Federal Court  Cour fédérale

Date: 20120112

Docket: T-82-11

Citation: 2012 FC 41

Toronto, Ontario, January 12, 2012

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

BABATOPE FELIX ADEWOLE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision made by an Adjudicator of Passport Canada dated December 23, 2010, wherein the Applicant's Canadian passport was revoked and passport services for him were to be withheld for a period of five (5) years. For the reasons that follow, I am dismissing this application.

[2] The Applicant is a Canadian citizen of Nigerian origin. He was detained while travelling through Heathrow Airport in London, England and was found to be in possession not only of his Canadian passport, but sixteen Nigerian passports strapped to his leg, and a Nigerian identity card which was not his. He was charged with possession of the identity card and seven of those passports which were believed to be forged. He entered a voluntary plea of guilty, the nature of which I will discuss later. He was convicted and sentenced to two years' imprisonment in the United Kingdom. He returned to Canada, where he reported that his Canadian passport had been lost. Subsequently, he stated that he found it while attending to his lawn, and that it was badly damaged. He sought a replacement.

[3] By a letter dated October 23, 2009 signed by J. Francoeur, Adjudicator, the Applicant was advised that a new passport would not be issued and that passport services would be withheld from him for a period of five (5) years. The Applicant sought judicial review of that decision. By an Order issued on consent (T-1931-09, March 29, 2010) this Court set aside that decision and sent it back for further consideration based on additional submissions from the parties. It is to be noted that the Order did not require that a different person consider the matter. The evidence before me in the present case is that there is only one person who regularly considers these matters in any event.

[4] The matter was reconsidered, resulting in the December 23, 2010 decision under review. That decision is signed by the same J. Francoeur.

[5] The sole ground upon which the Applicant seeks judicial review is that of bias, namely that the same person who made the first decision also made the decision under review. I repeat what the

Applicant set out in his Memorandum of Argument which was signed by him personally; no lawyer's name being apparent in the Applicant's Application Record:

> *POINTS IN ISSUE*
>
> *Was there a breach of the principles of natural justice*
>
> *4. To my mind there has been a breach of the principles of natural justice in my case. This is because I think that Adjudicator J. Francoeur is biased against me and that there might be real apprehension of bias on the part of the adjudicator. In my earlier application for judicial review of his decision (which was set aside on mutual consent) I had alleged that he did not invite me to make representation neither did he make any attempt to hear from me before he upheld the Passport Canada's recommendations to revoke my passport and to withhold me [sic] passport services. Therefore, it is only fair if a different adjudicator was invited to adjudicate the present matter.*
>
> *5. The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in Committee for Justice and Liberty v. National Energy Board, [1978] 1 S.C.R. 369, at p. 394:…the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…[T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."*
>
> *6. According to Justice Phelan in Khadr v. Canada (Attorney General) 2006 FC 727, [2007] 2 F.C.R. At paragraph 4 he stated: "For the reasons which follow, I have concluded that, in this case, every citizen is entitled to be treated, procedurally at least, in the manner in which the government says his or her rights or interests will be dealt with. It is part of our law of procedural fairness that in order to know the case one must meet, one is entitled to know who will decide and on what criteria the decision may be based".*

> *7. It is my belief that there is no way Adjudicator J. Francoeur would be expected to decide the matter in my favour .His earlier decision against me has already been set aside. Justice should not only be done, it should be manifestly and undoubtedly be seen to be done. And this is not the case here due to this serious breach of the principle of natural justice. The Passport office's position that there is only one adjudicator does not hold water in my view. The question that arises is what if J. Francoeur goes on vacation?, what if he is sick or indisposed?. Adjudicator J. Francoeur should have recused himself from adjudicating on the present matter. It appears that the adjudicator approached the matter in a spiteful and resentful manner and simply took the opportunity to justify his original decision which has been set aside.*
>
> *8. I submit that an informed person, viewing the matter realistically and practically, would conclude upon reading the decision of the adjudicator that he did not approach the matter impartially, whether consciously or unconsciously. This raises an apprehension of bias and breaches my right to an impartial hearing. Even if it is conceded that sending back the issue to the same adjudicator does not in itself create an apprehension of bias, however, the adjudicator's second decision must also be reviewed when considering an apprehension of bias on the part of the adjudicator. A review of his decision clearly shows that he did not look at the matter unprejudiced.*

[6] There is no dispute between the parties as to the test for bias. Both Counsel (the Applicant was represented by Counsel at the hearing before me) referred to the decision of Rothstein JA (as he then was) for the Federal Court of Appeal panel in *Gale v Canada (Treasury Board)* 2004 FCA 13 at paragraph 18:

> *18 We agree with the respondent that, in the circumstances of this case, the matter should be remitted to the same Adjudicator. At paragraph 12:6320 of Donald J.M. Brown & John M. Evans, Judicial Review of Administrative Action in Canada, looseleaf (Toronto: Canvasback, 2003), the learned authors state:*

> *When the tribunal reconsiders a matter either on its own motion or following judicial review it must, of course, comply with the duty of fairness. ... And unless a court orders otherwise, while the same persons who decided the matter on the first occasion may normally also rehear it, they should not do so where they were earlier disqualified for bias, or if for any reason, there is a reasonable apprehension that the original decision-maker is not likely to determine the matter objectively.*
>
> *There is no suggestion here of bias. Nor is there any reasonable apprehension of bias. The decision-maker in this case was the Vice-Chairman of the Public Service Staff Relations Board. There is a presumption of integrity and impartiality in such a decision-maker and in the absence of some evidence to the contrary, we can see no reason why the matter may not be redetermined by him (See I.L.W.U. v. British Columbia Maritime Employers Association (1987), 81 N.R. 237 at paragraph 6 (F.C.A.); Deigan v. Canada (Industry) (2000), 258 N.R. 103 at paragraph 3 (F.C.A.)).*

[7] Thus, the simple fact that the same adjudicator dealt with the matter at hand for a second time does not in and of itself give rise to a reasonable apprehension of bias. There was nothing in the Applicant's written Memorandum or elsewhere in his Record to raise or suggest some evidence or issue that would give rise to a reasonable apprehension of bias.

[8] At the hearing before me Applicant's Counsel made an argument that the plea of guilty in the United Kingdom was in respect only of possessing an identity card belonging to someone else, not to a plea of possessing other person's passports or false passports. This resulted in a conviction under section 25(1)(c) of the United Kingdom *Identity Cards Act*, 2006 which relates only to the possession of another person's identity card. Counsel argued that the Canadian *Criminal Code*, RSC 1985, c. C-46, section 57 contains no equivalent provision; section 57 relates to forged passports. Counsel argues that the decision under review repeatedly refers to a conviction for seven counts

relating to possession of fraudulent passports, which is equivalent to a section 57 *Criminal Code* conviction in Canada. This, Counsel argues, is bias.

[9] A very careful examination of the documents relating to the United Kingdom conviction, some of which is poorly copied, does reveal that Applicant's Counsel is correct; the conviction based on the Applicant's guilty plea is for possession of someone else's identity card, and it is not an offence which is equivalent to one under section 57 of the Canadian *Criminal Code*.

[10] However, the decision-maker cannot be faulted for such confusion. The Applicant himself in a letter dated August 25, 2010 to Passport Canada states on the first page:

> *It would interest you to know that one of the passports which I got a conviction for as a counterfeit passport…*

[11] The letter of December 23, 2010 at page 6 states that the Applicant did not dispute that the finding of guilt in the United Kingdom corresponded to a section 57 offence:

> *The equivalency test conducted to determine whether the offence committed abroad corresponds to the indictable offence described at section 57 of the Criminal Code of Canada is clearly positive. <u>This has not been disputed in the representations received</u>. It is the finding of guilt that is disputed more or less as not having been reached following due process. This reasoning will be saved for when the subjective test is performed.*
>
> *(Emphasis added)*

[12] At page 8 of the decision, it is pointed out that the Applicant offered no evidence to respond to the allegations that he was found guilty of seven counts of possession of counterfeit passports:

> *No evidence was offered in the course of this administrative process to respond to the allegations that you were found guilty of seven (7) counts of possession of counterfeit passports and passports belonging to other persons. Even if such elements had been submitted to the Bureau, the difficulty would have been for the undersigned to retry a matter that had to be debated in the appropriate fora abroad.*

[13] Thus, I find no basis for any finding that the decision-maker was biased. He may have been mistaken or misled by the Applicant, but he was not biased.

[14] Bias was the only ground raised. Nowhere in the Applicant's record is any issue as to mistake in fact or law raised. Applicant's Counsel attempted to squeeze the argument into one of bias. I have rejected that argument.

[15] To the extent that Applicant's Counsel wishes now, for the first time at the hearing, to raise an issue of mistake in fact or law, I reject that argument as having been raised too late. I adopt the reasoning of Décary J as repeated by Pinard J in *Mishak v Canada (Minister of Citizenship and Immigration)* [1999] FCJ, No 1242, 173 FTR 144, at paragraph 6:

> *6 Counsel for the applicants' last-minute attempt before me to add to her factum and argue a well-founded fear of persecution in Israel for each of the applicants met with a strenuous objection by the respondent, who referred in particular to the judgment of the Federal Court of Appeal in Sola Abel Lanlehin v. M.E.I. (March 2, 1993), A-610-90. In that case, Mr. Justice Décary said the following:*

> *This case raises disturbing questions as to the validity of the decision of the Refugee Division, and specifically as to the participation of one of the two members in the reasons for the decision. These questions were not, however, raised by the appellant in his memorandum, and it may be that, had the respondent known in time, she would have been able to explain the contradictions that are apparent on the record. At this point, we cannot assume that the decision is invalid and we are of the opinion, in the circumstances, that the appeal should be dismissed.*

[16] Therefore, the application is dismissed with costs at the Column III level.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. The Respondent is entitled to costs at the Column III level.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-82-11
STYLE OF CAUSE:	BABATOPE FELIX ADEWOLE and ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 10, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	January 12, 2012

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