of codeine and morphine, not heroin. A new information was later issued to reflect that the Applicant was then charged with the importation of codeine.

[5] On February 19, 2018, an investigator [Investigator] with the Passport Entitlement and Investigations Division [Passport Division] of Immigration, Refugees and Citizenship Canada [IRCC] sent the Applicant a procedural fairness letter [PFL]. The letter advised the Applicant that he was the subject of an investigation by the Passport Division into whether he had been involved in the misuse of his passport. The Investigator advised that unless new relevant information was received, the file would be forwarded for a decision. IRCC sent another letter, received by the Applicant on October 23, 2018, noting that no submissions had been received by the April 5, 2018 deadline, and a decision would be rendered soon.

[6] Applicant's counsel responded on November 5, 2018, asking for an extension of time to make submissions because English was not the Applicant's first language and, as a result, he had not understood what had been requested in the first letter. The Passport Division granted an extension, and, on March 5, 2019, the Applicant provided very short submissions consisting of three sentences regarding the airport incident. He asserted two points on the issue, namely that he (i) was a "victim", and (ii) had been "duped" (the complete extract is reproduced below).

[7] On May 21, 2019, the Decision-Maker issued the Decision to revoke the Applicant's passport and refuse passport services for four years from January 12, 2018, the date of the misuse of his passport. That Decision is the subject of this application for judicial review.

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III. Decision under Review

[8] The Decision-Maker considered several key points in reaching the Decision, including the facts that:

- on January 12, 2018, the Applicant traveled from Georgia to Toronto and used his passport to facilitate that travel;
- upon arrival, he was found to be in possession of heroin;
- he was arrested by the RCMP and charged under subsection 6(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 for importing a Schedule I controlled substance;
- in his March 5, 2019 submissions, counsel advised that the Applicant was adamant he was a victim and that he was duped, and that he was working with the RCMP to provide them with information;
- no information on file refuted that the Applicant was in possession of controlled substances when he arrived in Canada on January 12, 2018.

[9] The Decision-Maker noted that the *Canadian Passport Order*, SI/81-86, as amended [*Order*] does not require that an applicant be charged with, or convicted of, an offence in Canada or abroad, but only that the IRCC Minister has reasonable grounds to believe that the passport was used in the commission of an act or omission that would constitute an indictable offence if committed in Canada.

[10] The Decision-Maker noted the Applicant's desire to visit his siblings abroad in the event of an emergency and explained the ability to apply for a limited validity passport in urgent and compelling circumstances. However, other factors were also considered, such as the excellent reputation of Canadian passports and the seriousness of using one while committing an act that

could be treated as an indictable offence. Weighing the factors related to the mandate of the Passport Division against the hardship of refusing passport services, the Decision-Maker concluded that a refusal period of four years was reasonable.

IV. Issues and Standard of Review

[11] The Applicant submits that the Decision was invalid, inappropriate, and unlawful because the Decision-Maker denied the Applicant procedural fairness by refusing counsel's request for disclosure. Furthermore, he argues the Decision-Maker also committed errors in law by equating possession with physical custody and finding he "used his passport" in the commission of an offence. Finally, the Applicant contends the Decision-Maker erred in fact in finding he was in possession of heroin.

[12] I will accordingly address the issues in the order the Applicant raises them, namely (1) breach of procedural fairness, and (2) errors of law and fact. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court confirmed a general presumption of reasonableness with limited exceptions, including issues of procedural fairness on judicial review, noting at paragraph 23 that:

> Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

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[13] In his recent decision in *Alsaloussi v Canada (Attorney General)*, 2020 FC 364 [*Alsaloussi*], Justice Denis Gascon conducted a thorough analysis and explained why, for Passport Division reviews, *Vavilov* has confirmed that reasonableness applies.

[14] *Vavilov* also ruled that the presumption of reasonableness may be rebutted where the rule of law requires the application of the correctness standard, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and jurisdictional questions as between two or more administrative bodies (at para 17). None of these questions arise here. Therefore, the presumption of reasonableness applies, such that the Decision will be reviewed for intelligibility, justification and transparency (*Vavilov* at para 15). In other words, the pre-*Vavilov* standard in passport revocation proceedings prevails (see *Kamel v Canada (Attorney General)*, 2008 FC 338 at para 59 [*Kamel*]; *Allen v Canada (Attorney General)*, 2015 FC 213 at para 10 [*Allen*]).

[15] The presumption of reasonableness does not apply to questions of procedural fairness (*Vavilov* at para 23). For such questions, the Court asks whether a fair and just process was followed and whether the applicant knew the case to meet and had a full and fair chance to respond (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FC 69 at paras 54 and 56).

