Federal Court  Cour fédérale

Date: 20161125

Docket: T-288-16

Citation: 2016 FC 1304

Ottawa, Ontario, November 25, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JADE ELIZABETH THELWELL

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision by the Passport Program of Citizenship and Immigration Canada [CIC] dated November 30, 2015, which refused to reconsider an earlier decision denying the Applicant's passport application and imposing a five-year period of refusal of passport services, pursuant to ss. 9(1)(a) and 10.2(1) of the *Canadian Passport Order*, SI/81-

86 [the Passport Order]. The original refusal was based on the conclusion that the Applicant had provided false or misleading information in her passport application.

[2] As explained in greater detail below, this application is allowed, because the impugned decision by CIC is a product of fettered discretion and fails to recognize the power to reconsider its earlier decision.

II. Background

[3] The Applicant, Jade Elizabeth Thelwell, is a Canadian citizen, born on March 12, 1992. Ms. Thelwell is an aspiring pop singer, using the alias "Jade Naraine", and is actively pursuing a career in the music industry. Ms. Thelwell explains that she worked in the past with a potential investor whose interest in her career turned out to be disingenuous. She reacted negatively to this and contacted this man repeatedly. Her actions resulted in criminal charges of extortion and criminal harassment being laid by the Toronto Police Service [TPS].

[4] Due to a bail condition related to these charges, Ms. Thelwell's passport with number GF276964 was seized by the TPS on December 10, 2014. The Crown later withdrew the extortion charge, and Ms. Thelwell pled guilty to criminal harassment, for which she received an absolute discharge. Ms. Thelwell's evidence is that the TPS did not release her passport and that her criminal defence lawyer advised her to apply for a new one.

[5] Ms. Thelwell applied for a new passport on June 17, 2015. Her application was accompanied by a declaration that her passport GF276964 was "…about to expire, water-

damaged, inaccessible, thrown out by someone else." Her position in this judicial review application is that she did not declare that her most recent passport had been seized by the police because, based on the absolute discharge and her criminal lawyer's advice, she did not believe she was required to declare information that would reveal she had been convicted of a criminal offence.

[6] On June 22, 2015, the TPS advised CIC that they were in possession of a passport belonging to Ms. Thelwell, which had been seized from her pursuant to a bail condition. On July 3, 2015, in a questionnaire requested by CIC, Ms. Thelwell stated that she could not remember the circumstances under which her passport GF276964 had been lost, although she thought it had occurred in approximately December 2014, and that she did not file a police report because she knew the passport was "…thrown out/destroyed. Not lost".

[7] On July 31, 2015, the Investigations Division, Passport Integrity Branch of CIC advised Ms. Thelwell by letter that she was the subject of an investigation, as information had been received that she may have submitted false and/or misleading information in support of her passport application. In an additional questionnaire requested by CIC and submitted on July 31, 2015, Ms. Thelwell stated that no passport of hers had ever been seized by the police. However, in that same questionnaire, in response to a question advising that CIC had received information from the TPS that her passport GF276964 had been seized as part of a bail condition, Ms. Thelwell replied that she was arrested and her most recent passport was taken but was not returned when the case was over.

[8] Ms. Thelwell and CIC exchanged further correspondence in August 2015. She stated that, when she declared the passport to be damaged or thrown out, she was referring to the previous passport issued in her name and not the most recent passport. However, CIC concluded that Ms. Thelwell's previous passport application contradicted this description of how the previous passport had been lost. By letter dated August 14, 2015, CIC advised Ms. Thelwell that its investigation had concluded and that a decision would be made on her file, including whether to impose a period of refusal of passport services. Ms. Thelwell provided further correspondence to CIC referring to the negative impact that being without a passport would have on her career in the music industry.

[9] Based on the information provided by Ms. Thelwell and CIC's investigations, CIC issued a decision on September 11, 2015, refusing to issue a passport in Ms. Thelwell's name, pursuant to s. 9(1)(a) of the Passport Order, and further imposing a period of refusal of passport services until June 17, 2020, pursuant to s. 10.2(1) of the Passport Order. The refusal period was computed to correspond with the date Ms. Thelwell submitted her passport application, June 17, 2015, making this a five-year refusal of passport services.

[10] CIC's decision referred to having taken into consideration the application, questionnaires and other information provided by Ms. Thelwell. The decision stated that it had been determined that there was sufficient ground to support a conclusion that Ms. Thelwell provided false or misleading information in the declaration submitted with her passport application. The decision also communicated that Passport Program decisions are considered final as of the date the decision is rendered and that individuals who choose to challenge a decision may do so by filing

an application for judicial review with the Federal Court within thirty days of the date of the decision.

[11] On October 29, 2015, Ms. Thelwell's counsel provided written submissions to CIC, requesting reconsideration of the five year refusal period imposed in CIC's decision. These submissions included information explaining the impact of this period on Ms. Thelwell's career as an aspiring pop singer for whom travel to the USA is critical for success.

[12] In a decision issued on November 30, 2015, the Director of the Passport Program Integrity Branch of CIC wrote to Ms. Thelwell, acknowledging receipt of these submissions but advising that the decision taken by the Passport Program stands. It is this decision by CIC on November 30, 2015 that is the subject of this judicial review.

III. Issues

[13] Ms. Thelwell has identified the following as the issues for the Court's consideration in this application for judicial review:

A. What is the standard of review?

B. Did the Director fetter his discretion or otherwise err by failing to recognize that he had the power to reconsider the period of passport refusal?

C. Was it an error not to reconsider the application in light of the new evidence?

IV. Analysis

A. *What is the standard of review?*

[14] On the subject of the standard of review, the Respondent relies on authority that decisions to refuse, revoke or withhold passport services are reviewable on a standard of reasonableness (see, e.g. *Brar v Canada (Attorney General)*, 2014 FC 763, at para 25). Ms. Thelwell does not take issue with this general proposition but, in the specific context of an alleged fettering of discretion, she relies upon the decision in *Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 [*Stemijon*]. In that case, the Federal Court of Appeal analysed the standard of review applicable to an allegation of fettered discretion as follows, at paragraphs 21 to 24:

> [21] The appellants' submissions, while based on reasonableness, seem to articulate "fettering of discretion" outside of the *Dunsmuir* reasonableness analysis. They seem to suggest that "fettering of discretion" is an automatic ground for setting aside administrative decisions and we need not engage in a *Dunsmuir*-type reasonableness review.
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> [22] On this, there is authority on the appellants' side. For many decades now, "fettering of discretion" has been an automatic or nominate ground for setting aside administrative decision-making: see, for example, *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2 at page 6. The reasoning goes like this. Decision-makers must follow the law. If the law gives them discretion of a certain scope, they cannot, in a binding way, cut down that scope. To allow that is to allow them to rewrite the law. Only Parliament or its validly authorized delegates can write or rewrite law.
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> [23] This sits uncomfortably with *Dunsmuir*, in which the Supreme Court's stated aim was to simplify judicial review of the substance of decision-making by encouraging courts to conduct one, single methodology of review using only two standards of review, correctness and reasonableness. In *Dunsmuir*, the Supreme Court did not discuss how automatic or nominate grounds for

> setting aside the substance of decision-making, such as "fettering of discretion," fit into the scheme of things. Might the automatic or nominate grounds now be subsumed within the rubric of reasonableness review? On this question, this Court recently had a difference of opinion: *Kane v. Canada (Attorney General), 2011 FCA 19*. But, in my view, this debate is of no moment where we are dealing with decisions that are the product of "fettered discretions." The result is the same.
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> [24] *Dunsmuir* reaffirms a longstanding, cardinal principle: "all exercises of public authority must find their source in law" (paragraphs 27-28). Any decision that draws upon something other than the law – for example a decision based solely upon an informal policy statement without regard or cognizance of law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir* at paragraph 47. A decision that is the product of a fettered discretion must *per se* be unreasonable.

[15] The Respondent does not dispute this explanation of the applicable standard. I also note that, in the recent decision in *Gordon v Canada*, 2016 FC 643, at para 28, Justice Mactavish relied on *Stemijon* in stating that the fettering of discretion is a reviewable error and should be set aside regardless of the standard of review applied. I adopt this approach for purposes of the following analysis.

B. *Did the Director fetter his discretion or otherwise err by failing to recognize that he had the power to reconsider the period of passport refusal?*

[16] Ms. Thelwell notes that the Federal Court of Appeal has confirmed *in Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 230 [*Kurukkal*], at paragraphs 2 to 4, that the principle of *functus officio* (meaning that, once a decision is taken, the decision-maker has no

more authority on the matter) does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision. In that case, the decision-maker erred by failing to recognize the existence of discretion to reconsider, or refuse to reconsider, a request for relief on humanitarian and compassionate grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2000, c. 27.

[17] In the present case, Ms. Thelwell argues that CIC possessed the discretion to reconsider its September 11, 2015 decision to impose a five-year period for refusal of passport services, and failed to recognize that discretion because of the impact of departmental policy. The policy to which she refers is entitled "Investigation and decision-making process in passport refusal and revocation files – Category one" and, under the heading "Reasons", includes the following provision:

> All the Passport Program decisions are final and take effect the date the decision is rendered. Subjects who choose to challenge a decision may do so by filing an application for judicial review before the Federal Court of Canada within thirty days of the date of the decision.

[18] In advancing her position, that the impugned decision in the present case is a product of fettered discretion based on this policy, Ms. Thelwell relies on the decision's reference to the finality of the previous decision of September 11, 2015. In analysing this argument, it is necessary to review the entirety of the substantive portion of the decision in response to the reconsideration request. Following a paragraph on a procedural issue which the Respondent correctly acknowledges is not relevant to the issues in this application, the decision reads as follows:

> Notwithstanding the foregoing we have taken into consideration the information submitted on your behalf. You were advised in our letter dated September 11, 2015 that there was sufficient information to support a conclusion that you provided false or misleading information when you submitted your application for a passport. This decision resulted in imposing a period of refusal of passport services until June 17, 2020. You were advised that Passport Program decisions are considered final and that you could challenge the decision by filing an application for judicial review before the Federal Court of Canada within thirty days of the date of the decision.
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> Therefore the decision taken by the Passport Program stands. However, as you have already been advised you may, during the period of refusal of passport services apply for a passport of limited validity and containing geographical limitations based on urgent and compelling considerations. The following link to the web site: http://www.cic.gc.cca/english/passport/securit/limited-validity.asp may be of assistance to you.

[19] The Respondent argues that the reconsideration decision's reference to finality represented simply a confirmation of the statement in the September 11, 2015 decision that such decision was eligible for judicial review under sections 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which might not be the case if it were only an interim decision. The Respondent also notes the reconsideration decision's express reference to having taken into consideration the information submitted on Ms. Thelwell's behalf. The Respondent submits this demonstrates that CIC did exercise its discretion to reconsider the earlier decision and did not decline to do so based on departmental policy.

[20] The Federal Court of Appeal explained in *Kurukkal*, at paragraphs 4 to 5, that an administrative decision-maker's obligation, when presented with a request for reconsideration, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider. The officer is not obliged to conduct such reconsideration. Chief Justice Crampton

has also noted, in *Trivedi v Canada (Minister of Citizenship and Immigration)*, 2010 FC 422, at paragraph 30, that there is no general duty to provide detailed reasons for deciding not to reconsider an application. However, in the present case, CIC has provided brief reasons in its November 30, 2015 letter, and the Court is required to assess whether those reasons demonstrate that CIC considered whether to exercise its discretion to reconsider, as argued by the Respondent, or erred in failing to recognize that it had such discretion, as argued by Ms. Thelwell.

[21] I find that CIC's limited reasons support Ms. Thelwell's characterization of the decision. I should note that the Respondent is not arguing that the decision represents a so-called "courtesy letter" and therefore was not a decision amenable to judicial review. Rather, the Respondent's position is that CIC exercised its discretion and decided to uphold the September 11, 2015 decision. However, while the Respondent correctly notes that the decision refers to having taken into consideration the information submitted on Ms. Thelwell's behalf, the remainder of the decision supports Ms. Thelwell's position that CIC made the decision not to reconsider based on an erroneous conclusion that it was without the discretion to do so because of the impact of departmental policy.

[22] The November 30, 2015 decision refers to the contents of the September 11, 2015 decision, culminating in a reference to Ms. Thelwell having been advised "…that passport Program decisions are considered final and that you could challenge the decision by filing an application for judicial review before the Federal Court of Canada within thirty days of the date of the decision." This language, and the concepts captured therein, is quite close to the language

in the departmental policy. As such, I find that the policy influenced the inclusion of the language about finality and the availability of judicial review in both the September 11, 2015 and November 30, 2015 decisions. In itself, that is of course not problematic.

[23] However, quite significantly, the next paragraph in the November 30, 2015 decision begins with the word “therefore” and states that the result of the previous decision stands. The reference to finality in the policy language itself may well have been intended to refer to the availability of Federal Court judicial review resulting from a final decision. However, in the November 30, 2015 decision, the use of the word “therefore” before the statement that the previous decision stands suggests, as argued by Ms. Thelwell, that CIC declined to reconsider its previous decision because it interpreted the reference to finality in its policy as precluding such reconsideration.

[24] I therefore find that CIC did improperly fetter its discretion in reaching its decision on Ms. Thelwell’s reconsideration request, thereby committing a reviewable error. In the alternative, even if the decision was not a product of reliance on departmental policy, the wording of the decision still demonstrates a causal link between CIC’s statement as to the finality of its previous decision and its conclusion that such decision stands. I consider this to demonstrate a failure to recognize the existence of the discretion to reconsider and therefore a reviewable error of the sort recognized in *Kurukkal*.

C. *Was it an error not to reconsider the application in light of the new evidence?*

[25] Ms. Thelwell's position is that CIC's error in fettering or failing to recognize its discretion is a dispositive error which warrants the matter being remitted to a different decision-maker within CIC. Ms. Thelwell has also provided extensive arguments to the effect that the discretion to reconsider the previous decision should have been exercised in her favour, focusing upon the reasons underlying the September 11, 2015 decision and her arguments, based on the *Charter*, as to why that decision was unreasonable. The Respondent has also addressed those arguments in considerable detail. However, as I have accepted Ms. Thelwell's characterization of CIC's decision as having been based on the finality of the previous decision, it follows that, while CIC referred in its November 30, 2015 letter to having taken into consideration the information submitted on Ms. Thelwell's behalf, neither that information nor the analysis in the September 11, 2015 decision influenced the November 30, 2015 decision. As the latter is the decision under judicial review, and as it is not infused with the analysis of the earlier decision, I do not consider that it would be appropriate for the Court in this judicial review to reach a conclusion on the reasonableness of the earlier decision.

V. Conclusion

[26] It is therefore my decision to grant this application for judicial review and order the relief requested by Ms. Thelwell, that the November 30, 2015 decision be set aside and remitted to a different decision-maker.

[27] Ms. Thelwell has requested in her Memorandum of Fact and Law that this relief include a direction that the new decision-maker must receive any new evidence and argument submitted by her within 30 days of the Court's Order and that the new decision-maker must make a decision within 60 days of receiving her updated materials. The Respondent does not disagree that the Court has jurisdiction to impose these time frames but argues that they are unnecessary in the present circumstances, as there is no evidence of a delay by CIC in the handling of Ms. Thelwell's application. My decision is to include in my Order the time frames requested by Ms. Thelwell, not because of any lack of confidence that CIC is prepared to proceed in a timely manner, but rather to provide the parties with certainty as to the timing of the steps resulting from the Court's decision.

[28] With respect to the opportunity for Ms. Thelwell to provide updated materials, again the Respondent does not dispute the Court's jurisdiction to provide such an opportunity but argues that the reconsideration request should be considered based on the record as it presently exists. My conclusion is that it would be artificial to preclude the reconsideration being conducted based on potentially updated information. My Order will therefore provide for a brief period within which Ms. Thelwell may provide any new evidence and argument to CIC.

VI. Costs

[29] Having prevailed in this application, Ms. Thelwell is entitled to costs. She proposed a figure in the $2000 to $3000 range, with which range the Respondent concurred. I award her costs of $2000.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed;

2. The decision by the Passport Program of Citizenship and Immigration Canada dated November 30, 2015 is set aside and the matter is remitted to a different decision-maker in the Passport Program;

3. Within 30 days of the date of this Order, Ms. Thelwell shall provide any new evidence and arguments to the Passport Program or shall advise the Passport Program that no new evidence or arguments will be provided; and

4. The Passport Program shall make a decision within 60 days of the date it receives any new evidence and arguments from Ms. Thelwell or her advice that no new evidence or arguments will be provided.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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