

Federal Court



Cour fédérale

Date: 20170210

Docket: T-1035-16

Citation: 2017 FC 152

Toronto, Ontario, February 10, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MATTHEW WONG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a judicial review of a decision of the Passport Investigations Division [PID] – Program Integrity Branch of Immigration, Refugees and Citizenship Canada, dated May 30, 2016, refusing the issuance of a passport 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 decision was based on a determination that there was sufficient information

to support a conclusion that the Applicant had obtained a passport in an assumed identity by false or misleading information and failed to provide all the material required or requested on a passport application.

[2] As explained in greater detail below, this application is allowed, because I have concluded that the Applicant was denied procedural fairness in that the PID did not disclose to him a copy of a material document upon which it based its decision. While the PID's letters to the Applicant referred to this document, there were material facts in the document that were not disclosed.

II. Background

[3] The Applicant, Matthew Wong, submitted a passport application which was received on June 11, 2015. This application listed passport number WL183967, issued on August 6, 2009, as the only passport issued to him in the last six years. On or around June 15, 2015, a routine verification by the PID's facial recognition software indicated that the photograph submitted in support of this application matched the photograph that appears in another passport, number WH145631, issued in the name of Andrew Forrester [the Forrester Passport].

[4] Mr. Wong was advised by letter dated August 6, 2015 that he was under investigation by the PID, as it had information indicating that he did not provide all the information required on his passport application, specifically all Canadian passports that had been issued to him in the past six years. The PID's letter provided a questionnaire to which Mr. Wong responded,

verifying that a photograph accompanying the questionnaire was a photograph of him. While not stated in the questionnaire, this was the photograph which appears in the Forrester Passport.

[5] In further correspondence with Mr. Wong dated September 10, 2015, the PID informed him that they had reason to believe that he was involved in failing to provide a duly completed passport application and attached another questionnaire, which referred to the Forrester Passport. Mr. Wong provided a response on September 28, 2015, indicating that he does not know an individual by the name of Andrew Forrester, could not explain why a passport with his photograph under the name of Andrew Forrester was mailed to his permanent address, and that he does not have the Forrester Passport.

[6] Mr. Wong also expressed concern that he had been the victim of identity theft, explaining that he is at risk of such theft because he has a degenerative neuromuscular condition and requires the assistance of caregivers who have access to everything in his home and mailbox. He provided evidence of his disability and stated that, during the last few years, he had received calls from collection agencies for people he did not know, and had been told he has a poor credit score. Mr. Wong also stated that his credit card had been compromised and he had filed a police report with Metro Toronto Police. He asked whether he should follow up with the RCMP and advised that otherwise he would follow up with the Metro Toronto Police.

[7] The PID sent another letter to Mr. Wong dated November 25, 2015, advising him that he was under investigation concerning the possibility that he may have obtained a passport by providing false and misleading information, as well as his alleged involvement in failing to

provide a duly completed passport application and failing to provide all the material required in the application for a passport. This letter referred to information that had been revealed by the PID's investigation, including the following:

- A. The application which resulted in issuance of the Forrester Passport was received on September 22, 2009, listing Matthew Wong and Christopher Manansala as references and Aiko Hamasaki as a guarantor. Christopher Manansala and Aiko Hamasaki are also listed as references in Mr. Wong's June 11, 2015 application.
- B. The Forrester Passport was sent to the same address as Mr. Wong's permanent address.
- C. The photos used in both Mr. Wong's June 11, 2015 application and the application for the Forrester Passport were both taken at Photo Imaging, Cumberland Terrace, 2 Bloor St. West, Toronto.
- D. The application for the Forrester Passport was supported by a Canadian Citizenship Certificate. Verification by PID with Ontario Vital Statistics confirmed that there is no birth record for Andrew Forrester and that the birth certificate used to obtain the Canadian Citizenship Certificate issued in the name of Andrew Forrester is a fraudulent document. A request to obtain proof of Canadian citizenship for Andrew Forrester was signed by Matthew Wong on April 30, 2009.

[8] Mr. Wong provided a response dated January 11, 2016 and included four statutory declarations signed by him and his colleagues at his legal practice. He included a release of

medical information and reiterated his belief that he was a victim of identity theft due to his physical condition. He explained that he would not benefit in any way from having a false identity given his status as a lawyer, and that this would only serve to jeopardize this status. He also requested a personal interview.

