

October 17, 1989

## DEPARTMENT OF STATE

## BOARD OF APPELLATE REVIEW

IN THE MATTER OF: H [REDACTED] E [REDACTED] L [REDACTED]

## Passport Revocation

This is an appeal from a decision of the Assistant Secretary of State for Consular Affairs, dated July 29, 1988, approving the revocation of appellant's passport.

In a proceeding before a hearing officer of the United States Embassy at Mbabane on June 13, 1988, the hearing officer found that all requirements for passport revocation and due process were met, according to the applicable regulations, and recommended to the Assistant Secretary that she affirm revocation of appellant's passport. Following the Assistant Secretary's approval of the hearing officer's findings and recommendation, appellant entered a timely appeal on November 7, 1988. For the reasons given below, we conclude that revocation of appellant's passport was proper, and accordingly affirm the decision of the Assistant Secretary of State for Consular Affairs.

## I

Appellant, [REDACTED] was born at [REDACTED]. Around the spring of 1986, he went to Africa, travelling on a passport issued at Houston on January 17, 1983, and conducted business in Zimbabwe and neighboring countries. On July 24, 1986 he was indicted by a federal grand jury at Corpus Christi on the charge of second degree felony theft. <sup>1/</sup> A warrant for appellant's arrest was issued by a magistrate of the United States District Court for the Southern District of Texas on August 18, 1986, charging appellant, under section 1073 of Title 18, U.S. Code, with unlawful flight to avoid prosecution.

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<sup>1/</sup> The facts of the offense, according to a report the FBI sent the Department, are, briefly, as follows:

In March 1985, appellant, then president of a business enterprise, asked a fellow employee to use her property to secure a loan to help the financially troubled enterprise. The property was signed over. Following reorganization of the business, the enterprise was sold. The employee who signed the money to the enterprise at appellant's request learned later that no part of the loan or her property had been received by the enterprise.

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Having previously requested that the State Department issue a lookout on appellant, the FBI in April 1987 requested revocation of appellant's passport. In compliance with the Department's instructions, the Embassy at Harare in May 1987 wrote to appellant to inform him that the Department had revoked his passport pursuant to sections 51.70(a)(1) and 51.71(a) of Title 22, Code of Federal Regulations, 22 CFR 51.70(a)(1) and 51.71(a). 2/ The Embassy also informed appellant that he had the right to a proceeding before a hearing officer, 3/ and

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2/ 22 CFR 51.70(a)(1) (1988) provides that:

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...

22 CFR 51.71(a) (1988) provides that:

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; or ...

3/ 22 CFR 51.81 provides for a hearing to review an adverse passport action. It reads:

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 or her 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

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requested that he surrender his passport. Appellant visited the Embassy on July 20, 1987 and promised to surrender his passport ten days later, but did not do so. It appears that he left Zimbabwe thereafter and went to Swaziland. In January 1988, the Department instructed the Embassy at Mbabane to send appellant a letter identical to the one the Embassy at Harare had sent him in the spring of 1987. The Embassy at Zimbabwe sent appellant such a letter on January 15, 1988, as instructed. The letter was eventually returned, marked "undeliverable." It appears, however, that appellant received and read the letter, for an attorney of Houston addressed a letter to the Embassy at Mbabane, dated March 14, 1988, stating that pursuant to 22 CFR 51.81, "you are notified that: ...[appellant] received notice on February 5, 1988...informing him as to revocation of his passport [and that appellant] hereby requests that the appropriate Foreign Service post establish the basis for such action in a proceeding before a hearing officer...."

On April 22, 1988, the Embassy at Mbabane informed appellant in writing that June 13, 1988 had been set for a hearing on the revocation of his passport. Appellant visited the Embassy a few days later to discuss the impending hearing, but refused to surrender his passport, stating that he wished to await the outcome of the hearing.

The hearing was held at the Embassy on June 13, 1988.

A consular officer, who served as hearing counsel for the Embassy, opened the hearing by citing the provisions of (1) 22 CFR 51.71 and (2) 22 CFR 51.70 (note 2 supra). He then introduced in evidence the following documents: (1) a copy of the warrant for appellant's arrest issued by a magistrate of the United States District Court for the Southern District of Texas on August 18, 1986, charging appellant under

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3/ (Cont'd.)

in a proceeding before a hearing officer. If no such request is made within 60 days, the adverse action will be considered final and not subject to further administrative review. If such request is made within 60 days, the adverse action shall be automatically vacated unless such proceeding is initiated by the Department or the appropriate Foreign Service post, as the case may be, within 60 days after request, or such longer period as is requested by the person adversely affected and agreed to by the hearing officer.

