Federal Court  Cour fédérale

Date: 20230316

Docket: T-1218-22

Citation: 2023 FC 364

Toronto, Ontario, March 16, 2023

PRESENT: Madam Justice Go

BETWEEN:

DUANE ALAN THORNE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Duane Alan Thorne, is a Canadian citizen. The Applicant has a Canadian passport that was issued in his name on February 21, 2014 [Passport].

[2] After the Applicant received several criminal charges in 2022, the Passport Entitlement and Investigations Division [PEID] of Immigration, Refugees and Citizenship Canada recovered

the Applicant's Passport for safekeeping until such time as the charges against him were resolved [Decision]. The Decision was rendered pursuant to the PEID's authority under sections 3(d), 9(1)(b), 10(1) and 11 of the *Canadian Passport Order*, SI/81-86 [*CPO*].

[3] The Applicant initiated the present judicial review proceeding in June 2022 to challenge the Decision and seek a declaration that sections 3(d), 9(1)(b), 10(1) and 11 of the *CPO* [Impugned Provisions] are invalid and of no force [Application].

[4] The Applicant's criminal charges have since been withdrawn, and his Passport returned.

[5] The Applicant asks the Court to hear and decide the Application despite its potential mootness and to determine whether the Impugned Provisions breach his rights under section 6 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, enacted as Schedule B to the *Canada Act 1982*, 1982 c 11 (UK) [*Charter*].

[6] For the reasons set out below, I decline to decide the Application on its merits as it is moot. The application for judicial review is therefore dismissed.

II. Background

[7] On February 23, 2022, the Applicant was arrested and charged with sexual interference, contrary to subsection 151(a) of the *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*] and sexual assault, contrary to section 271 of the *Criminal Code*. That same day, he was released on

an Undertaking to a Peace Officer. The Undertaking did not include any limit on the Applicant's ability to leave Canada, and did not require him to surrender his Passport.

[8] After the charges were laid, a PEID investigator [Investigator] sent a procedural fairness letter to the Applicant on March 29, 2022, informing him that the PEID intended to revoke his Passport under sections 9(1)(b) and 10(1) of the *CPO* pursuant to an ongoing investigation, and demanding that he return his Passport pursuant to section 11 of the *CPO*.

[9] In response to the Investigator's letter, the Applicant, through counsel, made submissions arguing that there is no evidence of him being a flight risk and that the loss of his Passport would impact his mobility rights under the *Charter*.

[10] The Applicant returned his Passport to the PEID on May 2, 2022.

[11] On May 13, 2022, the Investigator wrote to the Applicant's counsel advising that the PEID would not return the Passport.

[12] On June 10, 2022, the Applicant filed his original Notice of Application in this matter based on the May 13, 2022 PEID email.

[13] On June 29, 2022, the PEID issued its Decision stating that the Applicant's Passport would not be revoked but would be kept for safekeeping until such time as the criminal charges

against him were resolved. The Decision informed the Applicant that he could apply for a limited validity passport on urgent, compelling and compassionate considerations.

[14] The Applicant amended his Notice of Application to challenge the Decision and sought declarations that the Impugned Provisions are invalid and of no force.

[15] On October 6, 2022, the Applicant's criminal charges were withdrawn. The Applicant's counsel requested the return of the Passport from the PEID. The Investigator responded on October 20, 2022, stating that the Passport would be returned as the Applicant is "no longer subject to the terms and conditions established under s. 9 of the [CPO]." The Investigator also stated:

> Please note that the decision to suspend our investigation does not imply the closure of [the Applicant's] case, which will remain open for monitoring purposes. As well, you should be aware that future requests for passport services will be subject to verifications, including any new information which may be obtained by the PEID.

[16] The Applicant received his Passport on October 24, 2022.

III. Issues

[17] As per an Order dated November 21, 2022 by Associate Judge Horne, the Applicant filed a Supplementary Applicant's Record asking the Court to first decide whether the Application is moot, and even if so, whether the Court should still hear the Application.

[18] Second, by Notice of Constitutional Question filed in accordance with section 57 of the *Federal Courts Act*, RSC 1985, c F-7, if the Court decides to hear the Application, the Applicant asks the Court to find that the Impugned Provisions of the *CPO* unjustifiably infringe the Applicant's rights under section 6 of the *Charter*.

