

November 16, 1984

DEPARTMENT OF STATE

BOARD OF APPELLATE REVIEW

IN THE MATTER OF: R [REDACTED] S [REDACTED] K [REDACTED]

This is an appeal from a decision of the Assistant Secretary of State for Consular Affairs, Department of State, dated January 16, 1984, approving the revocation of appellant's passport. 1/

I

Appellant, R [REDACTED] S [REDACTED] K [REDACTED] was born on [REDACTED] in [REDACTED]. On December 13, 1978, the Department of State Passport Agency in New York issued him a passport No. J3183482. It expired on December 12, 1983.

On July 28, 1983, the American Consulate General at Seville, Spain, informed appellant, who was imprisoned at the time in Malaga, that the Department of State had revoked the passport issued to him in 1978 and "any other current passport you may

1/ Appellant's passport, number J3183482, which the Department revoked on July 28, 1983, expired on December 12, 1983. He took an appeal to this Board on February 3, 1984, from the adverse decision of the Assistant Secretary of State for Consular Affairs affirming the revocation. Although the revocation, in effect, became moot with the expiry of the passport, the Department's action taken in July of 1983 and subsequently challenged by appellant in a proceeding before an Embassy hearing officer at the Carabanchel prison in Madrid still stands as a matter of record and is subject to review by this Board. The Board's jurisdiction includes appeals from administrative decisions denying, revoking, restricting, or invalidating a passport under sections 51.70 and 51.71 of Title 22, Code of Federal Regulations. See 22 CFR 7.3.

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possess." The Department's action was predicated upon evidence that appellant was the subject of an outstanding federal warrant of arrest for a felony and a request for extradition presented to the Government of Spain. The revocation action was taken under section 51.70(a)(1) and (4) and 51.71(a) of Title 22, Code of Federal Regulations. 2/

2/ Section 51.70(a)(1) and (4), Title 22, Code of Federal Regulations, 22 CFR 51.70, reads:

Sec. 51.70 Denial of passports.

(a) A passport, except for direct return to the United States, shall not be issued in any case in which:

(1) The applicant is the subject of an outstanding Federal warrant of arrest for a felony, including a warrant issued under the Federal Fugitive Felon Act (18 U.S.C. 1073); or

. . . .

(4) The applicant is the subject of a request for extradition or provisional arrest for extradition which has been presented to the government of a foreign country.

. . . .

Section 51.71(a), Title 22, Code of Federal Regulations, 22 CFR 51.71, reads:

Sec. 51.71 Revocation or restriction of passports.

A passport may be revoked, restricted or limited where:

(a) The national would not be entitled to issuance of a new passport under sec. 51.70;

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The Consulate General also informed appellant of his right to a proceeding before a hearing officer to determine whether there existed an outstanding federal warrant of arrest for a felony and a request for extradition presented to the government of a foreign country, whether appellant was the subject of the warrant of arrest and the request for extradition, and whether the appropriate passport regulations were properly applied. 3/ On August 23, 1983, appellant made a formal request for a hearing. The American consul at Seville acknowledged receipt of the request on September 8, 1983, and informed appellant of his right to be represented at his hearing by an attorney. It is unclear whether appellant received this letter at the time, as he had been transferred in the meanwhile to the Carabanchel prison in Madrid.

3/ Section 51.81, Title 22, Code of Federal Regulations, 22 CFR 51.81, provides for a hearing to review an adverse passport action. Section 51.81 reads in part:

Sec. 51.81 Time limits on hearing to review adverse action.

A person who has been the subject of an adverse action with respect to his right to receive or use a passport shall be entitled, upon request made within 60 days after receipt of notice of such adverse action, to require the Department or the appropriate Foreign Service post, as the case may be, to establish the basis for its action in a proceeding before a hearing officer. . . .

Upon learning of appellant's transfer from Malaga to Carabanchel prison, a consular officer at the American Embassy at Madrid notified appellant on September 30, 1983, of the receipt of appellant's passport file from the Consulate General at Seville and also acknowledged receipt of appellant's request of August 23, 1983, for a hearing.

On October 25, 1983, the consular officer at Madrid gave appellant notice in writing that the hearing would be held on November 3, 1983. At appellant's request, the hearing date was postponed until November 4, 1983.

The hearing was held at the Carabanchel prison in Madrid on November 4, 1983. 4/ The appellant appeared in person without an attorney. Counsel for the Embassy introduced into evidence a copy of appellant's passport application dated October 27, 1978; a copy of the letter of the Consulate General at Seville, dated July 28, 1983, informing appellant of the revocation of his passport and of the procedures for contesting such action; a copy of the federal bench warrant of arrest dated July 21, 1983, issued by the United States District Court for the Eastern District of Pennsylvania; and a copy of a diplomatic note of the Embassy at Madrid to the Spanish Ministry of Foreign Affairs dated July 13, 1983, requesting appellant's extradition in accordance with Article 10 and 11 of the Extradition Treaty of May 29, 1970.