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18 U.S.C 1073 with unlawful flight to avoid prosecution; (2) a copy of appellant's passport No. D0040918, issued January 17, 1983; (3) a copy of a letter from the United States Embassy at Mbabane, dated January 18, 1988, to appellant advising him that the Department had instructed the Embassy to revoke his passport, stating the grounds upon which revocation was based, and informing him that he had the right to a hearing; (4) a copy of a letter from appellant's attorney, Burnell L. Jones, Jr., dated March 14, 1988, to the Embassy at Mbabane, acknowledging appellant's receipt of the Embassy's letter of January 18, 1988, and requesting a proceeding before a hearing officer; and (5) a copy of a letter from the Embassy at Mbabane to appellant dated April 20, 1988, informing him of the date and place of the hearing he had requested.

On June 14, 1988, the hearing officer made the following findings of fact:

1. Harvey Earl [REDACTED] DPOB: 4/11/43, Winnsboro, Louisiana, was issued U.S. Passport No. D0040918 on Jan. 17, 1983 at CA's Passport Agency in Houston, Texas.
2. A federal arrest warrant was issued by federal magistrate Eduardo de Ases in Houston, Texas on Aug. 18, 1988, charging [REDACTED] with violation of USC 18, Section 1073, unlawful flight to avoid prosecution.
3. In January, 1988, [REDACTED] was notified by the Embassy in Mbabane that his passport had been revoked under CFR 22, Section 51.70 and 51.71.
4. In March, 1988, [REDACTED] notified the Embassy, through his attorney, that he received the revocation notice and wished to have a hearing to establish the basis for the revocation.
5. In April, 1988, the Embassy notified [REDACTED] by registered mail of the hearing [REDACTED] time and place.
6. A hearing was held on June 13, 1988, at which time the above facts were established using the attached documents. All requirements for passport revocation and due process have been met, according to the applicable regulations.

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In reporting his findings of fact to the Department, the hearing officer stated that at the hearing ██████ offered no new or additional information or evidence concerning the issue whether the Department had revoked his passport in accordance with the applicable regulations. ██████ did state, however, that he believed the charges against him in Texas were unjust. Although again asked to surrender his passport in return for one limited to direct return to the United States, ██████ refused to comply, stating that his livelihood depended upon use of his passport. Attesting that every legal requirement had been met, the hearing officer recommended that the Assistant Secretary of State for Consular Affairs affirm revocation of appellant's passport, adding that "the merits of the fugitive warrant are not germane to the revocation action - the fact the warrant exists is sufficient evidence for passport revocation."

On July 29, 1988, the Assistant Secretary for Consular Affairs, upon review of the entire record in the case, including the transcript of the hearing held at the Embassy in Mbabane, concurred in the hearing officer's findings of fact and recommendation, and upheld revocation of appellant's passport. By letter dated July 29, 1988 the Assistant Secretary informed ██████ of her decision and of his right to appeal that decision to the Board of Appellate Review within 60 days of receipt of her letter. 4/

On November 7, 1988, appellant wrote to the Board to state that he had received the Assistant Secretary's letter on September 22, 1988 and wished to enter an appeal from her adverse decision.

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4/ 22 C.F.R. 51.89 (1988) provides that:

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 of 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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"I deny that the revocation of my passport was properly exercised," appellant stated in his reply to the State Department's brief. Appellant pointed out that 22 CFR 51.70 (a)(1) provides that a passport, except for direct return to the United States, shall not be issued in any case where the applicant is the subject of a federal warrant of arrest for a felony. On the other hand, he notes, that 22 CFR 51.71 deals with a situation where a passport is already in existence. "Here the wording used is discretionary, i.e., a passport 'may be revoked' where in terms of subparagraph (a) [of 22 CFR 51.70] 'the national would not be entitled to issuance of a new passport under Section 51.70'," appellant asserts.