V. Analysis

A. *ISSUE ONE: Respect for the Applicant's right to procedural fairness*

[16] First, the Applicant submits IRCC breached his rights by failing to disclose the materials it relied on to make its decision. The Applicant requested disclosure of all documents obtained during the investigation and all correspondence between the Passport Division and the RCMP. In response to the request, the Passport Division directed counsel to make an Access to Information and Privacy [ATIP] request, the second reason for which the Applicant claims his rights were breached.

(1) Disclosure of the facts alleged

[17] I do not find that the Passport Division acted unfairly in its disclosure of the facts alleged. The Applicant relies strongly on *Kamel*, where the applicant sought judicial review of a decision to refuse him a passport under the *Order* on national security grounds. In its decision, this Court set out the duty of procedural fairness underlying a decision to refuse or revoke a passport. Justice Simon Noël considered the procedural guarantees to be met under the relevant authorities (including *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, and *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817). Justice Noël also noted that "the consequences of denying a passport are significant … [which] calls for the application of particularly stringent procedural guarantees, which must include real participation by the applicant in the investigative process" (*Kamel* at para 67), and concluded at paragraph 68 that procedural fairness in the passport revocation context requires:

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> … the investigation leading to the recommendation to be made to the Minister must include full participation by the individual affected. Procedural guarantees are therefore necessary: a passport applicant must be able to know exactly what the allegations against him or her are and what the information collected in the course of the investigation is, and must be able to respond to it completely, so that the report submitted to the Minister includes his or her comments.

[18] Justice Noël went on to further explain that it "is sufficient if the investigation includes disclosure to the individual affected of the facts alleged against him and the information collected in the course of the investigation and gives the applicant an opportunity to respond to it fully and informs him of the investigator's objectives … the decision-maker must have all of the facts in order to make an informed decision" (*Kamel* at para 72).

[19] This is consistent with recent case law. Earlier this year, in *Alsaloussi*, Justice Gascon acknowledged that a decision to suspend passport services requires a high level of procedural fairness, and that "in order to determine whether the Passport Division's process was procedurally fair, it suffices for the Court to be satisfied that [the applicant] was informed of the case against him and of the evidence obtained by the Passport Division" (*Alsaloussi* at para 85). Ultimately, in that case, Justice Gascon concluded that no breach of procedural fairness occurred, given that the applicant was "well aware of the substance of the case against him, and that he had multiple opportunities to respond to the evidence found by the Passport Division and to understand the case he had to meet, including the possible suspension to be imposed" (at para 91).

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[20] I find the same can be said of the Applicant here. The Passport Division sent a six-page PFL on February 19, 2018, setting out the information that the Passport Division had – namely that he was found to be in possession of heroin at the Toronto Pearson International Airport after arriving on a flight from the Republic of Georgia; then arrested and charged for importing a Schedule I controlled substance contrary to subsection 6(1) of the *Controlled Drugs and Substances Act*. The PFL also noted the conditions of the Applicant's bail. On the basis of that information, the Investigator outlined the applicable provisions of the *Order*, including paragraph 10(2)(b).

[21] The Applicant at first did not respond, and the Passport Division provided further notices and time. In fact, the Applicant waited nearly a year to respond. In that response to the PFL [PFL Response], Applicant's counsel advised: of changes to the bail conditions; that the Applicant believed he was a duped and thus a victim; of his poor health; and that he has family overseas who he would like to visit in an emergency. However, the PFL Response did not advise the Investigator that the Applicant's charge had been changed from possession of heroin to possession of codeine, despite being invited to make submissions. Granted, the Applicant did make submissions, just in an incomplete manner.

[22] This is unlike in *Kamel* where the applicant was unable to state his position fully because he did not know the facts relevant to the investigation. In this matter, conversely, the PFL did advise the "individual affected of the facts alleged against him and the information collected in the course of the investigation" (*Kamel* at para 72). The Applicant's right to procedural fairness was not breached.

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(2) Fairness in ATIP

[23] The Applicant also argues the Passport Division's suggestion that he file an ATIP request breached his fairness rights, because it should have disclosed all documents. More specifically, he submits that the ATIP regime is not a suitable alternative to first-party disclosure, particularly as the ATIP regime can be used to deny disclosure of records which contain information about an ongoing investigation (*Access to Information Act*, RSC 1985, c A-1, section 16). Further, an ATIP request requires a fee and the Applicant should not have to pay to find out the case against him (*Access to Information Regulations*, SOR/83-507, section 7).

