

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20100622

Docket: A-524-09

Citation: 2010 FCA 170

Present: EVANS J.A.

BETWEEN:

MARTHA KAHNAPACE

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on June 22, 2010.

REASONS FOR ORDER BY:

EVANS J.A.

Federal Court
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REASONS FOR ORDER

EVANS J.A.

[1] I have before me a motion by the Attorney General of Canada to dismiss for mootness the appeal of Martha Kahnpace from a decision of the Federal Court (2009 FC 1246), in which Justice Snider dismissed her application for judicial review of a Third-level Grievance Decision upholding her maximum security classification.

[2] Justice Snider rendered her decision on December 4, 2009. At that time, Ms Kahnpace was serving a life sentence for second degree murder. Because of the seriousness of her offence, she was incarcerated for more than two years in a maximum security facility pursuant to Policy Bulletin 107 (Policy 107), which also restricts the frequency of security classification reviews to once every two

years. She alleged in her application for judicial review that, among other things, Policy 107 had not been applied properly to her and that, in any event, it was invalid because it contravenes the governing legislation and violates her rights under sections 7 and 9 of the *Canadian Charter of Rights and Freedoms*.

[3] On May 7, 2010, this Court (Sexton J.A.) dismissed a motion by the Crown that Ms Kahnapace's appeal should be dismissed for mootness because she had been transferred from a maximum to a medium security facility. The basis of the Court's Order was that Ms Kahnapace "continues to be affected by the decision to classify her as maximum security", and that the appeal was therefore not moot.

[4] On May 10, 2010, the British Columbia Court of Appeal allowed Ms Kahnapace's appeal, set aside her conviction, and ordered a new trial. As a result of this decision, Ms Kahnapace was released from federal custody and thus ceased to be subject to federal correctional policies, including Policy 107. She was held in a provincial facility awaiting a new trial.

[5] Accordingly, the Attorney General says that the appeal from Justice Snider's decision is now moot since the outcome of the appeal cannot affect her rights. Moreover, if the appeal is moot, the Court should not exercise its discretion to allow it to proceed: the appeal can serve no useful purpose, no adversarial relationship exists between the parties, and there are no special circumstances that outweigh the public interest in judicial economy.

[6] Ms Kahnpace submits that the validity of Policy 107 remains a live controversy because her rights may still be affected by the Policy. In particular, she says, she has an unresolved grievance with Correctional Service Canada concerning the application of the Policy to her, namely, the date of her classification review. In this grievance, she raises, among other things, the validity of Policy 107. She submits that her release following the successful appeal against her conviction does not terminate the grievance. Although not raised by Ms Kahnpace, the validity of the Policy would remain a live controversy if she commenced an action for damages on the basis that her liberty interests had been infringed as a result of the application to her of an invalid Policy.

[7] These considerations, as well as possible future impacts of the Policy, may well be sufficient to prevent the appeal from being moot. However, I need reach no concluded opinion on the issue because I am satisfied that, even if the appeal is moot, the Court should exercise its discretion to allow it to proceed.

[8] In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 358-63 (*Borowski*), the Supreme Court of Canada outlined the three broad rationales for the mootness doctrine that a court must take into consideration when deciding whether to depart from the normal practice of not determining a matter that is moot.

[9] First, in order to ensure that a matter is fully argued there must be an adversarial relationship between the parties. In my view, the consequences of the past application of Policy 107 to Ms Kahnpace and the possibility that she may be subject to it in the future are sufficient to satisfy this

rationale. The quality and thoroughness of the submissions that have already been made in this matter by Ms Kahnpace's legal counsel also indicate that the issues will be fully argued before the Court.

[10] Second, in the interests of conserving scarce judicial resources for cases where the legal rights and duties of the parties are at stake, courts generally do not determine moot cases. The present appeal involves a challenge to the validity of an existing policy on Charter and non-Charter grounds. Since the issues raised by Ms Kahnpace in her appeal are not limited to her particular situation, the disposition of the appeal may effectively eliminate, or reduce, the possibility of future legal challenges to the validity of Policy 107 by other inmates to whom it is applied. In my opinion, to permit Ms Kahnpace's appeal to proceed does not offend the judicial economy rationale.

[11] Third, the mootness doctrine serves to remind courts that, in pronouncing judgments in the absence of a live controversy between the parties, they are in danger of straying beyond their adjudicative function and intruding into the legislative sphere. However, this is a matter on which it is important to retain some flexibility: *Borowski* at 362.

[12] In my opinion, if the Court permitted this appeal to proceed, it could not be said to be exceeding its adjudicative role. The appeal raises the statutory and constitutional validity of Policy 107, questions of law of public importance that affect a number of penitentiary inmates. Moreover, the Policy may otherwise prove evasive of review because of recurring changes to inmates' status.

[13] For these reasons, the Attorney General's motion to dismiss Ms Kahnpace's appeal is denied with costs.

“John M. Evans”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-524-09

STYLE OF CAUSE: Martha Kahnpace
and
Attorney General of Canada

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: EVANS J.A.

DATED: June 22, 2010

WRITTEN REPRESENTATIONS BY:

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