Federal Court Decisions

Case name: Djilani v. Canada (Foreign Affairs and International Trade)
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Docket: T-1248-13

Citation: 2014 FC 631

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 27, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

ZOHRA DJILANI
and
BELHASSEN TRABELSI

Applicants

and

THE MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

Respondent

JUDGMENT AND REASONS

[1] The applicants, Zohra Djilani and Belhassen Trabelsi, and their four minor children, are subject to the *Freezing Assets of Corrupt Foreign Officials (Tunisia and Egypt) Regulations*, SOR/2011 (Regulations), which were adopted by the Minister of Foreign Affairs and International Trade (Minister) following the events of the Arab Spring. This is an application for judicial review of the Minister's decision dated June 26, 2013, rejecting their application for a certificate filed pursuant to section 15 of the *Freezing Assets of Corrupt Foreign Officials Act*, SC 2001, c 10 (Act). By that application, the applicants were seeking to exclude the amount of $109,680 from the application of the Regulations to then transfer it into their lawyers' trust accounts.

[2] For the following reasons, this application for judicial review will be dismissed.

Factual background

[3] The applicants are citizens of Tunisia and they currently live in Montréal with their four minor children.

[4] Mr. Trabelsi is the brother-in-law of Zine el-Abedine Ben Ali, the former President of Tunisia. Since March 23, 2011, he has been subject to the Regulations as a "politically exposed foreign person". Since January 4, 2012, Mrs. Djilani and the couple's children have also been declared "politically exposed foreign persons". According to section 3 of the Regulations, the primary purpose of that designation is to prohibit any financial transaction in Canada on frozen assets.

[5] In February 2012, Mrs. Djilani and her children filed an application pursuant to section 13 and subsection 14(2) of the Act with the Minister to be excluded from the application of the Regulations. That same day, the applicant also filed an application pursuant to section 15 of the Act with the Minister to be issued a certificate excluding the

amount of $178,040 from the application of the Regulations for their expected expenses for the year 2012.

[6] A few months later, the applicants were informed that the Minister had rejected their two applications. They did not file an application for judicial review of those decisions.

[7] Instead, in December 2012, they filed a new application for a certificate pursuant to section 15 of the Act for the exclusion of $109,680 from the application of the Regulations. The conclusions of their application were as follows:

> [TRANSLATION]
>
> ALLOW this application by January 15, 2013;
>
> AUTHORIZE the applicants to receive the amount of one hundred and nine thousand six hundred and eighty dollars ($109,680) for the six-month period starting the first of January 2013;
>
> AUTHORIZE the applicants to deposit the amount of seventy-nine thousand six hundred and eighty dollars ($79,680) into the trust account of Donald KATTAN;
>
> AUTHORIZE the applicants to deposit the amount of thirty thousand dollars ($30,000) into the trust account of the law firm Saint-Pierre, Leroux, Avocats inc. for extrajudicial fees and disbursements.

[8] In that new application, the applicants explained that the amount must be used to pay for certain living expenses (including counsel fees), but also luxury products and services such as a chauffeur for the family, a non-subsidized private English school for the couple's children and their apartment, the monthly rent of which is $5,000.

[9] After analyzing the record, the Deputy Minister of Foreign Affairs and International Trade sent the Minister a document entitled Memorandum for Action that contained his analysis and his recommendation that the application for a certificate be granted in part and

that a certain amount be exempt from the application of the Regulations. The Deputy Minister's key findings were as follows:

a. The purpose of the Act and the Regulations is to preserve assets that have been supposedly misappropriated by the former regime, while waiting for Tunisia to be able to provide the evidence required to recover them, and not to prevent individuals from having access to the necessities of life or to legal advice;
b. The legislation does not prohibit paying certain amounts or making other assets accessible to designated persons. In other words, third parties are not prohibited from paying for their expenses through their lawyers' trust accounts;
c. The certificate requested concerns new funds from Hedi Djilani, the female applicant's father, such that no assets designated by Tunisia would be used;
d. Canada has no evidence to suggest that the new funds provided were illegally acquired, although Hedi Djilani is the subject of corruptions allegations;
e. Tunisia has not requested that Hedi Djilani be subject to the legislation;
f. Although the family has stated that the purpose of the application for a certificate is to end the necessity of living off charity from friends and family, this situation would not change even if the certificate were issued;
g. The request includes funds for luxury items such as chauffeur service and private school;
h. The transactions covered by the requested certificate would not be illegal if the funds in question were deposited directly in their lawyers' accounts, rather than routed through the family's own account.

[10] On June 26, 2013, the Minister rejected the Deputy Minister's recommendation and the applicants' application for a certificate by simply writing the following on the cover page

of the Memorandum for Action: "The Minister does not concur with the recommendations". Roland Legault, Interim Director of the Criminal, Security and Diplomatic Law Division, communicated that decision to the applicants in a letter dated July 3, 2013.

