

Federal Court



Cour fédérale

Date: 20120525

**Dockets: T-671-11
T-672-11
T-673-11**

Citation: 2012 FC 642

Ottawa, Ontario, May 25, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

Docket: T-671-11

SHUKRI ABDI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AND BETWEEN:

Docket: T-672-11

FADUMA HASHI

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-673-11

AND BETWEEN:

HALIMO ABSHIR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] At the outset of the hearing in this matter, counsel for the parties made an oral motion to amend the styles of cause in these three files to substitute the Attorney General of Canada as the respondent in light of the requirements of Rule 303 of the *Federal Courts Rules*, SOR/98-106. The motion is granted; the appropriate respondent in these matters is the Attorney General of Canada.

[2] These three files involve judicial review applications seeking to set aside the decisions of an adjudicator at Passport Canada, issued on March 18, 2011, in which the adjudicator upheld the revocation of the applicants' passports and refused passport services to them for five years. Because the decisions rendered in the three files are nearly identical and the same circumstances gave rise to the three decisions, these reasons deal with all three applications for judicial review, and a copy of these reasons shall be placed in each file.

[3] The applicant, Shukri Abdi, is originally from Somalia, and obtained Canadian citizenship in 1994. The applicant, Halimo Abashir, is Ms. Abdi's daughter and was 17 at the time the relevant events took place. The applicant, Faduma Hashi, is Ms. Abdi's friend.

[4] In July 2008, the three women took a trip to Egypt and Kenya to visit relatives and to meet a man with whom Halimo had been corresponding over the Internet. When en route back to Canada, Shukri Abdi, Faduma Hashi and a third woman (whom they claim was Halimo but whom the Canadian Border Services Overseas Migration Integrity Officer [MIO] concluded was an impostor) were stopped and questioned by the MIO at the airport in Cairo, Egypt. Because the MIO determined that the individual using Halimo's passport was an impostor, he turned the women over to the Egyptian authorities, who returned the entire party to Kenya (where their return journey had commenced). The Canadian High Commission in Nairobi seized the applicants' passports and issued them temporary travel documents to return to Canada.

[5] The matter was referred to Passport Canada for investigation. The Passport Canada investigators recommended that the applicants' passports be revoked, that their pending applications for replacement passports be denied and that future passport services also be denied to all three applicants for a period of five years, taking the position that the investigation had established that Ms. Abdi and Ms. Hashi had been involved in a human smuggling incident, that Halimo had improperly allowed her passport to be utilized by a third person, and that all three had provided false statements to Passport Canada when they applied for temporary travel documents and to have their passports re-issued. In accordance with its usual procedures, Passport Canada referred the matter for

determination by a Passport Canada adjudicator. The adjudicator agreed with the investigators' recommendations in the three decisions that are the subject of these judicial review applications.

[6] In his written materials, counsel for the applicants argued that the decisions should be set aside for the following reasons:

1. The adjudicator breached the principles of procedural fairness by accepting and relying upon evidence that was not disclosed to the applicants;
2. The investigative procedure adopted by Passport Canada was unfair and violated the principles of procedural fairness because Passport Canada disclosed information in two separate tranches (the second being after initial submissions had been made by the applicants) and thereby improperly split its case;
3. The adjudicator committed a reviewable error in accepting the MIO's unsworn notes as evidence and in preferring his notes over the sworn affidavits filed by the applicants;
4. Certain comments made by the Passport Canada investigator raise a reasonable apprehension of bias as do certain comments made by the adjudicator in the decisions;
5. The adjudicator committed a reviewable error in his interpretation of sections 117 and 135 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and section 10(2)(b) of the *Canadian Passport Order*, SI/81-86 [Order];
and
6. The adjudicator's decisions were unreasonable in failing to give proper weight to the sworn evidence of the applicants and in engaging in improper speculation.

In his oral submissions, counsel focused primarily on the first three of the foregoing points and indicated he would not be pursuing his fifth argument as there is case law that he was not aware of when he completed his memorandum, indicating that the interpretation afforded to the above-mentioned sections of IRPA and the Order was correct.

[7] Counsel for the respondent, on the other hand argued that there was no breach of procedural fairness because the material information relied upon by the adjudicator in his decisions was disclosed to the applicants and there was nothing untoward in the procedures followed by Passport Canada, noting in this regard that Passport Canada, as an administrative agency, is not required to emulate procedures followed by a court. In addition, counsel asserted that the arbitrator's decisions to admit the MIO's notes into evidence and to prefer them over the applicants' affidavits were reviewable on the reasonableness standard and were completely reasonable. Finally, the respondent argued that there is no reasonable apprehension of bias with respect to the conduct of either the Passport Canada investigators or the adjudicator.