From the foregoing, appellant concludes that in the case of an existing passport, section 51.71 must be taken as expressly qualifying the absolute prohibition which would apply in the case of issuance of a new passport. The words "may be," appellant asserts, therefore are intended to distinguish the situation of an existing passport from a new passport application. If revocation is discretionary, he reasons, then "the question as to whether nor [sic] not the Federal Warrant of Arrest should properly have been issued is both relevant and material to the review."

Appellant states that he has consistently maintained that the charges against him have no basis in law or fact, and that his willingness to return to the United States more than six months before the arrest warrant was issued attests to the fact he was not attempting to flee from the law. He is confident that if he were to return to Texas, the charges against him would be dismissed; he is, however, unable to return because doing so would entail "enormous personal financial cost and financial loss...." In sum, if the existence of a federal warrant for his arrest is the sole criterion of his right to hold a passport, and not the underlying charges, then a "grave miscarriage of justice will be perpetrated...." He appeals to the Board "to exercise its discretion in my favor and to hold that insufficient evidence is before it to have warranted the issuance of a federal warrant of arrest in my absence from the United States;..."

## II

In considering this appeal, the Board's review is limited to determining whether the Department's denial of a passport was made in conformity with the regulations and whether appellant was accorded the procedural due process provided by the

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regulations. 5/ The regulations do not require or authorize the Department or the Board to consider the validity or merits of the underlying charges of a federal warrant of arrest or a request for extradition to a foreign government.

In the instant case, appellant was and still is the subject of an outstanding federal warrant of arrest for a felony. The question to be determined in circumstances of this character basically is whether under the regulations appellant should be permitted to retain a passport notwithstanding the existence of an outstanding federal warrant of arrest.

We do not agree with appellant that revocation of his passport was discretionary on the part of the Department.

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) provides that a passport, except for direct return to the United States, "shall not be issued" in any case in which the appellant for a passport is the subject of an outstanding federal warrant of arrest, including a warrant issued under the Federal Fugitive Felon Act (18 U.S.C. 1073).

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

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5/ 22 C.F.R. 7.7 (1988) provides that:

Sec. 7.7 Passport cases.

(a) Scope of review. With respect to appeals taken from decisions of the Assistant Secretary for Consular Affairs denying, revoking, restricting, or invalidating a passport under sections 51.70 and 51.71 of this chapter, the Board's review, except as provided in paragraph (b) of this section, shall be limited to the record on which the Assistant Secretary's decision was based.

(b) Admissibility of evidence. The Board shall not receive or consider evidence or testimony not presented at the hearing held under sections 51.81-51.89 of this chapter unless it is satisfied that such evidence or testimony was not available or could not have been discovered by the exercise of reasonable diligence prior to such hearing.

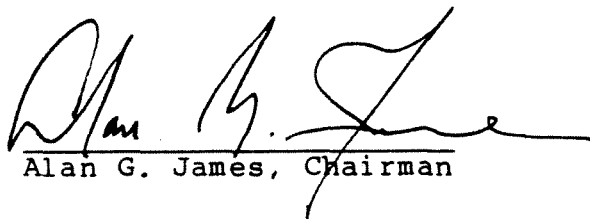
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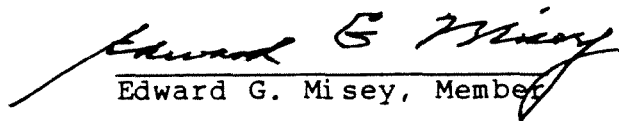
discretionary to determine whether or not a passport should issue. But, where it is mandatory that a passport not issue, we believe that the passport revocation power is virtually non-discretionary. In other words, if an applicant "shall not be issued" a passport if he is the subject of an outstanding 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 be occasions when, despite the technical existence of an outstanding federal felony arrest warrant, the Department should exercise the discretion afforded by the language of section 51.71 and refrain from revoking a citizen's passport. But it would appear that an attack on an underlying complaint or indictment in terms of the merits, weakness, or strength does not provide such an occasion; and that the Department is precluded from giving consideration to such factors. We are of the view, that, in the circumstances here, neither the Department nor the Board could properly give consideration to the merits of the underlying complaint charging appellant with unlawful flight to avoid prosecution in violation of Title 18, United States Code, Section 1073.

## III

We conclude 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, as specified in section 51.70(a)(1) of the regulations.

Accordingly, we hereby affirm the decision of the Assistant Secretary of State for Consular Affairs.

  
Alan G. James, Chairman

  
Edward G. Missey, Member

  
Howard Meyers, Member