Federal Court of Appeal | Cour d'appel fédérale

Date: 20210604

Docket: A-462-19

Citation: 2021 FCA 111

CORAM: **STRATAS J.A.**
BOIVIN J.A.
GLEASON J.A.

BETWEEN:

ELLIOT LEE SEXSMITH

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on June 2, 2021.

Judgment delivered at Ottawa, Ontario, on June 4, 2021.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Mr. Sexsmith appeals from the judgment of the Federal Court: 2019 FC 1509 (*per* McDonald J.). The Federal Court dismissed his application for judicial review from decisions made by two firearms officers acting under the *Firearms Act*, S.C. 1995, c. 39 and the *Authorizations to Carry Restricted Firearms and Certain Handguns Regulations*, S.O.R./98-207.

The officers denied his application for an authorization to carry a restricted firearm in his helicopter.

A. Background

[2] In the summer months, Mr. Sexsmith is based in Goodlin Lake, N.W.T. He transports guides and hunters by helicopter to and from remote areas in British Columbia, the Yukon Territory and the Northwest Territories.

[3] Mr. Sexsmith has a licence under the *Firearms Act* to possess a restricted firearm. But he needs an authorization under the Act and Regulations to carry a restricted firearm in his helicopter while on the job. He intends to keep the restricted firearm locked in a case and stowed under his seat in the helicopter in a compartment where passengers cannot see it or access it.

[4] In his application for the authorization, Mr. Sexsmith stated that he needs his restricted firearm to ensure the safety of himself and his passengers when they are on the ground in case of a grizzly bear attack. If he "land[s] or crash[es]" and is isolated in the bush, "hunters and meats and hides…attract grizzly bears" and so he needs his restricted firearm to deal with them.

[5] Mr. Sexsmith says his concern about being isolated in the bush, vulnerable to attacks from bears, is a real one: he has crashed twice over thirty years. At the time of application, he was 65.

[6] As well, he says the threat from bears is very real. In his view, “guides and outfitters in the NWT Mackenzie [Mountains] have plenty of stories of problems with grizzly bears” and “every year people are killed or attacked on this job”. In his application, he recounted one specific incident of a hunter killed by a bear and added that there are “lots of stories of grizzly problems that do not make the news”.

[7] In his application, Mr. Sexsmith suggested that other means of protection were neither available nor effective. When his small helicopter is packed with guides, hunters and their belongings, unrestricted weapons are too long and too heavy but his restricted firearm, a .460 calibre revolver, is more compact. As well, bear spray cannot be stowed in the helicopter because “it may discharge accidentally”, incapacitate everyone, and “cause the helicopter to crash”. Also bear spray “is not effective” when the bear is 150 yards away. And at close range, if the bear is charging, it may be too late. In the words of Mr. Sexsmith, due to the speed of the bear, at 10 yards “you are already dead”.

[8] Mr. Sexsmith plans to use his restricted firearm in two territorial areas. For that reason, two firearms officers with jurisdiction over a particular area adjudicated Mr. Sexsmith’s application. Both denied his application for substantially the same reasons.

[9] In making his decision, one firearms officer consulted with a government official from Transport Canada. The other firearms officer consulted with two government officials, one from Transport Canada and another from Environment and Natural Resources in the Government of the Northwest Territories.

[10] Mr. Sexsmith brought an application for judicial review of the firearms officers' decisions. The Federal Court dismissed the application. It held that the firearms officers' decisions were procedurally fair and substantively reasonable.

[11] On the issue of substantive reasonableness, the Federal Court did not have the benefit of the Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1. *Vavilov* replaced the earlier leading authority of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and changed the law concerning substantive reasonableness in some respects.

[12] Mr. Sexsmith, a self-represented litigant, now appeals to this Court. He submits that the firearms officers' decisions were procedurally unfair and substantively unreasonable and, thus, must be quashed. He also seeks a mandatory order—*mandamus*—requiring the officers to grant him the authorization he says he needs.