[8] For the reasons detailed below, I have determined that the adjudicator's decisions must be set aside as there was a breach of procedural fairness in the process followed by Passport Canada in these files. In this regard, the circumstances in this case are distinguishable from those in *Slaeman and Roukan v Attorney General of Canada* (2012 FC 641 issued concurrently with this decision) as here, unlike there, the information that was not disclosed to the applicants was material to the investigation and concerned matters that were and needed to be considered by the adjudicator. Accordingly, failure to disclose this information deprived the applicants of the ability to properly defend themselves, and, therefore, the decisions must be set aside. Given this determination, it is

neither necessary nor appropriate for me to comment on the other grounds raised by the applicants, given that these matters are to be returned to Passport Canada for re-determination.

The process before Passport Canada

[9] To understand the procedural fairness claims advanced by the applicants, it is useful to review how passports are issued and revoked and the process followed by Passport Canada in deciding cases like the present.

[10] As Justice Noël noted in *Kamel v Canada (Attorney General)*, 2008 FC 338 at para 25, [2008] 1 FCR 59 [*Kamel*] (which was overturned by the Federal Court of Appeal in *Kamel v Canada (Attorney General)*, 2009 FCA 21, [2009] 4 FCR 449 but not on this point), passports are issued pursuant to the Royal prerogative. In exercise of that prerogative, the Governor in Council issued the Order, which governs the issuance, refusal and revocation of passports. The provisions of the Order pursuant to which the applicants' passports were revoked and further passport services were denied to them for five years are contained in paragraphs 9(a), 10(2)(b), 10(2)(c) and subsection 10(1) of the Order (and subsections 8(1) and 8(2) by reference), which provide as follows:

8. (1) In addition to the information and material that an applicant is required to provide in the application for a passport or in respect of the delivery of passport services, Passport Canada may request an applicant and any representative of the applicant to provide further information, material, or

8. (1) En plus des renseignements et des documents à fournir avec une demande de passeport ou à l'égard de la prestation de services de passeport, Passeport Canada peut demander au requérant ou à son représentant de fournir des renseignements, des documents ou des

declarations respecting any matter relating to the issue of the passport or the delivery of passport services.

(2) The further information, material and declarations referred to in subsection (1) and the circumstances in which they may be requested include the information, material, declarations and circumstances set out in the schedule.

[...]

9. Passport Canada may refuse to issue a passport to an applicant who

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

- (i) in the application for a passport, or
- (ii) pursuant to section 8

[...]

10. (1) Passport Canada may revoke a passport on the same grounds on which it may refuse to issue a passport.

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

[...]

déclarations supplémentaires à l'égard de toute question se rapportant à la délivrance du passeport ou à la prestation des services.

(2) Les renseignements, les documents et les déclarations supplémentaires visés au paragraphe (1) et les circonstances qui justifient leur demande comprennent ceux mentionnés à l'annexe.

[...]

9. Passeport Canada peut refuser de délivrer un passeport au requérant qui :

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) dans la demande de passeport, ou
- (ii) selon l'article 8;

[...]

10. (1) Passeport Canada peut révoquer un passeport pour les mêmes motifs que le refus d'en délivrer un.

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

[...]

b) utilise le passeport pour commettre un acte

(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;

(c) permits another person to use the passport;

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;

c) permet à une autre personne de se servir du passeport;

[11] Passport Canada has promulgated rules, entitled the "Rules of Procedure in Passport Refusal and Revocation Cases" [the Rules], which are available over the Internet. As counsel for the applicant rightly notes, these rules were unilaterally promulgated by Passport Canada and are not issued under any explicit statutory or regulatory authority. The Rules provide for a two-step procedure in cases such as the present: first, an investigation by the Entitlement Review Section of the Security, Policy and Entitlement Directorate of the Passport Office [the Section], and, second, if warranted, referral of the case to an adjudicator for decision. The adjudicator is a member of the Adjudication and Conflict Management Office of the Passport Office [ACMO].

