Federal Court Cour fédérale

Date: 20181211

Docket: T-1689-17

Citation: 2018 FC 1248

Ottawa, Ontario, December 11, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ANDRIY VOLODYMYROVYCH PORTNOV

Applicant

and

THE MINISTER OF FOREIGN AFFAIRS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the implied decision by the Minister of Foreign Affairs [the Minister] not to remove the Applicant from the Schedule of the *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations,* SOR/2014-44 [the Regulations].

II. Background

[2] The Applicant, Andriy Portnov, is a citizen of Ukraine.

[3] The Applicant was elected as a Deputy (Member of Parliament) of the Verkhovna Rada of Ukraine in March of 2006, and served until April of 2010. He then served as an adviser to the President of Ukraine, Viktor Yanukovych, between April of 2010 and February of 2014.

[4] In February 2014, President Yanukovych was removed from his post. A new government took power, led by President Petro Poroshenko.

[5] The new government wrote letters to various international entities, including Canada, alleging that several former government officials, including the Applicant, were involved in criminal activity relating to the embezzlement of state funds and asking that restrictive measures be imposed against these individuals. The Applicant maintains that this information, insofar as it relates to him, was incorrect and politically motivated.

[6] In response to these letters, several international entities (including the Canadian government, as will be discussed below) imposed restrictions on the assets of the Applicant and other Ukrainian nationals.

[7] Since the spring of 2014, the Applicant has taken numerous steps to clear his name and have the restrictive measures withdrawn. He has been generally successful in this endeavour, and

there is evidence before this Court that the European Commission, Switzerland, and Norway have all taken actions to remove restrictions previously imposed on the Applicant.

[8] However, the Applicant has not succeeded in fighting the restrictions imposed against him in Canada.

A. *Canadian Restrictions*

[9] On or about March 3, 2014, a letter was sent from the Prosecutor General of the Ukraine to the Prime Minister of Canada which stated that law-enforcement agencies in the Ukraine had begun to investigate crimes committed by senior officials of the former government, including the Applicant, and that as a result of these investigations "there have been established factors of embezzlement of state funds in sizable amounts and its further illegal transfer outside the territory of Ukraine" [the March 3, 2014 Letter]. The March 3, 2014 Letter went on to ask the Prime Minister of Canada for assistance in returning the illegally withdrawn assets by "facilitating a relevant political decision."

[10] On March 5, 2014, the Regulations were enacted pursuant to the *Freezing of Assets of Corrupt Foreign Officials Act,* SC 2011, c 10 [the FACFOA]. The effect of the Regulations is to freeze the assets of the 18 individuals listed in the Schedule to the Regulations [the Schedule]. The Applicant is listed at item 9 of the Schedule.

[11] Since December of 2015, the Applicant has made seven requests to the Minister to be removed from the Schedule [the Request Letters]. The Request Letters included documents from

Ukrainian law enforcement agencies, statements by Ukrainian government officials, and court decisions, generally evidencing that there are no remaining investigations into any wrongdoing by the Applicant and that the Applicant has not been convicted of any wrongdoing. The Request Letters also put forward evidence that several entities, including the European Commission, had withdrawn their restrictions as against the Applicant.

[12] Perhaps the most compelling evidence submitted with the Request Letters is a decision by a panel of the General Court (Ninth Chamber) of the European Court of Justice dated October 26, 2015, which found that Mr. Portnov should never have been the subject of restrictions by the European Union [the ECJ Judgment]. The ECJ Judgment held that the March 3, 2014 Letter did not "constitute a sufficiently solid factual basis" for imposing restrictions on Mr. Portnov, and went on to find:

> … it is not even established that, at the time when the contested acts were adopted, the applicant was subject of genuine 'criminal proceedings', or even a mere preliminary inquiry. It follows that the inclusion of the applicant's name on the list as a 'person subject to criminal proceedings' is incorrect.

[13] I also note three documents submitted by the Applicant along with the Request Letters:

a) A certificate issued by the Ministry of Internal Affairs of Ukraine, dated January 16, 2017, which stated that Mr. Portnov had not been convicted of any criminal offences;

b) A letter from the office of the Prosecutor General of Ukraine, dated March 6, 2017, which stated that Mr. Portnov was not involved in any Ukrainian criminal proceedings or investigations; and

c) A letter from the office of the Prosecutor General of Ukraine, dated June 26, 2017, which notified the Prime Minister of Canada that the information in the March 3, 2014 Letter was "unreliable and violating the non-property rights of [Mr. Portnov]."