[9] The PID sent another letter dated February 19, 2016, acknowledging receipt of the further submissions and providing additional information on the application for the Forrester Passport. The PID noted that the passport issuing office had contacted the individual claiming to be Andrew Forrester in 2010 and requested additional documentation, which was sent by fax from Foresight Research and Consulting. This is the same employer listed in Mr. Wong's passport applications. Also, the back of the photo submitted in the application for the Forrester Passport showed what appeared to be Mr. Wong's signature below the printed name of Andrew Forrester. The PID also noted that Mr. Wong had not explained why he signed a request to obtain proof of Canadian citizenship for Andrew Forrester on April 30, 2009, or why the Forrester Passport was mailed to his address. The PID denied his request for an interview.

[10] Mr. Wong responded on March 22, 2016, explaining that Foresight Research is a company where he is the sole director and that, upon ceasing operations, he kept a fax machine from the company, which he assumes was used for this fax. Mr. Wong denied signing the photograph and letter for proof of citizenship that were used in the Forrester application, and he reiterated that in the past several caregivers have had access to his mailbox and speculated that one of them used his address to receive the Forrester Passport to avoid using their own. He also

stated that he does not have the means nor the motive to obtain a passport under someone else's name.

[11] On April 22, 2016, the PID wrote to the Applicant, confirming receipt of his latest submissions and advising him that the investigation would be forwarded for a decision. On May 30, 2016, the PID issued the decision that is the subject of this judicial review. The PID determined that, after a thorough review of all the information gathered throughout the investigation and Mr. Wong's submissions, based on a balance of probabilities, there was sufficient information to support a conclusion that he obtained passport number WH145631 in the assumed identity of Andrew Forrester by false or misleading information and that he failed to provide all the material required or requested on an application for a passport.

[12] The PID refused to issue a passport to Mr. Wong, pursuant to s. 9(1)(a) of the Order, and imposed a period of refusal of passport services until June 11, 2020, pursuant to s.10.2(1) of the Order. The decision-maker noted that this reflected the seriousness with which the PID regarded passport abuse, misuse or misinformation in the context of entitlement to passport services.

III. Issues

[13] Mr. Wong submits that this application raises the following issues for the Court's consideration:

- A. What is the standard of review?
- B. Was the decision rendered in a procedurally fair way?
- C. Was the decision reasonable?

D. Is the decision reached perverse?

[14] The Respondent identifies the following issues:

- A. Was the Applicant provided procedural fairness, and was an oral hearing required?
- B. Was the decision reasonable?

[15] Subject to identifying the standard of review, which is addressed below and on which I do not understand the parties to disagree, I consider the Respondent's articulation of the issues to represent the better framework for analyzing the arguments in this application.

IV. Standard of Review

[16] The standard of review for procedural fairness is correctness (*Mission Institution v Khela*, 2014 SCC 24, at para 79; *Dias v Canada (Attorney General of Canada)*, 2014 FC 64, aff'd in 2014 FCA 195, at para 11; *Sketchley v Canada (Attorney General of Canada)*, 2005 FCA 404, at para 70), and otherwise the standard of review applicable to the decision to refuse passport services is reasonableness (*Saibu v Canada (Attorney General of Canada)*, 2015 FC 255, at para 11; *Kamel v Canada (Attorney General of Canada)*, 2008 FC 338, at paras 57-59; *Villamil v Canada (Attorney General of Canada)*, 2013 FC 686, at para 30).

V. Analysis

A. *Was the Applicant provided procedural fairness, and was an oral hearing required?*

[17] Mr. Wong advances two procedural fairness arguments. First, he argues that the PID's decision involved credibility determinations and that, as such, the circumstances of this case warranted providing him with an oral hearing, which he expressly requested. Second, he argues that he was denied procedural fairness because the PID's disclosure was inadequate.

[18] Having considered Mr. Wong's first argument, I find no basis to conclude that he was entitled to an oral hearing on the facts of this case.

[19] The parties agree that neither the Passport Order nor its governing legislation requires an oral hearing in the context of a decision under ss. 9(1)(a) and 10.2(1). However, Mr. Wong argues that principles of procedural fairness may nevertheless result in such a requirement when a decision involves assessments of credibility. He relies on the decision in *Kamel v. Canada (Attorney General)*, 2008 FC 338 [*Kamel*], in which Justice Noël stated as follows at paragraph 72:

72 Having regard to the five factors, the Court concludes that the CPO had an obligation to follow a procedure that was in compliance with the principles of procedural fairness, meaning fairness to the applicant. This does not mean that a right to a hearing would automatically be a necessary part of the investigation (for example, where the passport applicant's credibility is in issue). 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; as well, the decision-maker must have all of the facts in order to make an informed decision. Did the CPO adhere to those principles in conducting the investigation?

(Emphasis added)

[20] Mr. Wong's position is that the analysis in *Kamel* demonstrates that a requirement for an oral hearing in the course of an investigation under the Passport Order is not foreclosed, that there are cases where the circumstances do necessitate such a hearing, and that his case represents such circumstances because the PID's decision involved credibility determinations.

[21] It is not necessary for the Court to comment upon the circumstances in which an investigation under the Passport Order might require an oral hearing in order to achieve procedural fairness, as my conclusion is that the PID's decision did not turn on credibility findings of a sort that required an oral hearing to be properly assessed. I agree with the Respondent's characterization of the decision as turning on sufficiency of evidence, as Mr. Wong had not produced sufficient evidence to address the concerns identified in PID's letters to him and to support his assertion that he was a victim of identity theft.

[22] Ultimately, Mr. Wong's argument is that, in the course of an oral hearing, he may have been better able to convince the PID that he did not submit the application for, or receive, the Forrester Passport. While he asserts that he has no knowledge of the application or the Forrester Passport, and therefore argues that his credibility is engaged, he has not pointed to any particular evidence of which the credibility could have been better assessed through an oral hearing. Mr. Wong argued at the hearing of this application for judicial review that an oral hearing would have afforded him an opportunity to adduce additional evidence to support his position. However, he did not explain what this evidence might have been or why it could not have been provided through his written submissions.

[23] Turning to Mr. Wong's second procedural fairness argument, I do find merit to his position on the PID's failure to disclose one of the documents upon which it based its decision.

[24] The parties do not appear to disagree on the legal principles applicable to this argument, only on the application of those principles to the facts of this case. As noted in paragraph 72 of *Kamel*, quoted above, the investigation must include disclosure to the individual affected of the facts alleged against him or her, the information collected in the course of the investigation, and the investigator's objectives, and must give the individual an opportunity to respond fully. The duty of fairness requires that all material facts discovered by the investigation be disclosed to the affected party, including both inculpatory and exculpatory information (see *Gomravi v. Canada (Attorney General)*, 2013 FC 1044, at para 32). However, it is not necessary that the investigation discloses every line of inquiry or even every document that is provided to the decision-maker. Rather, the disclosure requirement relates to all information gathered that is relevant to the determination to be made, which requirement can be met through provision of a summary of the material facts that are relevant to the determination (see *Slaeman v. Canada (Attorney General)*, 2012 FC 641 [*Slaeman*], at paras 37-38).

[25] As such, the fact that the PID's file included documentation which was not disclosed to Mr. Wong during the investigation, and which he received only through the Certified Tribunal Record generated in this application for judicial review, does not in itself raise a procedural fairness concern. Indeed, I find no such concerns in relation to several of the documents that Mr. Wong argues should have been disclosed. For instance, he argues that PID should have disclosed a Facial Recognition analysis dated June 15, 2015, which compared the photograph

accompanying his June 11, 2015 passport application with the photograph in the Forrester Passport. The information disclosed to Mr. Wong in the procedural fairness letters clearly identified the match between these photographs, and Mr. Wong acknowledged that the photograph from the Forrester Passport was a photo of himself. He has identified no relevant and material information of which he was unaware as a result of not been provided with a copy of the Facial Recognition analysis.

[26] However, the PID's investigation revealed an April 30, 2009 letter purportedly written by Mr. Wong, on his letterhead, which enclosed and supported Andrew Forrester's application for proof of citizenship. This document was referenced in the PID's letters to Mr. Wong dated November 25, 2015 and February 19, 2016. However, those references were limited to stating that "on April 30, 2009, you signed as Matthew Wong on a request to obtain a proof of Canadian Citizenship for Andrew Forrester" and subsequently noting that Mr. Wong had not explained why he had signed this request. No other detail on the April 30, 2009 document was provided.

