

Federal Court



Cour fédérale

**Date: 20130628**

**Docket: T-360-12**

**Citation: 2013 FC 724**

**Ottawa, Ontario, June 28, 2013**

**PRESENT: The Honourable Mr. Justice Zinn**

**TAMER MIKHAIL AND MONA MIKHAIL**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of a Passport Canada Adjudicator dated January 19, 2012, to revoke and nullify the applicants' passports and, with one exception, to refuse to issue them any new passports for a period of five years or, if the passport of the applicants' adopted son was not returned within thirty days of the decision, roughly eight years as of the date of the decision. The exception was that Passport Canada would continue to consider issuing limited duration passports to the applicants based on urgent and compelling compassionate considerations.

## **Background**

[2] The Applicants, Tamer Mikhail and Mona Mikhail, are married Canadian citizens. In January 2000, they traveled to Egypt to adopt a child, Joseph, in accordance with the traditions of the Coptic Orthodox church but in defiance of Egyptian law. To return to Canada, Mr. and Mrs. Mikhail applied for a passport for Joseph, falsely declaring in their passport application dated January 22, 2000, that Joseph was a Canadian citizen. A passport for Joseph issued on January 31, 2000, and the applicants' newly expanded family returned to Canada.

[3] On November 23, 2009, the applicants submitted applications for passport renewals for themselves and Joseph. They had been previously renewed in 2005. Three days later, on November 26, 2009, passports issued for each applicant. These were to be valid until November 26, 2014.

[4] On June 11, 2010, after an investigation conducted by the Royal Canadian Mounted Police, described immediately below, the applicant parents were each charged with two offences in relationship to the false declaration described above: one count of knowingly making a false statement for the purpose of procuring a passport contrary to subsection 57(2) of the *Criminal Code*; and one similar count contrary to paragraph 94(1)(b) the then-in-force *Immigration Act*. As part of undertakings in relation to these charges, the applicant parents relinquished their passports to an RCMP officer. They were not required by the terms of their undertaking to return Joseph's passport.

[5] In July 2010, the RCMP advised Passport Canada of the investigation it was conducting regarding offences alleged to have been committed by certain individuals, including the applicant parents, under the *Citizenship Act*, the *Criminal Code*, and the *Immigration and Refugee Protection Act*, involving children born in Egypt whose adoptive parents obtained Canadian citizenship for the children through fraudulent means.

[6] The Crown withdrew the charges against the applicant parents in October 2010.

[7] In or around November 2010, the applicant parents, through their counsel, requested their passports back from the RCMP but were informed that the RCMP had forwarded their passports to Passport Canada. On January 11, 2011, their counsel then demanded that Passport Canada immediately return the “illegally seized and confiscated” passports. By letter dated February 9, 2011, at Passport Canada’s instructions, counsel delivered the requisite direction and release from the applicant parents and reiterated its earlier demand.

[8] By letter dated February 18, 2011, Passport Canada advised counsel that the applicant parents were the subject of an investigation by its Investigations Division [the Division]. After outlining Passport Canada’s investigation and decision-making processes, the letter then clearly outlined the specific allegations against the Mikhails, including that on their citizenship application and passport applications they declared they were Joseph’s biological parents and that on Joseph’s original passport application they declared he was a Canadian citizen. The letter also demanded the return of Joseph’s passport. The letter then outlined the recommendations the Division intended to make to the Adjudicator that the applicant parents’ passports be revoked and, assuming that

Joseph's passport was returned promptly, the parents be withheld passport service until November 23, 2014, which represented five years since their latest misrepresentation. No penalty was recommended in respect of Joseph; however, a passport would only be issued to him if a certificate of Canadian citizenship issued after November 1, 2010, and a proof of adoption were submitted. Importantly, the letter also invited the applicants to file information by April 4, 2011, should they wish to contradict or neutralize the information outlined in the letter. Finally, the letter stated that notwithstanding any of the above, Passport Canada would continue to accept applications for short-term passports based on urgent and compelling compassionate considerations.

[9] The applicants took the opportunity to file information with Passport Canada by sending a letter from counsel dated April 27, 2011, nearly a month late, that contained no information whatsoever but merely reiterated the view that Passport Canada had no authority to withhold their passports under the Constitution.

[10] By letter dated July 22, 2011, Passport Canada stated that since no factual information was presented in their counsel's letter, its initial recommendation stood. However, since Joseph's passport was not returned as demanded, it would be further recommending to the Adjudicator that the date of no passport service for the applicant parents be extended to November 26, 2019, which represented five years after the expiry of Joseph's passport. Finally, it reiterated that Passport Canada would, notwithstanding the above, continue to consider applications for limited duration passports for urgent and compelling compassionate considerations.