B. Analysis

(1) Procedural fairness

[13] After receiving Mr. Sexsmith's application, the firearms officers interviewed him. At the end of the interview, they informed him that they would deny his application. At that time, they did not provide reasons.

[14] But that was not the end of their investigation. After the interview with Mr. Sexsmith, the firearms officers sought outside advice from one or two government officials, as mentioned above. The government officials provided facts and assessments concerning the merits of Mr. Sexsmith's application.

[15] The firearms officers never put these facts and assessments to Mr. Sexsmith for his response. They simply prepared and issued their written reasons for their decisions. It is obvious from their reasons that they substantially relied upon the facts and assessments they received from the government officials they consulted.

[16] From Mr. Sexsmith's perspective, these facts and assessments in the reasons came as a complete surprise. He never had an opportunity to offer further evidence, explanations or arguments in response.

[17] Before considering the legal issues, we must ask ourselves when the firearms officers made their decisions. This matters.

[18] If the firearms officers truly decided to deny Mr. Sexsmith's application at the end of their interview with him, then the consultation afterward with government officials smacks as an illegitimate attempt to shop for additional facts and opinions to cooper up decisions already made. It might even rise to the level of impermissible result-oriented conduct, bad faith conduct or improper *animus* against Mr. Sexsmith. And if the decisions were made at the end of their interview with Mr. Sexsmith, the substantive review of the decisions would consider only what

the firearms officers had before them at the time of their decisions—*i.e.*, not the consultations with government officials.

[19] If, on the other hand, the firearms officers' decisions took place when they released their written reasons, then we must analyze whether the firearms officers afforded procedural fairness to Mr. Sexsmith leading up to their decisions. And the substantive review of the decisions would consider everything the firearms officers had before them at the time of their decisions—*i.e.*, including the consultations with the government officials.

[20] The Federal Court seems to have equivocated on this point. However, the only evidence in the record is clear. While the firearms officers did tell Mr. Sexsmith after his interview that his application would be denied, this was before "[the firearms officers] finally determined [their] decisions": Affidavit of Carly Maurizio at para. 5. The firearms officers finally decided the matter when they signed and issued their written reasons. The post-interview statement to Mr. Sexsmith is best regarded as an ill-advised expression by the firearms officers of a "lean" or a tendency to decide in a particular direction.

[21] To what level of procedural fairness is Mr. Sexsmith entitled? In these circumstances, he is entitled to quite a high level.

[22] The controlling authority on this point is *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193. *Baker* (at paras. 23-27) sets out five factors for the Court to consider. Of these, at least two factors are particularly salient here.

[23] One *Baker* factor is the importance of the authorization to carry a restricted firearm on his helicopter to Mr. Sexsmith. It is high: to him, it is a matter of life and death to himself and his passengers.

[24] The other *Baker* factor is the procedure that the firearms officers chose to follow. In these circumstances, they rightly considered it fair, important and necessary to interview Mr. Sexsmith so he could put his case for the authorization and answer their questions. It was equally fair, important and necessary to disclose the government officials' facts and assessments to Mr. Sexsmith and interview him again so he could have a chance to respond to the case against him.

[25] By not doing this, the firearms officers offended the principle of *audi alteram partem*—decisions of importance cannot be made unless affected parties have had the opportunity to respond to material evidence offered against them.

[26] The Federal Court recognized this procedural unfairness but did not quash the firearms officers' decisions. It held that Mr. Sexsmith had no useful responses to offer in response to the government officials' facts and assessments.

[27] There is no factual basis for that holding. Mr. Sexsmith's statements in his application for judicial review and in his memorandum of fact and law filed in the Federal Court show that he had many important and material responses to the facts and assessments the government officials offered. The firearms officers had to receive and consider his responses: they were of a sort that might have changed their minds.

[28] Owing to procedural unfairness, the firearms officers' decisions must be quashed and Mr. Sexsmith's application must be redetermined.

(2) Substantive reasonableness

[29] Given that the decisions must be quashed due to procedural unfairness, it is unnecessary to consider whether the firearms officers' decisions are substantively unreasonable in accordance with the principles in *Vavilov*. However, it is prudent to do so.