[24] The Respondent counters that the Applicant misunderstands the administrative process, which, unlike the criminal process, does not entitle him to full disclosure, and that suggesting an Applicant resort to an ATIP request is not a breach of procedural fairness, citing *D'Almeida v Canada (Citizenship and Immigration)*, 2018 FC 870 at paras 15 and 50 [*D'Almeida*]; *Bui v Canada (Citizenship and Immigration)*, 2019 FC 440 at paras 15, 24-38 [*Bui*]; *Li v Canada (Citizenship and Immigration)*, 2013 FC 94 [*Li*].

[25] I disagree with the Respondent that *D'Almeida* or *Bui* stand for the principle that requiring an applicant to undergo the ATIP process does not breach an applicant's right to procedural fairness. Neither of these cases turn on the issue of ATIP requests. Rather, like *Kamel*, both hold that an applicant has the right to be advised of the allegations and nature of the evidence against him. In *D'Almeida*, at paragraph 50, Justice Martine St-Louis noted:

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> Moreover, the Court has confirmed previously that "the jurisprudence of this Court is not to the effect that an applicant must actually be given the document relied upon by the decision-maker, but that the information contained in that document be disclosed to the applicant so that he or she has an opportunity to know and respond to the case against him or her" (*Nadarasa* at para 25) and that the ICES report is not extrinsic evidence (*Cheburashkina* at para 31).

[26] In other words, applicants have a right to know the case against them, but not necessarily to receive copies of the documentation containing the evidence that will be used to prove that case.

[27] Similarly, in *Bui*, this Court held there was no breach of procedural fairness because the procedural fairness letter sent to the applicant expressed the case the applicant had to meet (at para 34). Justice René Leblanc also recognized that the results of the applicant's ATIP request may have allowed the applicant to make more fulsome submissions in response to the PFL, but the applicant chose not to wait for the ATIP results (at paras 35-36). This, however, did not impact the outcome and I therefore cannot agree with the Respondent that *Bui* creates any law with respect to the propriety of ATIP requests and their impact on procedural fairness.

[28] Finally, I think each side places reliance on authorities that are distinguishable. The Applicant relies on *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*], where the staunch disclosure obligations required for a fair trial arise in a criminal, not an administrative, proceeding. As stated by the Supreme Court in *May v Ferndale Institution*, 2005 SCC 82, the *Stinchcombe* principles "do not apply in the administrative context" (at para 91). The underlying

passport investigation and Decision here arise in an administrative, not a criminal context. In passport matters, applicants are not entitled to all documents and correspondence, as the case law above demonstrates.

[29] For its part, the Respondent's reliance on *Li* is also misplaced. *Li*, like *Stinchcombe*, arises in an entirely different context – a *mandamus* application for leave and judicial review, where leave had not been granted, and the Applicant brought a motion to request reasons for a supposed decision where the visa decision had not yet been made. That situation bears no resemblance to the current situation, where a PFL letter had already been issued providing notice of concerns relating to a pending passport decision.

[30] While I disagree with the framing of the above jurisprudence, I agree that the Applicant was not entitled to disclosure from the Respondent of "all documents obtained during the investigation and all correspondence between the Passport Entitlement and Investigation Division and the RCMP", as he claims. Put otherwise, he sought disclosure beyond that required by procedural fairness as consistently held in cases from *Kamel*, *D'Almeida*, *Bui* to *Alsaloussi* and others in between – namely all material facts alleged against him which led to the decision (see also *Lipskaia v Canada (Attorney General)*, 2016 FC 526 at paras 16-17; *Abdi v Canada (Attorney General)*, 2012 FC 642 at para 21).

[31] Indeed, in *Slaeman v Canada (Attorney General)*, 2012 FC 641 at para 38, another passport decision, Justice Gleason (as she then was), found that there was "ample authority" from other areas of administrative law to "support the notion that the requirements of natural

justice are met if the investigator provides a summary of the material facts that are relevant to the determination to be made", including in investigations of misrepresentation in visa applications, and summary investigation reports by the Canadian Human Rights Commission.

[32] To conclude on the ATIP issue, procedural fairness will be respected in meting out passport sanctions under the *Order* where sufficient information is disclosed to the applicant. Sufficient disclosure, in the passport context, means disclosing all the material facts.

[33] Here, the Applicant was given all material facts upon which the Decision was based. He was allowed to play a meaningful role in the decision-making process. That ends the procedural fairness issue. The ATIP request thus becomes an extraneous consideration: the Applicant was at liberty to make an ATIP request, and the Passport Division did not mislead the Applicant or breach his rights to a fair process in suggesting that he do so in this case. This is due to the fact that – as noted above – the extent of disclosure requested by the Applicant was not mandated by the requirements of procedural fairness. The fact that the ATIP process is subject to certain restrictions, such as section 16 (as noted by the Applicant), does not undermine the fair process provided by the Passport Division in this case.