4/ The regulations require the Department or the appropriate Foreign Service post to establish the basis for its adverse passport action in a proceeding before a hearing officer. Although the regulations are silent as to the venue or site of the proceeding, it is assumed that the proceeding will, as a rule, take place at the Department or the appropriate Foreign Service post, as the case may be. The regulations, however, do not expressly prohibit the proceeding being held elsewhere if unusual circumstances warrant it. See note 3, supra.

The Embassy's counsel also made a formal demand for the return of appellant's passport. Appellant, however, was unable to comply. He stated that at the time of his arrest in Spain, the Malaga police authorities had taken his passport.

Appellant made at the hearing several objections for the record. He questioned the qualifications of the reporter for the hearing, contended that he was not notified of the place of the hearing and that he was not provided a copy of the text of section 51.70 of the regulations relating to the denial of passports, and objected to the fact that the federal bench warrant for the arrest identified him as R [REDACTED] K [REDACTED] and not as R [REDACTED] S. K [REDACTED]. Further, he challenged the validity of the Embassy's extradition request to the Spanish authorities.

On November 14, 1983, the Embassy's hearing officer made the following findings of fact:

1. That R [REDACTED] K [REDACTED] applied for and was issued passport number J3183482 on December 13, 1978.
2. That a bench warrant for his arrest was issued by the United States District Court for the Eastern District of Pennsylvania.
3. That a request for extradition was made through the American Embassy by diplomatic note on July 13, 1983.
4. That the Department of State requested restrictive passport action based on the warrant of arrest and the request for extradition.
5. That the subject's passport was revoked under provisions of Sections 51.70(a)(1) and (4) and 51.71(a) of the passport regulations and that he was notified of such action on July 28, 1983.
6. That the subject was informed of his right to a hearing under applicable sections of the passport regulations and that he was accorded such a hearing on November 4, 1983.

In reporting her findings of fact to the Department, the hearing officer recommended that the revocation of appellant's passport be upheld. The Assistant Secretary of State for Consular Affairs, upon review of the entire record in the case, including the transcript of the hearing held at the Embassy, concurred with the findings and recommendation of the hearing

officer and upheld the revocation of appellant's passport. The Embassy forwarded to appellant the Assistant Secretary's letter of January 16, 1984, notifying him of the adverse decision and of his right to appeal that decision to the Board of Appellate Review. 5/ On February 3, 1984, appellant took an appeal to this Board and submitted the case for consideration on the basis of the record.

5/ Section 51.89, Title 22, Code of Federal Regulations, 22 CFR 51.89, reads:

Sec. 51.89 Decision of Assistant Secretary for Consular Affairs; notice of right to appeal.

The person adversely affected shall be promptly notified in writing of the decision of the Assistant Secretary for Consular Affairs and, if the decision is adverse to him or her, the notification shall state the reasons for the decision and inform him or her of the right to appeal the decision to the Board of Appellate Review (Part 7 of this chapter) within 60 days after receipt of notice of the adverse decision. If no appeal is made within 60 days, the decision will be considered final and not subject to further administrative review.

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II

On appeal to this Board, appellant maintains that his passport was improperly revoked. The principal thrust of his argument is that he was not notified of the place of the hearing in Madrid and thus was denied the right to counsel. In his letter of appeal to the Board, dated February 3, 1984, he pointed out that the Embassy in its correspondence did not inform him of the place of the hearing, and, as a consequence, he was denied "a fundamental right of having the opportunity to have an attorney present as required by the regulations, sec. 51.84." 6/ He further explained:

Regardless of the fact that I was, and am, incarcerated in Madrid, I was unaware as to whether I would be transported to the Embassy for the hearing and this uncertainty made it impossible for me to make appropriate arrangements with any attorney to represent me.

With respect to the matter of notice of the place of the hearing, section 51.82, Title 22, Code of Federal Regulations, provides:

The person adversely affected shall receive not less than 5 business days' notice in writing of the scheduled date and place of the hearing.

6/ Section 51.84, Title 22, Code of Federal Regulations, 22 CFR 51.84, reads:

Sec. 51.84 Appearance at hearing.

The person adversely affected may appear at the hearing in person or with his attorney, or by his attorney. The attorney must possess the qualifications prescribed for practice before the Board of Appellate Review or be admitted to practice before the courts of the country in which the hearing is to be held.