[14] The Minister's initial responses to the Request Letters suggested that, in order for the Applicant to be removed from the Schedule, it would be necessary for the Ukraine to make a formal request to Canada. In response to the Applicant's fifth request, the Minister indicated, by way of an email dated July 11, 2017, that the Applicant's request was still under consideration. The Applicant received no response to his sixth and seventh requests, dated August 22, 2017 and October 3, 2017 respectively.

[15] The Applicant filed this application for judicial review on November 3, 2017, challenging the Minister's failure to remove the Applicant's name from the Schedule.

[16] The Applicant seeks an order compelling the Minister to recommend to the Governor in Council that the Regulations be amended to remove item 9 of the Schedule, or alternatively a declaration that item 9 be declared *ultra vires* its enabling statute.

[17] The Respondent suggests that, despite the considerable evidence put forward by the Applicant in the Request Letters, the Minister has received four letters from the Ukrainian Embassy in Canada, the first in March of 2016 and the most recent in July of 2018, which satisfied the Minister that there was an ongoing investigation in the Ukraine in regard to the Applicant. The Respondent submitted two affidavits deposing to the existence of these letters,

but failed to produce the letters. The Respondent did produce, on the eve of the hearing of this matter, a letter from a representative of the Minister to the Applicant, dated October 7, 2018, which relied on the letters from the Ukrainian Embassy and concluded that the Minister would neither recommend that the Applicant's name be removed from the Regulations, nor recommend any amendments to the Regulations. While it would have been preferable for the Respondent to directly place the letters from the Ukrainian Embassy before this Court, this failure does not alter the conclusions reached below.

III. Statutory Framework

[18] Subsections 4(1) and 4(2) of the FACFOA impose requirements on the Governor in Council that must be met before regulations can be enacted under the FACFOA. Subsection 4(1) requires that, before regulations can be enacted, the Government of Canada receive a written request from a foreign state asserting that an individual has misappropriated property of the foreign state and asking the Government of Canada to freeze property of the individual:

> 4 (1) If a foreign state, in writing, asserts to the Government of Canada that a person has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship and asks the Government of Canada to freeze property of the person, the Governor in Council may
>
> > (a) make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (3) in relation to the person's property that the Governor in Council considers necessary; and
> >
> > (b) by order, cause to be seized, frozen or sequestrated in the manner set out in the order any of the person's property situated in Canada.
>
> [Emphasis added]

[19] Subsection 4(2) requires, before regulations can be enacted under the FACFOA, that Governor in Council be satisfied that:

> (a) the person is, in relation to the foreign state, a politically exposed foreign person;
>
> (b) there is internal turmoil, or an uncertain political situation, in the foreign state; and
>
> (c) the making of the order or regulation is in the interest of international relations.

[20] The term "politically exposed foreign person" is defined in section 2 of the FACFOA as:

> a person who holds or has held one of the following offices or positions in or on behalf of a foreign state and includes any person who, for personal or business reasons, is or was closely associated with such a person, including a family member:
>
> (a) head of state or head of government;
>
> (b) member of the executive council of government or member of a legislature;
>
> (c) deputy minister or equivalent rank;
>
> (d) ambassador or attaché or counsellor of an ambassador;
>
> (e) military officer with a rank of general or above;
>
> (f) president of a state-owned company or a state-owned bank;
>
> (g) head of a government agency;
>
> (h) judge;
>
> (i) leader or president of a political party represented in a legislature; or
>
> (j) holder of any prescribed office or position.

[21] On March 5, 2014, the Regulations were enacted pursuant to the FACFOA. The operative section of the Regulations, section 2, effectively freezes a politically exposed foreign person's assets in Canada:

> 2 A person in Canada or a Canadian outside Canada must not
>
> > (a) deal, directly or indirectly, in any property, wherever situated, of any politically exposed foreign person;
> >
> > (b) enter into or facilitate, directly or indirectly, any financial transaction related to a dealing referred to in paragraph (a); or
> >
> > (c) provide financial services or other related services in respect of any property of any politically exposed foreign person.

[22] Section 13 of the FACFOA provides that a person who is the subject of a regulation enacted under the FACFOA may apply in writing to the Minister to cease being the subject of that regulation on the grounds that the person is not a politically exposed foreign person. There are no other provisions under the FACFOA to challenge a regulation.

[23] Section 6 of the FACFOA provides that a regulation will cease to have effect five years after it comes into force, unless the Governor in Council orders that the term of the regulation be extended. As a result of section 6, the Regulations will cease to have effect on March 5, 2019, unless the Governor in Council orders that the term of the Regulations be extended.