B. *ISSUE TWO: Reasonability of the Decision*

(1) Considering the *mens rea* elements of possession and importation

[34] The Applicant submits that the Decision-Maker erred in law by overlooking the *mens rea* element of the offence and consequently equating possession with mere physical custody.

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Relying on *Haddad v Canada (Attorney General)*, 2017 FC 235 at para 26 [*Haddad*] and *Canada (Attorney General) v Dias*, 2014 FCA 195 [*Dias*], the Applicant argues that the Decision-Maker was required to at least consider whether all the constituent elements of the offence were present, but failed to do so. The Applicant submits that the Decision-Maker instead proceeded on the basis that, because the Applicant had drugs in his luggage, he was in possession of a controlled substance. However, the law requires that possession consists of more than physical custody, since the *mens rea* for importation is knowledge that the accused is bringing a controlled substance into the country. The Applicant also maintains that he was a victim, and has cooperated since.

[35] The Respondent counters that the Decision-Maker did engage with – but rejected – the Applicant's explanation that he was duped and determined there were reasonable grounds to believe the Applicant used his passport in committing an indictable offence. The Respondent submits that the Applicant is importing criminal law aspects into administrative law. Further, the Applicant has cited *Haddad*, which interpreted a previous version of the *Order* that did not permit decision-makers to act on a "reasonable grounds to believe" standard, and *Dias*, which concerned a repealed section of the *Order*. The Respondent submits that the Applicant's denial of knowledge does not need to be accepted by the authorities and there is no other evidence to support his denial. The Respondent notes there is also no evidence to support that the Applicant has cooperated with the police.

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[36] The problem with the Applicant's argument is that the law has changed since *Haddad* and *Dias*. In the version of the *Order* in force from December 2013 to June 2015, under which both of those cases proceeded, paragraph 10(2)(b) stated:

> (2) In addition, the Minister 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;
>
> [Emphasis added.]

[37] Comparatively, in the current version and the version in force at the time the underlying decision was made, paragraph 10(2)(b) states:

> (2) In addition, the Minister may revoke the passport of a person who
>
> …
>
> (b) the Minister has reasonable grounds to believe uses the passport 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;
>
> [Emphasis added.]

[38] The notable change, as emphasized above, is the addition of the words "reasonable grounds to believe" into the current version of paragraph 10(2)(b). *Dias* arose under the earlier version of paragraph 10(2)(b), which did not include the words "reasonable grounds to believe".

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[39] Neither does *Haddad* assist the Applicant. *Haddad* addresses a different section in the prior version of the *Order*, namely paragraph 9(1)(b), which relates to being charged with an indictable offence in Canada. Paragraph 9(1)(b) of the *Order* states:

> 9 (1) 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
>
> …
>
> (b) stands charged in Canada with the commission of an indictable offence;

[40] On the other hand, paragraph 10(2)(b), as noted above, has since been amended and now only requires the Minister to have "reasonable grounds to believe". Like *Dias*, I therefore cannot see the applicability of *Haddad* to the present circumstances.

[41] Earlier jurisprudence of this Court reflected that there was a conflict with respect to whether an individual needed to be convicted in order for the Minister to invoke paragraph 10(2)(b) of the *Order* (*Haddad* at para 25; *Allen* at paras 23-29). But that jurisprudence also recognized that Parliament could clear up the ambiguity. As Justice Fothergill stated in *Allen* at paragraph 32:

> As noted previously, the *Order* is not a statute but executive legislation issued by the Governor-in-Council. Given the conflicting jurisprudence of this Court, it would be unwise for Passport Canada to rely on s 10(2)(*b*) of the *Order* as it presently stands to refuse a passport or temporarily deny passport services in the absence of a criminal conviction, either in Canada or in a foreign state. The ambiguity in s 10(2)(*b*) could be resolved by amendment of the *Order* by the Governor-in-Council. Failing that, the conflicting jurisprudence of this Court must be settled by a decision of the Court of Appeal.

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[42] Similarly, when *Dias* was before this Court, Justice Phelan observed in *Dias v Canada (Attorney General)*, 2014 FC 64 at paragraph 16 that:

> 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.

[43] The amendment since implemented by the Governor in Council is thus clearly designed to clarify the law. Under the new wording of paragraph 10(2)(b), the decision-maker may find that an individual, on the standard of reasonable grounds to believe, used the passport to commit an indictable offence. No conviction is necessary to meet this standard. Unlike in a criminal trial, the Passport Division's decision-maker does not need to establish all the constituent elements of the offence beyond a reasonable doubt. Yet, s/he must still consider the elements of the offence and be satisfied on the lower standard of "reasonable grounds to believe" that the individual used the passport in committing an indictable offence in Canada.

[44] In the immigration context, the standard of "reasonable grounds to believe" has been found to be more than a suspicion, but less than a civil balance of probabilities standard (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114 [*Mugesera*]). It exists "where there is an objective basis for the belief which is based on compelling and credible information" (*Mugesera* at para 114). This analysis still applies, and was most recently restated by the Federal Court of Appeal in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at para 89.

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[45] Decisions in the immigration context which apply the "reasonable grounds to believe" standard – albeit under different statutory provisions (criminal inadmissibility, for instance) – suggest that while the facts before the decision-maker must support the elements of an offence on the reasonable grounds to believe standard, the decision-maker is not required to conduct the same rigorous analysis of each element as would be required in the criminal context. For instance, *Singh v Canada (Citizenship and Immigration)*, 2019 FC 946 [*Singh*] judicially reviewed the inadmissibility finding of a visa officer regarding a prospective permanent resident under the grounds of criminal inadmissibility. This context, obviously different than that of refusal of passport services, is still informative in terms of the reasonable grounds to believe.

[46] In *Singh*, Justice Fothergill determined that the paragraph 36(1)(c) inadmissibility analysis under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] required a two-component determination, namely (a) an illegal act was committed abroad, and (b) whether the act is equivalent to an offence in Canada punishable by a maximum of at least 10 years imprisonment (*Singh* at para 16). Justice Fothergill wrote at paras 22-23 of *Singh*:

> The facts underlying admissibility findings include facts "for which there are reasonable grounds to believe that they have occurred" (IRPA, s 33). This evidentiary standard requires "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities". Reasonable grounds will exist "where there is an objective basis for the belief which is based on compelling and credible information" (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114).
>
> I am satisfied the Officer reasonably concluded that Mr. Singh admitted the elements of the offence of aiding or abetting torture. It was not necessary for Mr. Singh to be convicted of an offence in India (*Magtibay v Canada (Minister of Citizenship and Immigration)*, 2005 FC 397 at para 10; *Bankole v Canada*

> *(Citizenship and Immigration)*, 2011 FC 373 at para 44). Nor was it necessary for him to have personally administered beatings or hung people upside down in order for him to be a party to the offence. There was sufficient evidence before the Officer, applying the relatively modest threshold of reasonable grounds to believe, to support the conclusion that prisoners were subjected to these forms of abuse by the Punjab Police, and that Mr. Singh aided and abetted this practice.

[47] Indeed, the second part of the inadmissibility analysis in *Singh* – whether the elements of the Canadian offence are equivalent to the Canadian offence – requires a thorough exploration of the elements of the offence. Therefore, the determination of the two components – (a) reasonable grounds to believe a criminal act was committed, and (b) if equivalent to a Canadian offence – are distinctly different: the first requires a modest threshold of proof, and the second requires a more thorough exploration of the elements of the offence.

[48] Turning back to the passport context, I note that in *Dias*, Justice Stratas, writing for the Court of Appeal, noted at paragraph 8 that in some circumstances, mere disbelief could lead to reasonable grounds to believe:

> The Director did disbelieve what Mr. Dias told him in response to his letter of invitation to make submissions. But disbelief in what Mr. Dias said, without more, does not support a finding that Mr. Dias himself committed the section 117 offence, *i.e.*, that all elements of the section 117 offence are present**.** In some circumstances, disbelief might cause the Director to have reasonable grounds to believe or to develop suspicions that a section 117 offence has been committed. But the *Canadian Passport Order* does not allow the Director to act on the basis of reasonable grounds or suspicions.
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> [Emphasis added.]

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[49] Considering the relevant jurisprudence and principles, the introduction of the "reasonable grounds to believe" standard into paragraph 10(2)(b) of the *Order* means that a conviction is no longer required. A less stringent "reasonable grounds to believe" evidentiary threshold is now law. While the decision-maker cannot simply disregard the elements of an offence, the "reasonable grounds to believe" threshold – being more than a mere suspicion, but less than a balance of probabilities – is a modest one. Compelling and credible information in support of the elements of an offence will suffice. These elements may not be named explicitly or precisely so long as the evidence supports a decision-maker's conclusion.

[50] Thus, for an offence with a *mens rea* component, such as the offence of importing a Schedule I drug, failure to give consideration to the element of intention would be an error. However, whereas certain jurisprudence under the former *Order* required a conviction and its standard of beyond a reasonable doubt, the current Order's amended language of "reasonable grounds to believe" – applicable to the Applicant – requires less.

[51] Turning back to the facts of this case, the Decision-Maker pointed to the evidence of what appeared to be a Schedule I controlled substance in the Applicant's luggage, and the accompanying charge for heroin importation. The only countervailing evidence before the Decision-Maker was the Applicant's brief submission to the Passport Division contained in his PFL Response, from his previous lawyer. In it, he provided an explanation of three short lines that he was both a "victim" and "duped". While his current lawyer points out that these statements were not contradicted, I note that the Applicant did not provide an Affidavit or even a personal statement to the Passport Division.

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[52] The PFL Response was weak, at best, as it lacked any meaningful explanation regarding why or how the Applicant was (i) a victim, or (ii) duped. Neither of these assertions precisely contradict that the Applicant knew he was in possession of a controlled substance. The Applicant's commission of the offence was not otherwise refuted in his submissions to the Passport Division. In addition, the Applicant did nothing to update the Investigator that the information containing a charge for heroin had been replaced with one for codeine (another drug listed in Schedule I to the *Controlled Drugs and Substances Act*).

[53] Given the evidence before the Decision-Maker, along with the muted response to the PFL, I find that it was ultimately open to the Decision-Maker to find that there were reasonable grounds to believe the Applicant used his passport in committing an indictable offence. The Decision-Maker neither ignored the "*mens rea*" element, nor had to use those precise words.

[54] The Applicant's other submission in regard to the drug charge was that he was cooperating with the RCMP. Apart from the evidence on that point being limited, as pointed out above, his cooperation, even if accurate, does not undermine the reasonability of the Decision as to whether the Applicant committed the offence.

(2) Reasonable statutory interpretation

[55] The Applicant submits that his travel was immaterial to the offence in question and therefore he never "used" his passport in committing an indictable offence. The Applicant

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submits that other reported cases concerning paragraph 10(2)(b) deal with travel-related offences like assisting others to travel on false documents.

[56] The Applicant further argues that paragraph 10(2)(b) requires a specific intention by an individual to use a passport to commit an offence, rather than the incidental usage of a passport: one might refer to this as a "passport offence", such as selling or altering a passport. This becomes clear, according to the Applicant, by considering the French version of the *Order*: that version shows the impugned act must focus on the passport.

[57] I agree with the Applicant that the French version of the *Order* is useful in understanding the legislators' intent. Justice Marie Deschamps of the Supreme Court outlined the interpretation of bilingual statutes in *R v SAC*, 2008 SCC 47 at paras 14-16, and then in *Caisse populaire Desjardins de l'Est de Drummond v Canada*, 2009 SCC 29 at para 84. In essence, there are two steps to interpreting bilingual statutes. First, one must identify the shared meaning of the French and English versions. Second, one must establish whether that shared meaning is consistent with Parliament's intent.

[58] Here, of course, we are dealing with an Order in Council, an exercise of government power issued under the royal prerogative, rather than a Bill of Parliament (for a detailed explanation of the nature of the *Order*, see *Khadr v Canada (Attorney General)*, 2006 FC 727 at paras 79-94). But the *Order* remains a statutory instrument and the review of authority provided under such instruments, is analogous to the substantive review of statutory powers (see Jennifer Klinck, "Modernizing Judicial Review of the Exercise of Prerogative Powers in Canada" *Alberta*

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Law Review (2017) 54:4 at 1035. Thus, the same principles of statutory interpretation apply to the *Order* as they would to Parliamentary legislation, as has been demonstrated in the passport context (see, for instance, *Hrushka v Canada (Foreign Affairs)*, 2009 FC 69 at paras 16-18).

[59] In determining a shared meaning, there are three possibilities, namely where (i) the versions are irreconcilable, (ii) if one is ambiguous and the other is clear, the shared meaning will be the latter, and (iii) if one has a broader meaning than the other, the common meaning will favour the more limited meaning.

[60] The English version of paragraph 10(2)(b) states:

> (2) In addition, the Minister may revoke the passport of a person who
>
> …
>
> (b) the Minister has reasonable grounds to believe uses the passport 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;
>
> [Emphasis added.]

[61] In French, paragraph 10(2)(b) states:

> (2) Il peut en outre révoquer le passeport de la personne:
>
> …
>
> b) s'il a des motifs raisonnables de croire qu'elle 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;
>
> [Emphasis added.]

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[62] The English version's wording "uses the passport in committing" is ambiguous as to whether it means that the passport must be used for the commission of the offence or whether the passport and the offence may be only tangentially related.

[63] The French version, on the other hand is plain and unequivocal. It states, "utilise le passeport pour commettre" meaning that the person "uses the passport to commit". "Pour" in this sense means "for the purposes of", or "for the objective of".

[64] Therefore, no ambiguity exists in the French version: the passport must be used to commit an indictable offence in Canada. Put otherwise, if the passport is used "for the purposes of committing" an offence, the conduct would be caught. This interpretation captures both possible meanings of the English provision described above. As such, it satisfies the second possibility in the first step of bilingual statutory interpretation described above.

[65] While I agree with the Applicant that the French version of the provision is clearer, an offence caught by paragraph 10(2)(b) of the *Order* does not need to be a "passport offence", such as manufacturing a counterfeit passport, or facilitating entry of someone by giving them a passport. In my view, the use of the passport may simply facilitate the impugned unlawful act, and thus be incidental to it. It need not be the subject matter of the alleged indictable offence.

[66] Here, the Applicant was found with a Schedule I controlled substance in his suitcase when he arrived at Toronto Pearson International Airport; he was therefore charged with the importation of a Schedule I controlled substance contrary to subsection 6(1) of the *Controlled*

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Drugs and Substances Act. The Applicant argues this is a different circumstance from other cases involving the application of paragraph 10(2)(b), where the passport formed part of the offence. Examples include assisting others to travel using false documents (*Desmond De Hoedt v Canada (Citizenship and Immigration)*, 2014 FC 829; *Vithiyananthan v Canada (Attorney General)*, [2000] 3 FC 576, 2000 CanLII 17124 (FCTD)); tampering with a valid passport (*Siska v Passport Canada*, 2014 FC 298); and permitting third parties to unlawfully use a valid passport (*Gomravi v Canada (Attorney General)*, 2015 FC 431).

[67] Certainly, this Court has found the application of paragraph 10(2)(b) reasonable in these "passport offences", where the passport itself was the key element of the impugned conduct, rather than an incident thereto. That said, there is nothing in paragraph 10(2)(b), whether looking at the French or English version, that limits its application to pure "passport offences": the provision can capture conduct where the use of the passport is incidental to an alleged crime, such as (in this case) the importation of a Schedule I listed substance. Importation requires transit across borders. If that indeed occurred – and the Decision-Maker found reasonable grounds to believe that it did – then the Applicant accomplished that transit by using his passport. The passport was not unrelated or immaterial to the importation – the passport facilitated it.

(3) Error in factual foundation

[68] The Applicant argues that the Decision-Maker based the Decision on an erroneous finding of fact: that the Applicant was in possession of heroin. The Applicant contends that this mistake is relevant to the reasonableness of the four-year refusal of passport services, because

heroin is one of the most addictive and destructive drugs in the world (*R v Sidhu*, 2009 ONCA 81 at paras 12-14), whereas codeine and morphine are far weaker (*R v Paper*, 2010 ONCJ 88 at paras 35-39 [*Paper*]). According to the Applicant, this mistake would have affected the period of suspension of passport services.

[69] I agree with the Respondent that the Applicant had an opportunity to advise the Investigator of changes in his charge (from heroin to codeine) in the PFL Response, but did not do so. The Applicant's lawyer conceded as much. Being from the same firm, the Court appreciates this frankness in counsel. I agree – the Applicant had ample opportunity both before and after receipt of the PFL to update the Passport Division.

[70] Just as the Applicant erred in failing to update the Passport Division, so too did the Investigator fail to obtain the facts and complete the inquiries made to the RCMP and Courthouse about the status of the proceedings. Rather, the Investigator's questions about the charges were left unanswered. Had the Investigator pursued them, s/he would have learned that the charges were not as understood – that the heroin information had been replaced. For greater information clarity, I will briefly review the miscues that led to the errors from both sides.

[71] In the March 5 PFL Response, Applicant's counsel devoted the majority of the short, two-page letter to changes in bail conditions. As mentioned previously, the only explanation of the actual offence comprised three short sentences:

> Since his arrest, Mr. Ebrahimi has adamantly asserted that he himself is a victim and was duped. As such, Mr. Ebrahimi has been

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> working with the RCMP and provided information that has been of assistance. At the moment, the investigation is still continuing.

[72] Less than 48 hours after receiving the PFL Response, the Investigator contacted the RCMP constable who had advised the Passport Division of the Applicant's arrest for the "smuggling of suspected heroin by CBSA weighing approximately 7 kg". The same constable subsequently answered questions from the Passport Division and provided updates on the matter, including from the Court proceedings (such as a copy of the Recognizance of Bail).

[73] The Passport Division's Investigator then e-mailed the constable stating that "I just spoke to the courthouse in Brampton and they informed me that the case was withdrawn". The Investigator continued to enquire and the constable replied "I have not been informed that the case has been withdrawn". The constable thereafter provided upcoming Court dates when the Investigator asked.

[74] Of course, the case had substantially changed. On March 18, the charge for heroin was withdrawn, and replaced with a new charge for the importation of codeine. At the time of the Decision, that Schedule I (codeine) charge remained. I would add that, according to counsel at the judicial review hearing, the charges have since been suspended. However, that did not occur until after the Decision, and therefore, the Decision-Maker had no such evidence in the record.

[75] Ultimately, this "comedy of errors" resulted in a factual underpinning for the Decision tarnished by a significant error – namely, pending charges for the importation of heroin when

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that simply was not the case. The Passport Division inquired into the matter with the Court and RCMP constable and received the technically correct information from both – that the case had been withdrawn (from the Court), and that the proceedings were ongoing (from the RCMP). And Applicant's counsel only provided updated information on bail conditions, and failed to then update the Passport Division regarding the new charge. To compound the situation, the Applicant himself apparently had problems communicating in English.

[76] While this scenario has the elements that a playwright could adopt for a script, this comedy of errors was no laughing matter for the Applicant. The result to him was a restriction on his ability to travel internationally for four years. This was a particularly difficult burden to bear for the Applicant, given his age (75), his health and family circumstances, and that he lives alone in Canada, with six siblings abroad.

[77] The Applicant and his counsel had every opportunity to update the Passport Division, which I have already determined did not breach the Applicant's procedural fairness rights. However, this does not remove the fact that the Decision-Maker had an inaccurate factual matrix upon which s/he relied on when making the decision to suspend passport services for four years. As stated by Justice Noël in *Kamel* at paragraph 72, "the decision-maker must have all of the facts in order to make an informed decision". Here, due to a comedy of errors, the Decision-Maker did not have all the facts. A correct matrix may well have lessened the suspension period. I note that imposing a suspension on passport services engages a person's mobility rights protected by section 6 of the *Canadian Charter of Rights and Freedoms*. As stated in *Alsaloussi*,

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a decision to suspend a passport "will be unreasonable if its impact on a *Charter* right is disproportionate" (at para 53).

VI. Remedy

[78] *Vavilov* notes that for judicial review under a reasonableness standard – as is the case here – it is ordinarily appropriate to remit the matter for reconsideration with the benefit of the Court's reasons (at para 141). In this case, a significant period of suspension has already taken place due to the passage of time since the Decision. Given all the circumstances that have taken place since the airport incident occurred well over two years ago, and mindful of the expertise and role of the Passport Division in determining suspension periods, I do not find this to be a case where a particular outcome is inevitable, or that remitting the matter would serve no useful purpose (*Vavilov* at para 142; *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at pp 228-30). I will accordingly return the case to the Passport Division, to reconsider only the remedy portion of this matter in light of these Reasons.

VII. Costs

[79] The parties agreed that neither side would seek costs. As a result, no costs will issue.

VIII. Conclusion

[80] I do not find that that the Respondent acted unfairly or decided unreasonably in the refusal of passport services. IRCC did not breach the Applicant's procedural fairness right when

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it declined to disclose all documents obtained during its investigation. The Applicant was given an opportunity to know the case he had to meet in the PFL sent to him, and had an adequate opportunity to provide his responding submissions. I also find the Decision-Maker's interpretation and application of the law to be intelligible, justified, and transparent, and thus reasonable. The Decision-Maker's application of paragraph 10(2)(b) on the basis of "reasonable grounds to believe" that his passport was used "while committing an act that would be treated as an indictable offence" was both logical and rational in light of the facts and the evidence before the Decision-Maker. Simply put, those parts of the Decision add up.

[81] However, I find the remedy meted out by the Decision-Maker to have been unreasonable because of a fundamental error in fact – mistaking the pending charge at the time of the Decision for importation of heroin. The charge, in fact, was for importation of codeine. I will consequently order that the matter be reconsidered only with respect to the length of passport suspension in accordance with these Reasons.

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JUDGMENT in T-1171-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed in part.
2. The Decision of the Passport Division is set aside in part and the matter is remitted to a different decision-maker for reconsideration and redetermination of only the issue of the period of refusal of passport services, in accordance with these Reasons.
3. The Passport Division shall make a decision within 60 days of the date of this judgment.
4. No costs will issue.

"Alan S. Diner"
Judge

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1171-19
STYLE OF CAUSE:	FARIBORZ GHAHRAMAN-EBRAHIMI V ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VIA VIDEO CONFERENCE AT TORONTO, ONTARIO
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JUDGMENT AND REASONS:	DINER J.
DATED:	JULY 6, 2020

APPEARANCES:

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