[30] This case represents the first time after *Vavilov* that this Court is reviewing the decisions of firearms officers. Therefore, firearms officers, including those to whom Mr. Sexsmith's application will be remitted, may benefit from our guidance in this area.

[31] As well, it would be unfortunate if we were to remit the application for redetermination, the redetermination were to repeat some of the substantive shortcomings in the decisions of the firearms officers in this case, and the Federal Court or this Court were forced to quash the redetermination for substantive unreasonableness and order yet another redetermination. The parties would be forced to ride "an endless merry-go-round of judicial reviews and subsequent reconsiderations": *Vavilov* at para. 142. This we must avoid.

[32] Under the *Firearms Act*, it is for the Regional Chief Firearms Officers, not this Court, to decide on the merits whether an authorization should be granted: *Vavilov*. In other words, the firearms officers are the merits-deciders, not this Court: *Association of Universities and Colleges*

of Canada v. Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22, 428 N.R. 297 at paras. 17-18; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin. L.R. (5th) 301 at para. 41.

[33] Therefore, on judicial review or in an appeal from a judicial review, acting under the reasonableness standard, we do not reweigh the evidence before these administrative decision-makers nor do we second-guess their exercises of discretion. Our posture in a case like this must be one of deference. But deference is far from automatic acceptance.

[34] In conducting review for substantive reasonableness, we must ensure that administrative decisions like these are within the boundaries set by legislation (as reasonably construed by the administrative decision-makers) and respect the other constraints discussed in *Vavilov*. And, as mentioned above, *Vavilov* (at paras. 83-87 and 91-96) requires us to ensure that reasoned explanations for the sort of administrative decisions the firearms officers made here are discernable from the reasons and the record before them. Reasoned explanations are especially important concerning key points raised by the affected party that might affect the outcome: *Vavilov* at paras. 127-128. Reasoned explanations must also show "an internally coherent and rational chain of analysis": *Vavilov* at paras. 85, 96 and 102-104.

[35] In this case, there are certain shortcomings in the firearms officers' decisions that, if repeated in the redeterminations, might rise to a finding of substantive unreasonableness. The firearms officers conducting the redeterminations should have regard at least to the following:

- *The governing legislation*. The firearms officers are bound by the governing legislation and the criteria in it for the granting of authorizations. They cannot go outside of it and help themselves to different criteria or rely on their own personal opinions of what the criteria should be. In determining the criteria, the firearms officers should have regard to the meaning of the words of the relevant provision, other provisions that might shed light on the meaning of the words of the relevant provision, and their purpose: *Vavilov* at paras. 115-124. One contextual provision is subsection 3(*c*) of the Regulations. It gives licensed trappers a right to carry restricted firearms, likely due to the threat from wild animals.

- *The threat of bears to Mr. Sexsmith*. The decisions note that Mr. Sexsmith's primary concern is being "downed", *i.e.*, stuck on the ground due to weather, equipment failure, or other unforeseen circumstances. This has happened to Mr. Sexsmith at least twice before. However, in this case, the firearms officers did not deal with this. Instead, they focused on the threat from bears only while Mr. Sexsmith and his passengers are inside or near an active helicopter.

- *The availability of alternatives*. The decisions state that Mr. Sexsmith's desire to carry a restricted firearm is a mere preference—not a need—because he could use bear spray, bear bangers, or a shotgun instead. Mr. Sexsmith says these alternatives are unavailable and inadequate. In the circumstances of this case, if the firearms officers' decisions are to be reasonable, the firearms officers must fairly consider and address what Mr. Sexsmith says.

- *The efficacy of handguns*. One firearms officer, relying on information provided by one of the government officials, found that handguns "in general" are not effective against bears. This broad statement should be critically assessed, not taken on faith. As well, this is only an "in general" statement and does not consider the features and capability of the specific restricted firearm that Mr. Sexsmith seeks to carry, a Smith & Wesson model 460XVR.

