Date: 20090302

Docket: T-1012-08

Citation: 2009 FC 212

Ottawa, Ontario, March 2, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JOHN BRUCE GRUNDISON

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Attorney General of Canada seeks judicial review of a decision of the Public Service Staffing Tribunal which found that an Assessment Board abused its authority in assessing the application of John Bruce Grundison for a Foreign Service Officer position at Citizenship and Immigration Canada.

[2] The Attorney General of Canada submits that the PSST erred in several respects in arriving at its decision. In particular, the Attorney General says that the PSST erred in the test that it applied in finding that an Assessment Board could have abused its authority in the absence of any evidence of misconduct, improper motive or bad faith on the part of the Board.

[3] For the reasons that follow, I have determined that this application for judicial review is moot. I have also decided not to exercise my discretion to decide the issues raised by the Attorney General. As a consequence, the application for judicial review will be dismissed.

Background

[4] Mr. Grundison participated in a competition at CIC for several Foreign Service Officer (Level Four) positions. An Assessment Board convened by CIC to assess the qualifications of applicants determined that Mr. Grundison lacked the requisite degree of Headquarters experience, and thus did not meet one of the experience requirements identified in the Statement of Merit Criteria for the positions in question. As a consequence, he was screened out of the competition at a preliminary stage, and his application was not considered any further.

[5] Mr. Grundison filed a complaint with the Public Service Staffing Tribunal alleging that he was not appointed to the FS-04 group at CIC because of an abuse of authority in the establishment and application of the essential qualifications included in the Statement of Merit Criteria for the pool of FS-04 positions.

[6] The PSST determined that there was no merit to Mr. Grundison's allegation that CIC had abused its authority in requiring significant Headquarters experience as an essential qualification for the FS-04 positions.

[7] Although the PSST found that there was no evidence of any improper intent on the part of the Assessment Board, it nevertheless concluded that it had abused its authority in its evaluation of Mr. Grundison's qualifications. According to the PSST, this occurred because the Assessment Board went beyond merely interpreting and assessing an essential qualification for the positions and actually altered the qualification. In the view of the PSST, this was clearly improper conduct on the part of the Assessment Board.

[8] By way of corrective action, the PSST ordered CIC to reassess Mr. Grundison's qualifications in relation to his Headquarters experience. In the event that Mr. Grundison was deemed to meet the experience requirement, then the Assessment Board was to proceed to assess Mr. Grundison's application in relation to the remaining merit criteria.

[9] Approximately two months after the PSST released its decision, and after this application for judicial review had been commenced, Mr. Grundison was appointed to an FS-04 position at CIC through a different competitive process.

Is the Application for Judicial Review Moot?

[10] The Attorney General has conceded that the outcome of this application will have no practical consequences for Mr. Grundison, given that he is now in an FS-04 position. As a result, I do not understand there to be any real debate about the fact that the application for judicial review is indeed moot.

[11] Indeed, the focus of the Attorney General's submissions was on whether the Court should exercise its discretion to decide the case, notwithstanding the fact that the outcome was academic as far as Mr. Grundison was concerned.

Should the Court Exercise its Discretion to Deal With the Matter?

[12] The leading case on the doctrine of mootness, and the circumstances under which a Court may exercise its discretion to deal with matters that are moot, is the decision of the Supreme Court of Canada in *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342.

[13] In *Borowski,* the Supreme Court indicated that caution should be exercised before a Court proceeds to pronounce judgment on a matter, in the absence of a live dispute affecting the rights of the parties. The Supreme Court further observed that regard should be had to the underlying rationale for the mootness doctrine, in determining whether a Court should exercise its discretion to decide a matter that is otherwise moot.

[14] In this regard, the Supreme Court observed that one rationale for courts refusing to decide cases that are moot is that the courts' competence to resolve legal disputes is rooted in the adversarial system. The Supreme Court noted that a full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system: see *Borowski* at para. 31.

[15] A second rationale for the policy is the concern with respect to judicial economy. This requires the court to examine the circumstances of the specific case, in order to determine whether scarce judicial resources should be allocated to resolve the moot issue: *Borowski* at para. 34.

[16] Finally, courts must be aware of the judiciary's role in our political framework, and be sensitive to the effect of judicial intervention: *Borowski* at para. 40.

[17] Applying the criteria articulated by the Supreme Court of Canada to the facts of this case, I would commence by noting that even though Mr. Grundison no longer has a stake in the outcome of this proceeding, his counsel did appear and make arguments in relation to the application, which does somewhat limit the concern about the absence of a full adversarial relationship: *Borowski* at para. 43.

[18] However, it should also be observed that the fact that the Court reserved its decision on the mootness question and proceeded to hear argument in relation to the merits of the application does not militate towards resolving the mootness question in favour of the Attorney General. As the Supreme Court observed at paragraph 44 of *Borowski*, “it would be anomalous if, by reserving on the mootness question and hearing the argument on the merits, the Court fettered its discretion to decide it”.

[19] More fundamentally, I do not agree with counsel for the Attorney General of Canada that the issues raised on this application are not capable of repetition or are otherwise evasive of judicial review: see *Borowski* at para. 45.

[20] Indeed, it is evident from the jurisprudence cited by the parties that even though the PSST has only been in operation for just over three years, a number of cases alleging an abuse of authority by government staffing officials have already made their way to hearings before the PSST. I am advised by counsel that some of these cases are now before this Court on judicial review.

[21] Moreover, the fact that this case is the first decision of the PSST to actually find that an allegation of an abuse of authority by staffing officials to have been made out does not mean that the issue will not arise again in future cases. In my view, the scarce resources of this Court will be better spent resolving such future cases, where the interests of the parties involved will in fact be affected by any decision that the Court may make.

[22] I have also considered the Attorney General's submission that the question of the proper legal test to be applied in relation to allegations of abuse of authority is an issue of considerable importance to those involved in government staffing. While I accept that this may be so, the issue is, in my view, better resolved in the context of a live controversy between the parties.

[23] Having regard to the above considerations, I am not persuaded that this is an appropriate case wherein the Court should exercise its discretion to decide a moot application.

[24] That said, the dismissal of this application on the grounds of mootness should not be interpreted as any indicator of the merits of either party's submissions in relation to the legal issues underlying the application.

Costs

[25] Mr. Grundison seeks his costs at the upper end of Column IV on the basis that he had put the Attorney General of Canada on notice from the outset that this application for judicial review was moot. Mr. Grundison says that he should not be put to the expense of funding the Attorney General's attempt to obtain a judicial opinion on an issue that is now clearly academic insofar as he is concerned.

[26] While I have given Mr. Grundison's argument careful consideration, I am not persuaded that the conduct of the Attorney General of Canada in pursuing this matter justifies an elevated award of costs to the successful party.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, with costs to Mr. Grundison to be calculated at the middle of Column III of the table to Tariff B of the *Federal Courts Rules*.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1012-08
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. JOHN BRUCE GRUNDISON
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 25, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Mactavish, J.
DATED:	March 2, 2009

APPEARANCES:

Mr. J. Sanderson Graham	FOR THE APPLICANT
Mr. Paul Champ	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE APPLICANT
RAVEN, CAMERON, BALLANTYNE & YAZBECK, LLP/s.r.l. Barristers and Solicitors Ottawa, Ontario	FOR THE RESPONDENT