[19] In the alternative, the Applicant argues that the Decision was unreasonable because it failed to appropriately balance his section 6 *Charter* rights with the *CPO*'s objectives, as required by *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

[20] The Respondent argues that the Court should not determine the Application based on its mootness. If the Court decides to determine the Application, the Respondent argues that any infringement of the Applicant's section 6 *Charter* rights, if found, is justified under section 1 of the *Charter*. In the alternative, the Respondent maintains that the Decision appropriately balanced *Charter* values and the *CPO*'s objectives.

[21] In my decision, I will address the following issues only:

a) Is the Application for judicial review moot?
b) If yes, should the Court still hear the Application?

IV. Analysis

A. *Is the Application Moot?*

[22] As the Supreme Court of Canada [SCC] set out in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], a case is moot where a decision of a court will have "no

practical effect" on the rights of the parties and where "no present live controversy exists" which affects the rights of the parties: at 353. The general principle is that courts will decline to hear a case that is moot, where the case raises "merely a hypothetical or abstract question": *Borowski* at 353.

[23] The Applicant argues that there remains a live controversy between the parties because the PEID is still monitoring the Applicant's case. The Applicant relies on the Investigator's October 20, 2022 correspondence stating that "future requests for passport services will be subject to verifications, including any new information which may be obtained by the PEID", to submit that his future passport service-related requests will be subject to added scrutiny.

[24] The Applicant asserts that the PEID's present and potential future actions result from his prior criminal charges and the consequent application of paragraph 9(1)(b) of the *CPO*. Accordingly, the Applicant submits that a declaration of constitutional invalidity would remove the bases for ongoing and future action by the PEID which impact the Applicant's rights.

[25] With respect, I disagree. In my view, the Application is moot because the Passport was returned and the Applicant is no longer restricted from accessing passport services.

[26] While the October 20, 2022 correspondence from the Investigator suggests that the Applicant's case would continue to be monitored, the same communication confirms that the investigation was suspended. With the criminal charges – the basis for which action under the

CPO was initially taken – withdrawn and the Passport returned, there is no evidence that the Applicant's access to passport services is or will be restricted, contrary to the Applicant's claims.

[27] The Respondent references several cases where the Court declined to hear challenges to the *CPO* involving *Charter* issues when the impugned decision no longer affected the passport holder's rights: *Jama v Canada (Attorney General)*, 2022 FC 37 [*Jama*] at para 2; *Saint-Vil v Canada (Attorney General)*, 2014 FC 48 [*Saint-Vil*] at paras 5-6 and 28; *Kamel v Canada (Attorney General)*, 2010 FC 1309 [*Kamel*] at paras 10-15.

[28] The factual contexts in *Kamel*, *Saint-Vil* and *Jama*, in my view, are different from the case at hand. However, I agree that in general, case law concerning challenges of decisions made under the *CPO* confirms that a matter is moot when the relief sought is no longer needed by an applicant and the issue underlying the challenged decision has been resolved: *Jama* at para 2 and *Saibu v Canada (Attorney General)*, 2015 FC 255 at para 30.

[29] I also agree with the Respondent that just because PEID may still monitor the Applicant's case or the Applicant's future applications for passport services may be subject to verification, it does not mean that a live controversy remains. As the Respondent accurately notes, there is no evidence suggesting that there is a basis for restricting the Applicant's access to a passport in the immediate term, given that the Passport is valid until 2024 and the criminal charges have been withdrawn: *R v Oland*, 2017 SCC 17 at paras 5 and 17. I further agree with the Respondent that any restriction on the Applicant's access to passport services in the future will arise out of different situations, which can be disputed then.

[30] Given that the Applicant's access to passport services is not in jeopardy, I find that there is no live dispute regarding the Applicant's entitlement to passport services: *R v Finlay*, [1993] 3 SCR 103 at 112; *R v Adams*, [1995] 4 SCR 707 at para 21. The Application is moot.

B. *Should the Court Hear the Application even if it is moot?*

[31] When a case is moot, courts should only consider it where it is in the interests of justice or the public interest to do so: *ES v Joannou*, 2017 ONCA 655 [*ES*] at para 37.

[32] The Federal Court of Appeal [FCA] recently confirmed the three factors the Court should consider when determining whether to exercise its discretion to hear a moot case: *CUPE Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 [*CUPE*] at para 9, citing *Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 [*Amgen*] at para 16 and *Borowski* at 358-363.