Although the consular officer's letter of October 25, 1983, notified appellant of the date of his passport revocation hearing, it made no mention of the place where the hearing would be held.

In her comment on the findings of fact, the hearing officer noted that the notification of hearing letter did lack the place of the hearing. She observed, however, that, notwithstanding the omission, the hearing could take place nowhere else than in Carabanchel prison because he was detained there. Moreover, it appears from the record that appellant was otherwise informed that the hearing proceeding would take place at the prison.

We are satisfied that appellant was aware of the place of the hearing prior to the hearing. Furthermore, we do not believe that the failure of the Embassy to give notice in writing of the place of the hearing, as required by the regulations, in the special circumstances of this case, is sufficient by itself to render the proceedings defective. It did not constitute material error or irregularity.

Appellant, we believe, also had ample time to obtain legal counsel if he so desired. The Embassy consular officer informed him by letter dated October 25, 1983, expressly of his right to be represented by an attorney at the hearing. In response, appellant stated in his letter of October 27, 1983, that he was attempting to consult an appropriate attorney, but, because of the short time period of the notice, he would not have sufficient time to arrange legal representation. It should be noted in this connection, however, that the regulations do not specifically require the appearance of an attorney. The regulations provide that the appellant may appear in person by himself or may be accompanied by his attorney, or that he may be represented by an attorney at the hearing. Appellant was provided a copy of the relevant passport regulations, including section 51.84 regarding appearance at the hearing, with the letter of the Consulate General at Seville, dated July 28, 1983. He thus was on notice of his right to legal representation and had sufficient time to consult with an attorney about the revocation of his passport and his rights for further administrative review.

In considering this appeal, the Board's review is limited to determining whether the Department's action in revoking appellant's passport in July 1983, was in conformity with the regulations and whether appellant was accorded the procedural and substantive administrative due process provided by the regulations. The regulations do not require or authorize the

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Department or the Board to consider the merits of charges underlying a federal warrant of arrest or a request for extradition to a foreign government.

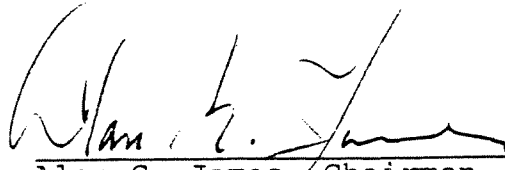
The question to be determined in circumstances of this character is whether under the regulations appellant should be permitted to retain a passport notwithstanding the existence of an outstanding federal warrant of arrest or if he is the subject of a request for extradition. Section 51.71(a) of the regulations states that a passport "may be revoked" where the person would not be entitled to issuance of a new passport. Section 51.70(a)(1) and (4) provides that a passport, except for direct return to the United States, "shall not be issued" in any case in which the applicant for a passport is the subject of an outstanding federal warrant of arrest or a request for extradition.

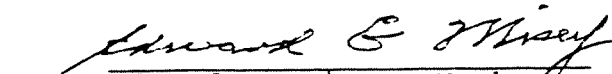
The term "may be revoked" appearing in section 51.71 is, in our view, intended to permit full discretionary exercise of the passport revocation power in circumstances where it is discretionary to determine whether or not a passport should issue. But, where it is mandatory that a passport not issue, we believe that the passport revocation power is virtually non-discretionary. In other words, if an appellant "shall not be issued" a passport if he is the subject of an outstanding federal warrant of arrest for a felony, it would appear that he should not be permitted to retain a passport after a warrant of arrest is issued, and that his passport must be revoked. There may possibly be occasions when, despite the technical existence of an outstanding federal felony arrest warrant or a request for extradition, the Department should exercise the discretion afforded by the language of section 51.71 and refrain from revoking a citizen's passport. However, the failure of the Embassy to mention the venue or site of the hearing in its letter notifying appellant of the scheduled date of the hearing does not, in our view, provide such an occasion.

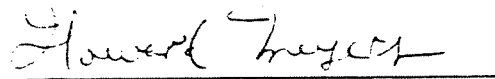
III

Under the regulations, the Board's action is limited to determining whether the Department's action in revoking appellant's passport was in conformity with the regulations. We find that the revocation of appellant's passport was proper under section 51.71(a) of Title 22, Code of Federal Regulations, in that appellant was the subject of an outstanding federal warrant of arrest for a felony and the subject of a request for extradition presented to the Government of Spain, as listed in section 51.70 of the regulations. Accordingly, we affirm the decision of

the Assistant Secretary for Consular Affairs approving the revocation of appellant's passport.


Alan G. James, Chairman


Edward G. Misey, Member


Howard Meyers, Member