[12] The first step of investigation is meant to determine whether evidence exists to support a recommendation that a passport be refused or revoked on one of the grounds listed in sections 9 or 10 of the Order. Under section 19 of the Rules, the Section is required to communicate to the interested party "all material facts and information in possession of the Section and provide the party the opportunity to respond and provide further information". The Rules also provide that the Section must advise the interested party of the procedure governing the investigation and of any

recommendation it may make. Recommendations are made in those cases where the Section believes there are grounds to support a revocation or refusal to issue a passport. Before submitting a recommendation to the ACMO, the Section must send the affected party a letter summarizing "all material facts and information" and afford the party the right to respond (sections 21 and 22 of the Rules). Thereafter, the Section provides a written recommendation, with supporting reasons, to the ACMO and must provide a copy to the interested party. The Rules require that the recommendation include "any material evidence and material the Section considered in making its recommendation" (section 23 of the Rules). The Rules do not contemplate the Section providing its entire investigation file to the ACMO; despite this, as is more fully detailed below, this appears to be the standard practice of the Section.

[13] In terms of the second step, the Rules provide that the adjudicator will not hold an in-person hearing and will consider the written evidence provided by the Section in making his or her determination. The adjudicator is directed by section 11 of the Rules to apply the balance of probabilities standard of proof. The Rules provide that the burden to prove the existence or non-existence of a fact or issue is on the person (the Section or the party) who asserts the existence or non-existence of it (section 10 of the Rules): the Rules allow for filing of copies and admission of hearsay evidence (sections 15 and 16 of the Rules).

[14] The procedure followed in this case, which appears to be standard as it is so-described by the Section in correspondence that it sent the applicants, involved the Section transmitting its entire investigation file to the adjudicator, for consideration by the adjudicator in making the decision to accept or reject the Section's recommendations. It also appears to be standard procedure that the

Section does not forward a copy of its entire file to the interested party, and, indeed, in these cases, the applicants were not provided with a copy of the file that was placed before the adjudicator.

Despite repeated requests from counsel for the applicants, the Section did not disclose any of the documents it relied upon, including detailed reports it had received from the MIO and officials in the High Commission in Nairobi, Kenya. Rather, the Section wrote a series of letters to the applicants (or their counsel) in which several – but not all – of the material facts before the Section were disclosed.

[15] The Section received several relatively detailed reports which were not disclosed to the applicants. The first was an email from the MIO that was written within a day or two after the incident at the Cairo airport when the applicants were confronted. The second was also from the MIO and was written couple of weeks later. In both, the MIO provided details as to what transpired with the applicants and why he concluded that the individual who sought to use Halimo's passport was an impostor. Salient facts in these reports included:

- the observation that the three women seemed nervous and overly friendly when he first approached them;
- the suspected impostor resembled the photograph in Halimo's passport;
- the suspected impostor's fluency in English was poor and her knowledge of Toronto (where Halimo had lived for several years) was sketchy;
- the suspected impostor feigned sickness when the MIO began probing her to verify her identity;
- when he indicated to the three women that they could go to the departure lounge, the impostor's illness suddenly vanished and she smiled at him and thanked him;

- he confronted the women a little while later, after they were in the departure lounge, and again questioned them. During this questioning, the MIO asked the impostor to sign her name to a blank sheet of paper, and the signature so obtained did not match that in Halimo's passport;
- shortly thereafter, all three women confessed separately to trying to smuggle the impostor into Canada, and admitted that she was the daughter of Ms. Adbi's brother;
- before he turned them over to the Egyptian authorities, Ms. Hashi made a sexual advance towards him to try and influence him to ignore the situation;
- Ms. Adbi expressed concern about getting Halimo out of Nairobi; and
- the Egyptian police determined to send the entire group back to Nairobi, where their trip originated from.

[16] Passport Canada also received a third report from an official at the High Commission in Nairobi, where the applicants attended after being returned to Kenya from Cairo. This report was not disclosed to the applicants. The salient facts contained in it included the following:

- the High Commission had been forewarned by the MIO unit in Cairo to expect the applicants to attend to seek assistance in returning to Canada;
- the applicants did so on July 31, 2008 and denied that they had attempted to smuggle anyone into Canada. Halimo claimed that she had been at the airport in Cairo;
- the passports were taken from the applicants and they applied for temporary travel documents to return to Canada;
- a search was conducted of the relevant Department of Foreign Affairs and International Trade's databases, which showed a case of passport fraud from Dubai, appearing under the

name of Shukri Abdi, but it was not possible to determine whether or not the applicant was the same person as was involved in that case of passport fraud.

[17] In addition, the Section's file contained emails to and from the MIO, in which the MIO confirmed that he had not retained the specimen signature provided by the bearer of Halimo's passport when she was questioned by the MIO at the Cairo airport. The file also contained a document entitled, "Security Case History Sheet", which provided a summary of the various steps taken in the investigation and included comments from one of the investigators which, in many cases, are equivalent to submissions in support of the Section's positions and which set out reasons why the submissions of counsel for the applicants ought to be rejected. For example, one comment states that an exculpatory explanation given by the Ms. Adbi is "immaterial to the incident". Another comments on submissions made by counsel for the applicants and notes that the version of events provided by the applicants conflicts with that provided by the MIO for the same incident and is an incident "where veracity is to be considered on the balance of probabilities". A further comment, dealing with the repeated requests made by counsel for the applicant for disclosure of the documents relied upon by Passport Canada, imputes improper motives to counsel. The note states as follows:

I believe that the lawyer has not responded to the information we provided in our letters, other than to just relay his clients' denials of the alleged details as we have provided them. He keeps asking us to provide actual documentation for the information we provide and I believe he is well aware that we have it only in the form of information. I believe he aks [sic] for the documentation simply because he knows that it is unavailable in the hope that our case to be [sic] fail because we cannot provide the documents.

[18] Many of the facts contained in the reports from the MIO and the official at the High Commission in Nairobi were disclosed to the applicants or their counsel in the letters the Section wrote to them. However, several key facts were omitted. The most important of these was the fact that the MIO had not retained a copy of the signature provided by the suspected impostor. Counsel for the applicants repeatedly requested disclosure of the signature in order to have it analyzed by a handwriting expert as the signature was the key piece of evidence in the Section's case and the applicants virulently denied that they had engaged in human smuggling or made any of the admissions to the MIO referred to in his reports. Their position was that it was Halimo, herself, who was at the airport in Cairo, seeking to board the plane to Canada. In addition, the fact that Ms. Adbi was suspected in conjunction with the previous human smuggling incident in Dubai was not disclosed, nor was the fact that the impostor resembled the picture in Halimo's passport or that she suddenly seemed to recover when she erroneously thought her identity had been accepted by the MIO.

[19] In the decisions, the adjudicator was required to choose between the version of events offered by the applicants (through sworn affidavits and their statements to various Passport Canada officials) and a version of events offered principally by the MIO in his reports. Thus, what was at issue was the credibility of the applicants, pitted against the credibility of the MIO. Each of the non-disclosed facts mentioned in the preceding paragraphs were relevant to the determination the adjudicator was required to make as they related directly to the truthfulness or untruthfulness of the versions of events offered by the two sides. In particular, the signature provided by the supposed impostor was a key piece of evidence. As counsel for the applicants rightly noted in his submissions, failure to disclose the fact that Passport Canada did not have the signature (or even a

copy of it) deprived him of the ability to make a central argument in the case, namely, that the unsworn observation of the MIO regarding the authenticity of the signature ought to be given little or no weight, when the signature, itself, was not part of the Section's case. Another of the undisclosed facts could have buttressed this argument in a significant way, namely, the fact that the supposed impostor resembled the picture in Halimo's passport.

[20] I make no determination as to whether such arguments would be successful; the point, rather, is that the applicants had no ability to advance them. Likewise, they had no ability to address the very damning suggestion that Ms. Abdi had previously engaged in human smuggling and, likewise, because they did not know of it, could not address the MIO's observations regarding the suspected impostor's quick recovery, which added colour to the MIO's version of events.

The requirements of Procedural Fairness in Adjudications under the Order

[21] Counsel for the applicants argues that the requirements of procedural fairness necessitated providing the applicants with a copy of the entire file that was placed before the adjudicator. I do not agree that procedural fairness requires disclosure of that extent in the circumstances of determinations by Passport Canada under the Order. Rather, in my view, what is required is that all material facts discovered by the Section in its investigation be disclosed to the parties affected; in addition, any documents which make any form of submission in support of the Section's position that are provided to the adjudicator must also be disclosed to the parties affected. Finally, the affected parties must be afforded a full opportunity to respond, prior to the case being remitted to the adjudicator for determination.

[22] In this regard, the right to hold a Canadian passport is an important one, and allows Canadian citizens to travel internationally. However, the interests at stake in a case such as the present are of less significance to the individuals affected than the right to life or liberty, which may be engaged in other sorts of decisions that this Court is called upon to review.

[23] In the seminal case of *Baker v Minister of Citizenship and Immigration*, [1999] 2 SCR 817, 174 DLR (4th) 193, the Supreme Court of Canada, at paragraphs 21 to 27, set out the principles regarding the requirements of procedural fairness for administrative decisions and held that these requirements will vary depending on the nature of the decision and the impact of the decision on the interests of the person affected. Factors relevant to the content of the duty include: the nature of the decision and of the procedures followed by the tribunal in making it or the "closeness of the administrative process to the judicial process"; the requirements of the statute under which the decision is made and the role of the particular decision within the statutory scheme; the importance of the decision to the individuals affected; the legitimate expectations of the affected individuals regarding what procedures would be followed by the tribunal; and the choices made by the tribunal regarding procedure, especially where the tribunal is afforded the right to establish its own procedures.