[33] The considerations are:

i. The absence or presence of an adversarial context;

ii. Whether there is any practical utility in deciding the matter or if it is a waste of judicial resources; and

iii. Whether the court would be exceeding its proper role by making law in the abstract, a task reserved for Parliament.

[34] Further, as Justice Fothergill noted in *Jama* at para 36: "The mootness doctrine is not applied strictly, to ensure important questions that might independently evade review are heard

by the Court (*Borowski* at 360).” With this qualification in mind, I will examine the three factors as set out by the FCA in CUPE.

Adversarial Context

[35] The Applicant highlights cases in which the presence of an adversarial context has been established where parties involved take opposing positions, are represented by counsel, and continue to “argue their respective sides vigorously”: *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 19 [*Doucet-Boudreau*]; *CUPE* at para 10; *ES* at para 39. As the Respondent’s position regarding the constitutional question is contrary to the Applicant’s, he submits that an adversarial context is established in this case.

[36] The Applicant contends that should this Court find that the Impugned Provisions are unconstitutional, collateral consequences would arise given the PEID’s plan to keep his case open to monitoring. The Applicant reiterates that the Decision resulted from the applicability of paragraph 9(1)(b) of the *CPO*, and submits that if it is found unconstitutional, any future action based on paragraph 9(1)(b) would be unconstitutional as well.

[37] The Respondent submits that the existence of an adversarial context itself is insufficient and the analysis must also consider the existence of collateral consequences for the parties: *Borowski* at 359. The Respondent argues that no collateral consequence exists, as regardless of the outcome of the Application, the Applicant will continue to have access to his Passport and it is unknown whether his future access to passport services will be restricted.

[38] In my view, the jurisprudence supports the Applicant's position that an adversarial context exists where the parties involved continue to pursue their respective opposing positions through the use of counsel, as simply stated by the FCA in *CUPE* at para 10: "We do have an adversarial context: both sides, represented by counsel, take opposing positions."

[39] Contrary to the Respondent's assertions, collateral consequences do not appear to be necessary to establish the presence of an adversarial context. More recent FCA cases such as *CUPE* (see para 10) and *Amgen* (see para 16) do not raise this issue at all when discussing adversarial context, nor does the SCC raise it in *Doucet-Boudreau*: see para 19. To the contrary, as the Applicant pointed out at the hearing, the SCC in *Borowski* raised collateral consequences as an example of a situation in which an adversarial relationship may prevail despite the cessation of a live controversy: at 359.

[40] I further note that the FCA in *Amgen* decided not to hear the case because the rights are affected only in a "remote" or "speculative" sense: at para 23. On the other hand, in *Doucet-Boudreau*, the SCC decided to hear the matter because it found that the appeal raised an important question about the jurisdiction of superior courts to order effective *Charter* remedies, taking into consideration the social cost of continued uncertainty in the law: at para 21.

[41] In conclusion, I find that an adversarial context is established. However, this is not determinative of the issue before me. I now turn to the remaining two factors in *CUPE* to determine whether to decide the merits of the Application.

Judicial economy

[42] In his written submissions, the Applicant asked the Court to consider three factors when determining whether there is utility in deciding the matter in view of the limitations on judicial resources:

a) the jurisprudential issues are evasive of review;

b) there is a complete record and argument before the court; and

c) the issues raised are ones of public, social or constitutional importance with broad implications: *ES* at paras 40-41.

[43] The Applicant did not pursue the first point at the hearing rigorously, although he did emphasize the limited number of judicial review decisions regarding paragraph 9(1)(b) of the *CPO*. The six cases that have come before this Court are: *Courtemanche v Canada (Attorney General)*, 2020 FC 649 [*Courtemanche*]; *Elangovan v Canada (Attorney General)*, 2020 FC 882 [*Elangovan*]; *Al Nahawi v Canada (Attorney General)*, 2017 FC 1085; *Haddad v Canada (Attorney General)*, 2017 FC 235 [*Haddad*]; *Lipskaia v Canada (Attorney General)*, 2016 FC 526; *El Shurafa v Canada (Attorney General)*, 2014 FC 789.

[44] I am not persuaded by the Applicant's argument that the Impugned Provisions are evasive of review. Indeed three of the cases cited by the Applicant raised *Charter* issues in the context of a paragraph 9(1)(b) decision: *Haddad; Courtemanche; Elangovan*.

[45] Although the Court has yet to consider the constitutionality of paragraph 9(1)(b) of the *CPO per se*, it has examined whether a decision under the Impugned Provisions was

unreasonable because it failed to appropriately balance an applicant's section 6 *Charter* rights with the *CPO*'s objectives, as required by *Doré*: see *Elangovan* at para 2. In *Haddad*, this issue was raised in the alternative if the Court found no error of law: at para 28.

[46] That the Court had the occasion of reviewing an applicant's *Charter* rights in the context of decisions made under the *CPO* means that the Impugned Provisions are not evasive of review. On the contrary, it is entirely possible for another applicant to challenge the suspension of their passport based on the constitutionality of paragraph 9(1)(b) as well as the reasonableness of the Decision in view of their *Charter* rights, as the Applicant has done in this case.

[47] The Applicant also submitted in writing that criminal proceedings are regularly resolved before this Court can decide the judicial review of a decision made pursuant to paragraph 9(1)(b), as was the case with the Applicant. The Applicant stressed that even where cases go to trial, the timelines on which criminal cases proceed (in light of the usual 18-month deadline that applies to proceedings in provincial court per *R v Jordan*, 2016 SCC 27 at para 46), compared to judicial review applications, likely mean that criminal cases are resolved first.

[48] I am not persuaded by the Applicant's argument. Assuming for a moment that the Applicant's charges were not withdrawn and his case proceeded to trial, the Applicant's criminal matter would have to be heard by August 23, 2023 based on the 18-month deadline, which would still be about six months ***after*** this Court's hearing of the Application.

[49] I acknowledge the concerns raised by the Applicant about how the constitutionality of paragraph 9(1)(b) has broader implications beyond the Applicant's situation. However, as the FCA confirmed in *CUPE*, a "mere jurisprudential interest fails to satisfy the need for a concrete and tangible controversy": at para 7, citing *Borowski* at 353.

[50] Similarly, the FCA stated at para 4 of *Kozarov v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185 [*Kozarov*], a case cited by the Respondent:

> [4] Despite the able arguments of counsel, we are not persuaded that we should depart from the general principle that courts do not decide cases that are moot. The fact that the question raised in this case is likely to recur, and, indeed, has recurred, does not in itself warrant our hearing a moot case. The following passage from the reasons of Justice Sopinka in *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342 at 361 is particularly apt here:
>
> > The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.
>
> [Emphasis added]

[51] The Applicant also submits that his alternative argument around the balancing of *Charter* values in the Decision is of importance. The Applicant submits that it would allow the Court to provide a first, "vital" guidance on how the PEID should balance issues raised surrounding *Charter* rights when a decision under paragraph 9(1)(b) is being made, in light of the breadth of cases the Impugned Provisions can capture, which may not engage the *CPO*'s legislative purpose(s). Once again, I reject this argument in light of the fact that the Court has already considered similar arguments made in the context of reviewing decisions pursuant to the *CPO*.

[52] The Court in *Elangovan* relies on *Kamel v Canada (Attorney General)*, 2009 FCA 21 [*Kamel* (FCA 2009)] and *Kamel v Canada (Attorney General)*, 2013 FCA 103 [*Kamel* (FCA 2013)] for the following legal principle, at para 18:

> […] The Federal Court of Appeal has determined that the refusal of passport services infringes an individual's mobility rights protected under subsection 6(1) of the *Charter* (*Kamel v Canada (Attorney General)*, 2009 FCA 21 at paras 15, 68 (*Kamel 1*); leave to appeal to the Supreme Court of Canada refused, [2009] SCCA No. 124). A decision that fails to take into account such rights or that disproportionately restricts those rights is not reasonable (*Kamel v Canada (Attorney General)*, 2013 FCA 103 at para 35).

[53] *Elangovan* is analogical to the case at bar, as Mr. Elangovan was charged with similar offences and had his passport revoked through the PEID's authority under paragraph 9(1)(b) of the *CPO*. In his submissions asking the PEID to reconsider the revocation, Mr. Elangovan similarly claimed that the decision violated his section 6 and 11(d) *Charter* rights. Thus, contrary to what the Applicant alleges, this is not the first opportunity presented to the Court to provide guidance on how an appropriate *Doré* balancing is to be conducted in this context.