IV. Issues

[24] The issues are:

A. Are the Regulations *intra vires*?

B. Did the Minister err in relying on the March 3, 2014 Letter?

C. Did the Minister err by not recommending an amendment to the Regulations?

V. Standard of Review

[25] The question of whether a regulation has been enacted within the jurisdiction of its enabling statute is a legal question attracting the correctness standard. As stated in *Canadian Council for Refugees v Canada,* 2008 FCA 229 at paragraph 57 [*Canadian Council for Refugees*]:

> An attack aimed at the *vires* of a regulation involves the narrow question of whether the conditions precedent set out by Parliament for the exercise of the delegated authority are present at the time of the promulgation, an issue that invariably calls for a standard of correctness.

[26] The Respondent argues that the standard of review in relation to the *vires* of regulations is reasonableness, citing *West Fraser Mills Ltd v British Columbia (Workers' Compensation Appeal Tribunal),* 2018 SCC 22 [*West Fraser*]. That decision relates to the situation where an enabling statute has conferred unto a board a broad power to determine what regulations were necessary, and the review related to whether the enactment of regulations was a reasonable exercise of the board's delegated power. In contrast, this matter relates to the narrow question of whether the conditions precedent set out by Parliament for the exercise of the delegated authority under the FACFOA were present at the time of the promulgation of the Regulations. As a result, I find that the correctness standard applies (*Katz Group Canada Inc v Ontario (Health and Long‑Term Care),* 2013 SCC 64; *Canada (Attorney General) v Mercier*, 2010 FCA 167 at paras 78, 79).

[27] However, as I indicated at the hearing, whether the standard of review be reasonableness or correctness on this issue, it does not affect my decision below.

[28] The issues of whether the Minister erred in relying on the March 3, 2014 Letter, and whether the Minister erred by not recommending an amendment to the Regulations, should be reviewed with the reasonableness standard.

VI. Analysis

A. *Are the Regulations intra vires?*

[29] The Applicant argues that item 9 of the Schedule to the Regulations is *ultra vires* its enabling statute.

[30] As an initial challenge, the Applicant states that pursuant to subsection 4(1) of the FACFOA, in order for the Minister to find that the Applicant's assets should be frozen under section 2 of the Regulations, the Minister must have a representation in writing from the Ukraine that the Applicant has misappropriated property inappropriately, not merely that there is an investigation being conducted to ascertain if there has been such a misappropriation.

[31] While the language of subsection 4(1) does support the Applicant's argument, to suggest that the Minister must have been satisfied that there was in fact misappropriation at the outset would be inconsistent with the intent of the FACFOA, and elevates the initial threshold to

consider the application of section 2 of the Regulations such that the FACFOA could, in many if not most cases, be rendered nugatory.

[32] The purpose of the FACFOA is to enable states faced with an uncertain political situation to ask Canada to freeze property that may have been misappropriated by certain individuals until the situation has been restored and that state can obtain evidence and carry out investigations of these persons or property (*Djilani v Canada (Foreign Affairs)*, 2017 FC 1178 at para 100 [*Djilani*].

[33] In light of these purposes, I find that the requirement under subsection 4(1) of the FACFOA is merely that an assertion of impropriety be made by a foreign state. This requirement was satisfied by the March 3, 2014 Letter. While I need go no further, I note that even if the requirement in subsection 4(1) were to be interpreted as the Applicant suggests, which I reject, the requirement would be satisfied by the language in the March 3, 2014 Letter stating in reference to the Applicant that "there have been established factors of embezzlement of state funds in sizable amounts and its further illegal transfer outside the territory of Ukraine."

[34] As pointed out by the Respondent, when one considers the affidavit of Kevin Rox, at paragraph 12, and that of Allison Grant, at paragraph 2, it is apparent that the Department of Foreign Affairs was satisfied that the Applicant may have misappropriated state property and that there have been ongoing investigations into that possible misappropriation.

[35] On the basis of these affidavits, as well as the preamble to the Regulations, it is clear that the requirements under subsection 4(2) of the FACFOA were also satisfied at the time the Regulations were enacted.

[36] The Applicant goes on to challenge the Regulations on the basis that they became *ultra vires* at a subsequent point in time. The parties disagree on whether a regulation can become *ultra vires* subsequent to its promulgation.