- *The basis for believing the sources of information consulted*. Both decision-makers appear to have uncritically accepted the advice of the government officials on key points and have offered no explanation for doing so. To the extent other individuals or sources are consulted in the redeterminations, what is the basis for accepting what they say? And caution must be exercised in relying upon what they say. For example, one firearms officer in his decision adopted the concern of one of the government officials about "under-trained persons" using "inadequate firearms, including handguns". There is no evidence that this concern is present in Mr. Sexsmith's case. Training was a prerequisite for him to have a license to possess a restricted firearm and there was no evidence that his handgun of choice is "inadequate".

- *Overall decision-making. Vavilov* requires that administrative decision-makers such as these deal with the issues before them in a genuine, open-minded way, avoiding result-oriented thinking.

[36] The reasons on the redeterminations need not be an encyclopedia of everything that can be said on the matter, nor do they need to be an ambitious literary effort. Far from it. In the end, there need only be a reasoned explanation concerning the key issues, including the key arguments made. Sometimes a few well-chosen words or sentences may suffice; sometimes, because of complexity, a longer explanation is needed.

[37] Further guidance is available in a recent article written for administrative decision-makers: David Stratas and David Williams, “The Bullet-Proof Administrative Decision-Maker: Maximizing the Chances of Surviving a Judicial Review” (26 October 2020), online: SSRN <ssrn.com/abstract=3719276> (date accessed 4 June 2021).

[38] In providing this guidance, the Court is not recommending or suggesting any outcome, one way or the other. The merits of the redeterminations are for those redetermining Mr. Sexsmith’s application, not this Court.

(3) Remedy

[39] The normal remedy for material procedural unfairness is the quashing of the decisions.

[40] Mr. Sexsmith seeks *mandamus* requiring the authorization to be granted. On the pre-conditions for *mandamus*, see generally *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55, 444 N.R. 93, citing relevant Supreme Court authority; and see also *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167. *Mandamus* is available

only where the facts and law are such that the administrative decision-maker has no choice and must determine the matter in a particular way. As well, in rare cases, *mandamus* can be granted for significant maladministration or administrative misconduct. Here, neither circumstance is present. On redetermination, Mr. Sexsmith's application could either be granted or denied depending on how the facts and the law are reasonably viewed.

[41] The nature of the procedural fairness defects in this case and concerns about some aspects of the firearms officers' substantive decision-making suggest that actual and apparent fairness would be furthered if different firearms officers conducted the redetermination.

[42] Those conducting the redetermination should make whatever other investigations are necessary and appropriate. They should give Mr. Sexsmith an opportunity to submit any fresh information and provide him with a fresh interview. Overall, Mr. Sexsmith should have a full opportunity to make his case and answer any case against him.

[43] Given the time that has elapsed, the redetermination should be conducted as quickly as practicable.

[44] The period of authorization sought by Mr. Sexsmith has now lapsed. In conducting the redetermination, the firearms officers should find out from Mr. Sexsmith the period for which he seeks authorization and consider his application on that basis. This is what the Court required in *Martinoff v. Canada*, [1994] 2 F.C. 33, 18 Admin. L.R. (2d) 191 (C.A.) when ordering a

redetermination of an application for a firearm licence in circumstances substantially similar to these.

[45] Mr. Sexsmith does not seek costs and so I would not award any.

C. Proposed disposition

[46] I would allow the appeal, set aside the judgment dated November 27, 2019 of the Federal Court in file T-2030-18, grant Mr. Sexsmith's application for judicial review and, giving the judgment that the Federal Court should have given, quash the firearms officers' decisions dated April 9, 2018 and May 18, 2018. I would remit Mr. Sexsmith's application for an authorization to carry his restricted firearm to different firearms officers for redetermination in accordance with these reasons. I would award no costs.

"David Stratas"
J.A.

"I agree
Richard Boivin J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-462-19

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE McDONALD DATED NOVEMBER 27, 2019, NO. T-2030-18

STYLE OF CAUSE:	ELLIOT LEE SEXSMITH v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	JUNE 2, 2021
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	BOIVIN J.A. GLEASON J.A.
DATED:	JUNE 4, 2021

APPEARANCES:

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