[11] By decision dated January 19, 2012, the Passport Canada Adjudicator found on a balance of probabilities that the applicants' declaration that Joseph was a Canadian citizen was false or misleading and, pursuant to 10(2)(d) of the *Canadian Passport Order*, SI/81-86 [*CPO*], declared it null and void. As regards the applicant parents' passports, the Adjudicator found on a balance of probabilities that the parents had failed to comply with paragraph 9(a) of the *CPO* and pursuant to subsection 10(1), declared their passports null and void as well. Pursuant to section 10.2 of the *CPO*, the Adjudicator also agreed with the Division's recommendation that passport service be withheld for five years; however, it outlined an earlier starting date for the refusal period – the date of the decision – should the applicant parents comply with the Division's demand for the return of Joseph's passport within thirty days of the decision. Otherwise, the Division's recommendation of a refusal period lasting until November 26, 2019, would apply. The relevant provisions of the *CPO* are attached as Appendix A to these Reasons

[12] Immediately prior to the hearing the respondent filed an affidavit attesting that Joseph's passport was returned to Passport Canada within 30 days of the final decision rendered by Passport Canada and thus the period during which passport services will be withheld from the Applicants, subject to the above noted exception, will end on January 19, 2017.

### **Issues**

[13] The issue on the merits of this application is whether the decision of the Adjudicator was reasonable. The respondent, however, raises a preliminary issue concerning numerous paragraphs of and exhibits attached to the affidavit of Tamer Mikhail. These, it is submitted, are new evidence as they set out facts or documents not before the Adjudicator.

[14] The reasonableness of the decision under review must be assessed based on the facts and information before the decision-maker, not evidence that could not have been considered as it was not placed before him or her. Paragraphs 6, 14, 15, 18 of the affidavit, the Adoption Certificate issued by the Coptic Orthodoxy of Alexandria, the birth Certificate of Joseph from the Republic of Egypt, and Joseph's social insurance card, are all inadmissible as they are evidence that was not before the decision-maker.

[15] It is not disputed that some of this evidence might have been important had it been put to the decision-maker. For example, it is argued based on affidavit evidence presented for the first time in this application that the applicants believed "in good faith" that the adoption of Joseph made him a citizen of Canada and that they did not "intend to mislead." However, the applicants were given a clear invitation to put such factual information before the Adjudicator but declined to do so, instead submitting what can only be described as a written tirade from their then counsel. Undoubtedly, the information they now seek to rely on which goes only to the merits of the Adjudicator's decision ought to have been put before the Adjudicator and cannot be considered on judicial review: See, e.g., *Slaeman v Canada (Attorney General)*, 2012 FC 641 at paras 15 – 20. This is not a trial *de novo* or an appeal – it is a judicial review.

### **Analysis**

[16] On January 22, 2000, when the applicants first obtained a passport for Joseph, in Egypt, they declared, among other things, that Joseph was a Canadian citizen. He was not.

[17] The *Citizenship Act*, RSC 1985, c C-29, in force at that time set out in subsection 3(1) those

who are Canadian citizens. It read as follows:

3. (1) Subject to this Act, a person is a citizen if

3. (1) Sous réserve des autres dispositions de la présente loi, a qualité de citoyen toute personne :

(a) the person was born in Canada after February 14, 1977;

a) née au Canada après le 14 février 1977;

(b) the person was born outside Canada after February 14, 1977 and at the time of his birth one of his parents, other than a parent who adopted him, was a citizen;

b) née à l'étranger après le 14 février 1977 d'un père ou d'une mère ayant qualité de citoyen au moment de la naissance;

(c) the person has been granted or acquired citizenship pursuant to section 5 or 11 and, in the case of a person who is fourteen years of age or over on the day that he is granted citizenship, he has taken the oath of citizenship;

c) ayant obtenu la citoyenneté — par attribution ou acquisition — sous le régime des articles 5 ou 11 et ayant, si elle était âgée d'au moins quatorze ans, prêté le serment de citoyenneté;

(d) the person was a citizen immediately before February 15, 1977; or

d) ayant cette qualité au 14 février 1977;

(e) the person was entitled, immediately before February 15, 1977, to become a citizen under paragraph 5(1)(b) of the former Act.

e) habile, au 14 février 1977, à devenir citoyen aux termes de l'alinéa 5(1)b) de l'ancienne loi;

[18] Paragraph 3(1)(b) makes it clear that a child born outside Canada is a Canadian citizen only if one of his natural parents was a Canadian citizen at that time. Children born and adopted outside Canada are not Canadian citizens. Section 5 of the Act sets out the mechanisms by which those not described in subsection 3(1) may obtain citizenship. None of these provisions were followed by the Applicants with respect to Joseph.

[19] Subsection 4(2) of the *CPO* makes it clear that “no passport shall be issued to a person who is not a Canadian citizen under the [Citizenship] Act.” Accordingly, Joseph was not entitled to have a passport issued to him in January 2000 or at any time thereafter.

[20] The Adjudicator’s decision is based on a finding that objectively, Joseph’s passport application contained false or misleading information. Given that it contains a declaration by Tamer Mikhail that Joseph is a Canadian citizen, and given, based on the analysis above, that he was not, the finding that the application contained false or misleading information was not only reasonable, it was correct. As a result of this finding, paragraph 10(2)(d) of the *CPO* comes into play. It provides that Passport Canada may revoke the passport of a person who “has obtained the passport by means of false or misleading information.”