[54] Further, these cases highlighting the relatively settled legal principle set out above in *Elangovan* support the Respondent's position that paragraph 9(1)(b) of the *CPO* is not evasive of review.

[55] As noted above, the "social cost of continued uncertainty in the law" was cited as a factor to consider when deciding whether to hear a moot case: *Doucet-Boudreau* at para 21. In the context of this case, it is unclear that there is such an "uncertainty." The Court has had the opportunity to judicially review passport revocation and refusal decisions on their merits, such as

in *Elangovan* and *Kamel* (FCA 2013). Both cases acknowledge that decisions under paragraphs 9(1)(b) and section 10.1 infringe section 6 *Charter* rights and therefore must be balanced to not restrict these rights disproportionately in achieving the *CPO*'s objectives: *Elangovan* at para 18, citing *Kamel* (FCA 2013) at para 35.

[56] Further, as the FCA stated in *Kamel* (FCA 2013) at para 47:

> The assessment of the infringement of Mr. Kamel's rights implied a balancing that was essentially dependent on the assessment of the facts of the case.

[57] While there arguably remains some uncertainty with respect to the general constitutionality of the Impugned Provisions, I prefer to heed the FCA's guidance and not delve into this issue, which will no doubt arise in the future in a case with a "genuine adversarial context": *Kozarov* at para 4, citing *Borowski* at 361.

The Court's role

[58] The final factor outlined in *CUPE* tends to turn on whether courts view the moot issue before them as solely in the abstract, turning a case into a private reference, or asking the court to engage in "a form of law-making for the sake of law-making": *CUPE* at para 13; *Borowski* at 365. In these situations, courts appear readily prepared to decline to hear a moot case. For example, the SCC in *Borowski* stated that even if the first two factors were met, the third factor nonetheless prevented the court from exercising its discretion to hear the moot case: at 365. The SCC explained:

> The appellant is requesting a legal opinion on the interpretation of the *Canadian Charter of Rights and Freedoms* in the absence of

> legislation or other governmental action which would otherwise bring the *Charter* into play. This is something only the government may do.

[59] On the other hand, where the matter before courts go beyond a mere request to interpret a statute in the absence of legislation or government action, a different outcome may arise. For example, in *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 48, the SCC drew a distinction in holding that an issue was moot, but not abstract:

> Finally, the Court is not overstepping its institutional role in deciding this case. Unlike *Borowski*, the appellant is not requesting a legal opinion on the interpretation of the *Charter* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play. While the issue in this case is moot, it is not abstract: see *Borowski*, *supra*, at p. 365.
>
> [Emphasis added]

[60] The Applicant argues that the Court would not exceed its judicial role by hearing the Application, nor would it be making law in the abstract, given the full record. The Applicant maintains that determining the constitutionality of a law, and whether a decision-maker exercised their discretion in a constitutionally compliant manner, falls squarely within the Court's role.

[61] The Respondent asserts that the Court risks overstepping its adjudicative role if it hears the Application, as the matter would involve a general determination of whether the Impugned Provisions of the *CPO* are constitutional. The Respondent maintains that the Court should not offer general legal opinion: *Borowski* at 365.

[62] I have already found that decisions made under the Impugned Provisions of the *CPO* are not evasive of review, and that there is no live issue as the Applicant no longer faces any limitations in accessing his Passport. I have also considered but rejected the Applicant's speculative arguments around the potential added scrutiny he may face by the PEID when accessing passport services in the future. As such, I agree with the Respondent that the only remaining issue is the constitutionality of the Impugned Provisions.

[63] I acknowledge that the Court has the benefit of a complete record and both parties have provided able submissions on the constitutional question before the Court. However, I am not convinced that the issue in this case is of such a magnitude or importance that there would be a high social cost arising from any continued uncertainty in the law: *Doucet-Boudreau* at para 21.

[64] In the absence of any live dispute and evidence of impediment to the Applicant's mobility rights under the *Charter*, any pronouncement I make with respect to the constitutionality of the Impugned Provisions would be made in the absence of any factual context, and be viewed as an intrusion into the role of the legislature.

[65] For all the reasons cited above, I decline to determine the merits of the Application.

V. Conclusion

[66] The application for judicial review is dismissed for mootness. This is not an appropriate case for costs.

JUDGMENT in T-1218-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There is no order as to costs.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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