[24] The requirements of procedural fairness in the context of a passport revocation and permanent passport services suspension were considered in *Kamel* (cited above). The situation in *Kamel* was different from that in the present case in that here the passport services were suspended by Passport Canada for five years. In *Kamel*, on the other hand, the Minister of Foreign Affairs and International Trade suspended Mr. Kamel's passport services indefinitely, based on the

determination that he posed a security risk. The Minister's decision in *Kamel* turned on a report from the Canadian Security Intelligence Service that was not disclosed to Mr. Kamel. Justice Noël determined that, in not being informed of the substance of the report, Mr. Kamel had been denied procedural fairness which, in the circumstances of that case, required that Mr. Kamal be provided with the ability to engage in “full participation” in the process before the Minister. According to Justice Noël, to ensure this, he needed “... to know exactly what the allegations against him [were] ... and what the information collected in the course of the investigation [was to] ... be able to respond to it completely” (*Kamel* at para 68). Justice Noël summarised the applicable principles as follows at para 72:

[i]t 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; as well, the decision-maker must have all of the facts in order to make an informed decision.

[25] In light of the foregoing, it is evident that the requirements of procedural fairness were not met in this case because material facts and the Sections submissions, in the form of advocacy, were not disclosed to the applicants. They were thereby deprived of the right to fully respond to the case that the Section advanced for the removal of their passports. In addition, I note parenthetically that the Section failed to follow its unilaterally promulgated rules which reflect the requirements of procedural fairness and require disclosure to the affected individuals of all material facts. As I noted in *Slaeman and Roukan* (cited above), even though the requirements of procedural fairness do not necessarily require the Section to disclose immaterial documents placed before the adjudicator, it might well be a more prudent practice for it to provide identical disclosure to the adjudicator and the individuals under investigation so as to ensure it would be immune from challenges of this nature.

Failure to follow this prudent practice, in the circumstances of the instant cases, results in the decision of the adjudicator being set aside.

Conclusion

[26] In light of the foregoing, the decision of the adjudicator must be set aside and the matter remitted back to the ACMO of Passport Canada for re-determination by another adjudicator.

[27] At the hearing, I raised the issue of costs with the parties, and counsel for the applicant requested the opportunity to file brief written submissions on the issue of costs following release of the Judgment in this matter. Accordingly, counsel are given until June 8, 2012 to file submissions of no more than 10 pages in length on costs. They shall have the opportunity, if they wish, to file a reply of up to five pages to each other's costs submissions by June 15, 2012.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The styles of cause in these applications for judicial review are amended to remove the Minister of Foreign Affairs and International Trade as the respondent in each application and instead name the Attorney General of Canada as the respondent in each application;
2. These applications for judicial review of the decisions of the Passport Canada adjudicator issued on March 28, 2011 are granted and the decisions of the adjudicator are set aside;
3. The issue of revocation of the applicants' passports and of the imposition of a ban on their receiving passport services shall be remitted back to Passport Canada for re-determination by a different adjudicator than the one who issued these decisions, if there is another individual employed by Passport Canada in the ACMO who could act as an adjudicator. If there is no other individual employed by Passport Canada who could act as an adjudicator, the matters may be remitted back to Mr. Francoeur, who shall conduct a hearing *de novo* and in no way refer to or consider anything said in the decisions that have been set aside. The adjudicator to whom the matters are referred for re-determination shall afford the applicants a fresh opportunity to make submissions based on the materials that have been disclosed in the Record before this Court;
4. The parties shall file written submissions of no more than 10 pages with respect to costs by June 8, 2012;

5. The parties shall have the opportunity, if they wish, to file a reply of up to 5 pages to each other's costs submissions by June 15, 2012;
6. I remain seized of the issue of costs in this matter; and
7. A copy of these Reasons for Judgment and Judgment shall be placed on the files in Court Dockets T-671-11; T-672-11; and T-673-11.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-671-11, T-672-11, T-673-11

STYLE OF CAUSE: *Shukri Abdi v Attorney General of Canada, Faduma Hashi v Attorney General of Canada, Halimo Abshir v Attorney General of Canada*

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 30, 2012

REASONS FOR JUDGMENT AND JUDGMENT: GLEASON J.

DATED: May 25, 2012

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