[27] In his affidavit filed in support of this application for judicial review, Mr. Wong explained that when he received the Certified Tribunal Record, he saw evidence relied upon by the decision-maker of which he had not previously been aware, including this request for proof of citizenship for Andrew Forrester, which Mr. Wong noted referred to an incorrect and invalid Law Society number. Mr. Wong was cross-examined on his affidavit and explained that the April 30, 2009 letter provides a Law Society of Upper Canada number after his name, but that he had not been called to the bar by that time, and the number is not his. He also noted that the

degree credentials inserted after his name (LLB, LLM, MSc) are incorrect, in that he had received his LLB and MSc by April 2009, but not his LLM.

[28] Mr. Wong submits that, had he been provided with a copy of the April 30, 2009 letter, and been aware of the details of that letter, it would have enabled him to pursue additional lines of inquiry to support his assertion that he was a victim of identity theft. The Respondent submits that Mr. Wong has not demonstrated how this information would have assisted him to support his position. However, as noted by Justice Roussel at paragraph 28 of *Lipskaia v. Canada (Attorney General)*, 2016 FC 526 [*Lipskaia*], in considering material information that was not disclosed in a PID investigation, it is not open to the Court to speculate as to what the result might have been had the applicant been apprised of the information. The April 30, 2009 letter itself was obviously relevant and material to the investigation and decision, as it was referenced in several letters from the PID to Mr. Wong, including the decision itself. However, while those letters reference the April 30, 2009 document, they do not disclose the details which Mr. Wong now testifies to represent errors.

[29] Whether the identification of these errors might have enabled Mr. Wong to succeed in establishing that someone else, not fully aware of his educational and professional status, was impersonating him in submitting this letter, represents the sort of speculation against which Justice Roussel cautioned in *Lipskaia*. However, given that possibility, I consider the details of the letter to represent relevant and material information of which he was not made aware. In reaching this conclusion, I am conscious of the following comments by Justice Gleason at paragraph 37 of *Slaeman*:

... While it might be a more prudent practice for Passport Canada to provide identical disclosure to the adjudicator and the individuals under investigation (and thereby ensure it would be immune from challenges of this nature), in my view, there is no breach of natural justice where, as here, buried in the file forwarded to the adjudicator there are a few irrelevant facts that were not disclosed to the individuals under investigation.

[30] While the applicable procedural fairness obligations can be met by summarizing the material facts that are relevant to an investigation by the PID, rather than by disclosing copies of the underlying documents, that approach does run the risk of some material facts being omitted in the summary. I find that such omission in the present case represents a denial of procedural fairness, which requires that the decision be set aside and sent back to be re-determined by different decision-maker, after Mr. Wong is given the opportunity to make further submissions to the PID.

B. *Was the decision reasonable?*

[31] While Mr. Wong raised the issue of the reasonableness of the decision and made brief written submissions thereon in his Memorandum of Fact and Law, his oral submissions at the hearing of this application for judicial review focused exclusively on the issue of procedural fairness. Having reached the conclusion that the decision must be set aside for reasons of procedural fairness, it is not necessary for the Court to address the issue of whether the decision was reasonable. Because the decision is to be re-determined, and such re-determination will take into account any additional submissions that Mr. Wong may make, I do not consider it useful for the Court to make findings on the reasonableness of the decision that is being set aside.

VI. Costs

[32] At the hearing, Mr. Wong submitted a draft Bill of Costs, quantifying costs totaling \$2255 for fees and disbursements. I have directed that this document be filed for completeness of the record. However, in the course of their respective submissions, each of the parties agreed that costs should be awarded to the successful party in a lump sum amount up to \$2000. As Mr. Wong has prevailed in this application, he is entitled to costs, which I fix at the amount of \$2000.

JUDGMENT

THIS COURT’S JUDGMENT is that:

1. This application for judicial review is allowed.
2. The decision dated May 30, 2016 is set aside and the matter is remitted to be re-determined by a different decision-maker in the Passport Investigations Division – Program Integrity Branch of Immigration, Refugees and Citizenship Canada, after the Applicant is given the opportunity to make further submissions.
3. The Applicant is awarded costs of \$2000.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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