[21] The Adjudicator decided to maintain the recommendation to revoke Joseph’s then valid passport, which he declared to be null and void. He reasoned: “There are no reasons not to maintain the recommendation because Passport Canada cannot ignore that false documentation was submitted in the applications.” There was no evidence before the Adjudicator that makes that assessment and determination unreasonable.



[22] The Adjudicator then turned to the parents' involvement and their passports.

[23] Subparagraph 9(a)(i) of the *CPO* provides that Passport Canada may refuse to issue a passport to an applicant who fails to provide the Passport Office with a duly completed application for a passport ... in the application for a passport." Pursuant to subsection 10(1) of the *CPO*, Passport Canada may revoke a passport on the same grounds on which it may refuse to issue one.

[24] The Adjudicator correctly noted that "where a person provides false or misleading information in a passport application, the CPO does not make a distinction on the basis of whether the application was for that person him- or herself, or for a third party over whom he or she exercises (or, even more so, pretends to exercise) parental or other legal rights of representation." Although only Tamer Mikhail signed the declaration attesting that Joseph was a Canadian citizen in the January 2000 passport application, he and Mona Mikhail both made the same declaration in the subsequent passport applications in 2005 and 2009. Accordingly, the Adjudicator's finding that they had both provided false or misleading information in Joseph's passport application was reasonable. Again, I find that it was also correct.

[25] His finding that the recommendation that their passports be revoked as a result of this violation was also reasonable. There must be some consequence for actions such as these.

[26] Lastly, the Adjudicator considered the recommendation to refuse or withhold passport services for a period of five years. The Adjudicator noted that for a revocation decision "to have a

meaningful impact, a period during which passport services are refused should be considered [otherwise] a refusal or revocation would be meaningless, as the subject could simply turn around, reapply for a passport and be issued a new document.”

[27] The Adjudicator, as noted, imposed a five year period, subject to the noted exception. The applicants submit that this is an unreasonable period given that others who committed fraud on Passport Canada, and in some cases profited by it, were also penalized for the same period: See *Slaeman v Canada (Attorney General)*, 2012 FC 641, and *Okhionkpanmwonyi v Canada (Attorney General)*, 2011 FC 1129.

[28] The period of suspension of services is a matter entirely within the discretion of the Adjudicator. He considered a number of factors, including the seriousness of the passport abuse, that the misrepresentation of the child as a citizen enabled the “parents” to bring Joseph illegally to Canada, that no specific representations were made by the Applicants on this issue, and that they failed to surrender Joseph’s passport as and when required.

[29] The Applicants submit that the Adjudicator made two assumptions: first that adoption in Egypt was illegal, and second that the Applicants knew this. First, despite Passport Canada’s invitation for further information, there was no evidence placed before the Adjudicator, nor now before the Court that would establish that the finding of illegality of Egyptian adoption by the Adjudicator is questionable. Absent such evidence, the Court cannot find his “assumption” to have been unreasonable. Similarly, there was no evidence placed before the Adjudicator that these Applicants did not know that local laws prohibited legal adoption of Joseph. On the contrary, in

light of the efforts they made to bring Joseph into Canada, the “assumption” that as former citizens of Egypt they were aware of its laws cannot be said to have been unreasonable.

[30] For these reasons this application is dismissed with costs. The respondent seeks \$1,500.00 which the Applicants admit is a reasonable sum in the circumstances.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is dismissed, with costs payable to the Respondent fixed at \$1,500.00 inclusive of fees, disbursements, and taxes.

"Russel W. Zinn"

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Judge

**APPENDIX “A”**

## Canadian Passport Order SI/81-86 – Order Respecting Canadian Passports

## Décret sur les passeports canadiens TR/81-86 - Décret Concernant les passeports canadiens

9. Passport Canada may refuse to issue a passport to an applicant who	9. Passeport Canada peut refuser de délivrer un passeport au requérant qui :
(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	a) ne lui présente pas une demande de passeport dûment remplie ou ne lui fournit pas les renseignements et les documents exigés ou demandés
(i) in the application for a passport, or ...	(i) dans la demande de passeport, ou ...
10. (1) Passport Canada may revoke a passport on the same grounds on which it may refuse to issue a passport.	10. (1) Passeport Canada peut révoquer un passeport pour les mêmes motifs que le refus d'en délivrer un.
(2) In addition, Passport Canada may revoke the passport of a person who ...	(2) Il peut en outre révoquer le passeport de la personne qui : ...
(d) has obtained the passport by means of false or misleading information; ...	d) a obtenu le passeport au moyen de renseignements faux ou trompeurs; ...
10.2 The authority to make a decision to refuse or revoke a passport under this Order includes the authority to impose a period of withheld passport service.	10.2 Le pouvoir de prendre la décision de refuser la délivrance d'un passeport ou d'en révoquer un en vertu du présent décret comprend le pouvoir d'imposer une période de refus de service de passeport.

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-360-12

**STYLE OF CAUSE:** TAMER MIKHAIL AND MONA MIKHAIL v THE  
ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Toronto, Ontario

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AND JUDGMENT BY:** ZINN, J.

**DATED:** June 28, 2013

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