[37] The Federal Court of Appeal has stated that an attack aimed at the *vires* of a regulation involves the narrow question of whether the conditions precedent set out by Parliament for the exercise of the delegated authority are present at the time of promulgation (*Canadian Council for Refugees*, above, at paras 57, 64, 87, 88).

[38] Arguing against this proposition, the Applicant referred the Court to the decision of Justice Tremblay-Lamer in *Re Charkaoui*, 2009 FC 1030 [*Charkaoui*].

[39] In *Charkaoui*, the Court considered the reasonableness of a certificate issued by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration [the Ministers] which attested that an individual was inadmissible to Canada on grounds of security. Section 77 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] in force at that time required that the Ministers file with the Court the evidence upon which the certificate was based. The Ministers initially filed this evidence, but then withdrew it, citing, among other things, national security concerns. The Court in *Charkaoui* found that when

a certificate issued under section 77 of the IRPA was no longer supported by evidence, the certificate was rendered *ultra vires*.

[40] *Charkaoui* is distinguishable on the basis that section 77 of the IRPA specifically required a certificate to be supported by evidence to justify its issuance – no such requirement exists in the FACFOA with respect to the Regulations. Additionally, I am bound by a clear statement of law from the Federal Court of Appeal in *Canadian Council for Refugees*.

[41] As a result, the Applicant's challenge to the *vires* of the Regulations, on the basis that events subsequent to the promulgation of the Regulations render them *ultra vires*, must fail.

B. *Did the Minister err in relying on the March 3, 2014 Letter?*

[42] The Applicant also argues that the Minister erred in exercising the discretion to enact the Regulations without taking steps to verify the information contained in the March 3, 2014 Letter.

[43] The FACFOA was enacted to enable foreign states faced with an uncertain political situation to ask Canada to freeze property that may have been misappropriated until the situation is restored and that foreign state can obtain evidence and carry out investigations (*Djilani*, above, at para 100). Consistent with this purpose, the requirement under subsection 4(1) of the FACFOA is merely that an assertion of impropriety be made by a foreign state; the Ukraine made such an assertion by way of the March 3, 2014 Letter. As a result, the Minister was reasonable to rely on the March 3, 2014 Letter.

C. *Did the Minister err by not recommending amendment to the Regulations?*

[44] The Applicant has no avenue to request an amendment to the Regulations based on the text of the FACFOA or the Regulations. The only provision which would allow the Applicant to have his name removed from the Regulations is section 13 of the FACFOA, which provides that a person who is the subject of a regulation enacted under the FACFOA may apply in writing to the Minister to cease being the subject of that regulation on the grounds that the person is not a politically exposed foreign person. The Applicant does not dispute that he is a politically exposed foreign person within the meaning of the FACFOA.

[45] The Applicant nonetheless submits that the Minister's refusal to recommend the delisting of the Applicant from the Regulations was unreasonable, in light of the considerable evidence outlined above which strongly suggests that the Applicant never misappropriated property or embezzled funds from the Ukraine. The Applicant argues that:

a) The Minister has the discretion to recommend that the Regulations be amended;
b) This discretion must be exercised in line with the purposes of the statutory framework; and
c) The Minister's failure to recommend amendment, in light of the evidence discussed above, runs contrary to the purposes of the statute and is thereby unreasonable.

[46] The Minister's failure to recommend that the Regulations be amended to remove the Applicant's name is reasonable. To find otherwise would be to improperly step beyond the role of the Court and usurp the constitutionally delegated role of the executive branch of government.

[47] However, it is unfortunate that there is no evidentiary basis for the Applicant to obtain one of the remedies he seeks. While the enactment of the Regulations was based on a request from the Ukraine that the Minister reasonably relied upon, the Applicant has since put before the Minister considerable evidence that he never misappropriated property or embezzled funds from the Ukraine.

[48] The Respondent failed to answer a number of the Applicant's requests for reconsideration over an extended period of time, and this delay by the Respondent has shown a disregard for the Applicant's serious concerns about his status. In the circumstances, I exercise my discretion not to award costs.

[49] The application is dismissed.

JUDGMENT in T-1689-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed

2. Costs, in the circumstances, should not be awarded.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1689-17
STYLE OF CAUSE:	ANDRIY VOLODYMYROVYCH PORTNOV v THE MINISTER OF FOREIGN AFFAIRS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 4, 2018
JUDGMENT AND REASONS:	MANSON J.
DATED:	DECEMBER 11, 2018

APPEARANCES:

Geoff R. Hall John W. Boscariol Robert A. Glasgow	FOR THE APPLICANT
Roger Flaim	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCarthy Tétrault LLP Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT