

Federal Court



Cour fédérale

**Date: 20140328**

**Docket: T-1180-13**

**Citation: 2014 FC 298**

**Ottawa, Ontario, March 28, 2014**

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

**BETWEEN:**

**RUTH LUCIA SISKA**

**Applicant**

**and**

**PASSPORT CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of Passport Canada under sections 10(2)(b) and 10.3 of the *Canadian Passport Order*, SI/81-86 [CPO], dated June 12, 2013, to revoke the Applicant's passport and impose a period of refusal of passport services of four years.

[2] The facts are not disputed.

[3] Lucia Siska, was issued a Canadian passport on May 14, 2008. On September 1, 2012, she was scheduled to fly with her daughter, Lucero Quiroz, to Toronto from Lima, Peru. They checked in for their flight, but between check-in and boarding, their passports went missing. As a result, they did not board their flight as scheduled.

[4] After the flight departed, Ms. Quiroz admitted to her mother that she had taken the passports from the check-in counter and hidden them in her shoe, as she did not want to leave Peru. Ms. Siska in a written statement said: "I checked the passport & look like OK." She subsequently advised the Canada Border Services Agency [CBSA] that the passports had been found.

[5] On September 7, 2012, Ms. Siska and her daughter attempted to check in for another Air Canada flight from Lima to Toronto. Both of their passports had a substituted bio-data page (i.e. the page of the passport with a photograph and biographic information of the passport holder) which had various deficiencies compared to a legitimate bio-data page. Specifically, the page was a colour photocopy of the original genuine page but the page had been cut out with scissors, the edges had not been cut straight, the text was cut off in some places, the copy had been made with an ink jet printer, the copy was affixed with clear adhesive tape, the pages were laminated with a thick laminate, it was not optically variable, perforations were reproduced by a print technique, and the corners were not die-cut.

[6] The two passports were seized by CBSA. Ms. Siska and her daughter were directed to the Canadian embassy where on September 10, 2012, she completed a declaration concerning a lost, stolen, inaccessible, damaged or found Canadian travel document and she provided a written

statement of the events leading up to the seizure of the passports. She concluded that statement as follows: “On September 07 in the airport I notice the passport the first page was damaged [*sic*].” She was issued an Emergency Travel Document for her return to Canada.

[7] On March 27, 2013, an Investigator from the Investigations Division of Passport Canada advised Ms. Siska in writing that she was the subject of an investigation for misuse of a passport issued in her name.

[8] On May 13, 2013, Ms. Siska sent submissions to Passport Canada from both herself and her daughter. She indicated that she had been unaware of any tampering with her passport, and that her daughter had altered the passports unbeknownst to her. She also stated that she had noticed that the pictures in the passports were damaged, but thought that the damage was caused because they had been stored in her daughter’s shoe. She said that had she known that the page was a copy of the original, with the deficiencies noted above, she would not have attempted to travel on the passport. Her daughter stated that she had altered the passports one day before the flight because she did not want to return to Canada.

[9] On June 12, 2013, Passport Canada issued the decision revoking Ms. Siska’s passport and imposing a period of refusal of passport services. The decision-maker concluded that Ms. Siska was, in fact, aware of the damage to the passport, yet attempted to travel with them anyway. The relevant portion of the decision reads as follows:

After a thorough review of all the information gathered throughout the investigation and your submissions, it has been determined that, based on the balance of probabilities, there is sufficient information to support a conclusion that you attempted to use Canadian passport

WS641640 issued in your name to assist you in committing the indictable offence of possessing a forged passport, contrary to section 57(3) of the *Criminal Code*; and of attempting to use a forged or altered document for the purpose of entering Canada, contrary to section 122(1) of the *Immigration and Refugee Protection Act* (the *IRPA*), in combination with sections 122(2) and 123 of the *IRPA*.

Given the aforementioned, it is important to note that criminal proceedings are separate from any action taken by Passport Canada. Therefore, the decision is to revoke passport WS641640 issued in your name under section 10(2)(b) of the *Canadian Passport Order*, SI/81-86, as amended (the *Order*), and **to impose a period of refusal of passport services until September 7, 2016**, pursuant to section 10.3 of the *Order*. The application of section 10(2)(b) of the *Order* does not require you to have been charged with, or convicted of, an offence in Canada or abroad. For this section of the *Order* to apply it is sufficient to determine, based on the balance of probabilities, that the passport was used in the commission of an act or omission that constitutes an indictable offence in Canada, or an act or omission in a foreign state that would constitute an indictable offence if committed in Canada.

Section 10.3 of the *Order* authorizes Passport Canada to impose a period of refusal of passport services when a passport issued to a person has expired but, had the passport not expired, could have been revoked under any of the grounds set out in sections 10 and 10.1. Although passport WS641640 has expired, this section of the *Order* applies as the misuse of the passport occurred before its expiry on May 14, 2013.

This ineligibility period has been computed to correspond with the date passport WS641640, was misused, which was September 7, 2012. This reflects the seriousness with which we regard passport abuse, misuse or misinformation in the context of entitlement to passport services.  
(bolding in original, emphasis added)

[10] The relevant provisions of the CPO are as follows:

10(2) In addition, the Minister may revoke the passport of a person who	10(2) Il peut en outre révoquer le passeport de la personne qui:
(a) being outside Canada,	a) étant en dehors du Canada,

stands charged in a foreign country or state with the commission of any offence that would constitute an indictable offence if committed in Canada;

est accusée dans un pays ou un État étranger d'avoir commis une infraction qui constituerait un acte criminel si elle était commise au Canada;

(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;

b) utilise le passeport pour commettre un acte 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) permits another person to use the passport;

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

(d) has obtained the passport by means of false or misleading information; or

d) a obtenu le passeport au moyen de renseignements faux ou trompeurs;

(e) has ceased to be a Canadian citizen.

e) n'est plus citoyen canadien.

10.1 Without limiting the generality of subsections 4(3) and (4) and for greater certainty, the Minister may refuse or revoke a passport if the Minister is of the opinion that such action is necessary for the national security of Canada or another country.

10.1 Sans que soit limitée la généralité des paragraphes 4(3) et (4), il est entendu que le ministre peut refuser de délivrer un passeport ou en révoquer un s'il est d'avis que cela est nécessaire pour la sécurité nationale du Canada ou d'un autre pays.

10.2 The authority to make a decision to refuse to issue or to revoke a passport under this Order, except for the grounds set out in paragraph 9(g), includes the authority to impose a period of refusal of passport services.

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, pour tout motif autre que celui prévu à l'alinéa 9g), comprend le pouvoir d'imposer une période de refus de services de passeport.

10.3 If a passport that is issued

10.3 Dans le cas où un

to a person has expired but could have been revoked under any of the grounds set out in sections 10 and 10.1 had it not expired, the Minister may impose a period of refusal of passport services on those same grounds, except for the grounds set out in paragraph 9(g), if the facts that could otherwise have led to the revocation of the passport occurred before its expiry date.

passport aurait pu être révoqué pour l'un des motifs visés aux articles 10 et 10.1 — à l'exception du motif prévu à l'alinéa 9g) — s'il n'avait pas été expiré, le ministre peut imposer une période de refus de services de passeport pour le même motif si les faits qui auraient autrement pu mener à la révocation se sont produits avant la date d'expiration.

[11] Ms. Siska, who is self-represented, alleges that (1) the decision failed to acknowledge the fact that her daughter acted alone in altering the passport, (2) the decision is incoherent, (3) the decision is not supported by sufficient reasons, and (4) the decision is not supported by the evidence on file. She did not allege as an issue the authority of the Minister to revoke her passport and refuse her passport services given the facts as the Minister found them; however, it is that issue on which this decision rests.

[12] In his memorandum, counsel for the Minister relied on this Court's decision in *Vithiyananthan v Canada (Attorney General)*, [2000] 3 FCR 576, [2000] FCJ 409 (QL) [*Vithiyananthan*] for the proposition that it is not necessary for the purposes of paragraph 10(2)(b) of the CPO that the person whose passport is being revoked has had a charge laid or been convicted of an indictable offence. At paragraphs 10 and 11 of *Vithiyananthan*, Justice Simpson stated as follows:

The dispute concerns the meaning of "committing an indictable offence".

With regard to the word "committed", it is relevant to note that section 10(a) of the CPO deals with people who have been "charged" with an offence, while section 9 covers both those who have been "charged" (sections 9(b) and (c)) and those who have been "convicted" (section 9(e)). In this context it is clear, and the Applicant does not dispute, that the word "committed" in section 10(b) of the CPO is not intended to include a requirement that a charge has been laid or that a conviction has been obtained. (emphasis added)

[13] The dispute in *Vithiyananthan* turned not on whether that applicant had “committed” an offence, rather it turned on whether it was an indictable offence as the Crown had elected to proceed summarily. What is important to note for the present purposes is that Mr. Vithiyananthan had been charged and convicted of an offence, specifically the offence then provided for in subsection 94(2) of the *Immigration Act*, RSC 1985, c I-2, of having aided and abetted his cousin to enter Canada illegally.

[14] Accordingly, the emphasized portion of the judgment recited above that is relied upon by the Minister is *obiter*. It was not required for the purposes of the decision.

[15] The Applicant here, unlike Mr. Vithiyananthan, has not been charged or convicted of any of the offences referenced by the decision-maker in the decision under review.

[16] Counsel for the Minister quite properly brought to the attention of the Court, Justice Phelan’s recent decision in *Dias v Canada (Attorney General)*, 2014 FC 64, [2014] FCJ No 60 (QL) [*Dias*]. Counsel informed the Court that it is presently under appeal and urged the Court not to follow it. Justice Phelan held that a revocation of a passport pursuant to paragraph 10(2)(b) of the

CPO is dependent upon there having been a conviction. He states the basis for his conclusion succinctly in paragraphs 14 to 16, as follows:

In interpreting paragraph 10(2)(b), the power to revoke is dependent on the commission of an indictable offence in Canada or an offence of similar type in another country. The words “in committing an indictable offence” mean that a precondition to revocation or service denial is the commission of an indictable offence by the subject person.

There was no finding of the commission of an indictable offence. Not only did the Director not say so (he only referred to misuse of a passport), the Director has no jurisdiction to make such a finding. That type of finding is a matter of criminal law to be determined by a judge, not by a government official. The constitutional prohibition on the executive branch of government to find someone guilty of an indictable offence is too settled to require further elaboration.

It is noteworthy that paragraph 10(2)(b) is not couched in terms of “has reason to believe” or “there are grounds to believe that an offence may have been committed” or other such words used in various other immigration provisions. Such language might well have invested the Director with the jurisdiction he thought he had. However, in the absence of such wording, the Director did not have the authority to find that an indictable offence had occurred

[17] Although it is not referred to in his Reasons, the decision in *Vithiyananthan* was before Justice Phelan in *Dias*, as it was here. Comity would not have applied there, nor here, because the passage relied upon by the Minister is *obiter*.

[18] I find Justice Phelan’s reasoning compelling. I agree with him that it is a precondition to passport revocation under paragraph 10(2)(b) of the CPO that the passport holder has been convicted of an indictable offence. Because Ms. Siska was never convicted, let alone charged, the decision to revoke her passport was made without authority.



[19] In any event, the revocation was invalid because the passport had expired by the time it was purportedly revoked. The Minister can only revoke a passport that has not expired. This is clear from section 10.3 of the CPO which speaks to a situation where, but for the expiration of the passport, it could have been revoked under paragraph 10(2)(b).

[20] In fact, the Minister relied on section 10.3 to impose a period of refusal of passport services. This decision to impose a refusal of passport services is also made without authority as such an order can only be made on the same grounds set out in sections 10 and 10.1. As there was no conviction as required under section 10, and no suggestion of any national security issues as provided for in section 10.1, there is no authority to impose the withdrawal of services.

[21] For these reasons, the application must be granted.

[22] The Applicant sought her costs in the amount of \$2,000. However, as she was self-represented and as the basis for her success is due entirely to the Minister's counsel fulfilling his duty to the Court and bringing *Dias* to our attention, there will be no order as to costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application is granted and the decision revoking the passport of Ruth Lucia Siska and imposing a period of refusal of passport services is quashed and no costs are ordered.

"Russel W. Zinn"

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Judge

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

**DOCKET:** T-1180-13  
**STYLE OF CAUSE:** RUTH LUCIA SISKA v PASSPORT CANADA

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** MARCH 20, 2014

**REASONS FOR JUDGMENT  
AND JUDGMENT:** ZINN J.

**DATED:** MARCH 28, 2014

**APPEARANCES:**

Ruth Lucia Siska

APPLICANT  
(On Her Own Behalf)

Brad Bedard

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

N/A

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