Issues

[11] The following issues are raised in this application:

1. What is the appropriate standard of review of the Minister's decision?
2. Is the Minister's decision to refuse to issue the requested certificate reasonable?

Analysis

Appropriate standard of review of the Minister's decision

[12] In accordance with *Dunsmuir* v *New Brunswick*, 2008 SCC 9 (*Dunsmuir*) at paragraph 62, the applicable standard of review must be identified in the following manner: first, it must be ascertained whether the jurisprudence has already determined in a satisfactory manner the standard of review applicable to the type of case at issue. Second, where the first inquiry proves unfruitful, it is necessary to proceed with the standard of review analysis as described in *Dunsmuir*.

[13] Because this Court has not yet determined the appropriate standard of review of a decision by the Minister made in accordance with section 15 of the Act, I must proceed with that analysis based on the relevant factors, namely: (i) the presence or absence of a privative clause; (ii) the purpose of the tribunal as determined by interpretation of enabling legislation; (iii) the nature of the question at issue, and (iv) the expertise of the tribunal. "In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case" (*Dunsmuir* at paragraph 64).

[14] In this case, subsection 15(2) of the Act provides the Minister with the discretionary authority to issue a certificate in cases where the Minister determines that the property that is the subject of an application for a certificate is necessary to meet the reasonable expenses of the applicant and their dependants. The exercise of that discretion will depend heavily on the facts in each case and on the nature of the application for a certificate filed. The Minister's discretion in that regard weighs in favour of deference.

[15] Furthermore, when there is a question of fact or even where the legal and factual issues are intertwined and cannot be readily separated, as in this case, the reasonableness standard of review must apply (*Dunsmuir* at paragraph 53).

[16] When applying the reasonableness standard, a reviewing court must show deference and be concerned with the existence of justification, transparency and intelligibility within the decision-making process as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47; *Canada (Minister of Citizenship and Immigration)* v *Khosa*, 2009 SCC 12; *Alberta (Information and Privacy Commissioner)* v *Alberta Teachers' Association*, 2011 SCC 61). Furthermore, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. . . . This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome." (*Newfoundland and Labrador Nurses' Union* v *Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (*Newfoundland Nurses*) at paragraphs 14 and 15).

Reasonableness of the Minister's decision

[17] The applicants submit that section 15 of the Act creates an obligation for the respondent to determine the reasonableness of the expenses submitted, and, if necessary, to issue a certificate. In this case, the respondent apparently failed to respect those obligations.

[18] The applicants add that, in his letter dated July 3, 2013, the respondent stated that he was not [TRANSLATION] "convinced that the information provided established that all of the expenses claimed were reasonable". As a result, the applicants state that it is clear that some of the expenses claimed are reasonable. From the moment some of the expenses claimed were deemed reasonable, the respondent had the obligation to issue a certificate and could not simply reject the application.

[19] They also argue that the respondent's position that the family expenses should continue to be paid with the transfer of funds by third parties into their lawyers' trust accounts has a number of consequences, namely the following:

a. If the female applicant's father were no longer able to transfer funds to Canada, the applicants would have no means with which to support themselves;

b. The applicants could not have their assets unfrozen for reasonable expenses, notwithstanding section 15 of the Act;

c. The applicants could not receive a salary from an employer in Canada or other forms of income for work in Canada because such salaries or income would constitute "property" under subsection 4(3) of the Act;

d. Any small expenses, including the cost of groceries, cigarettes and the children's spending money, must be paid from the amounts deposited into their lawyers' trust accounts;

e. The applicants submit that that position is unreasonable and damages their human dignity within the meaning of section 7 of the *Canadian Charter of Rights and Freedoms* (Charter). To live with dignity in Canada, a person must be able to work, receive the product of his or her labour and have the means to pay current expenses, without disproportionate interference or hardship.

[20] First, I share the respondent's opinion that this Court cannot rule on the argument

based on section 7 of the Charter because the applicants failed to give him prior notice to that effect. Furthermore, that argument is not supported by any serious analysis and, generally, neither the right to hold employment nor the economic interests of the applicants are protected by the Charter (*Siemens* v *Manitoba (Attorney General),* 2003 SCC 3, [2003] 1 SCR 6 at paragraphs 45 and 46). As a result, I will not consider that argument.

[21] The respondent admits that Mr. Legault's letter suggests that some of the expenses claimed were reasonable. However, the Minister's decision is not in that letter, but instead on the cover page of the Memorandum for Action, which was signed by him. However, there are no reasons as to why the Minister did not follow the Deputy Minister's recommendation.

[22] Regardless, the respondent argues that, even if some of the expenses were admitted to be reasonable, the issue is instead whether the Minister was required to issue a certificate in the circumstances of this case.

[23] Upon reading this record in its entirety, including the applicants' application for a certificate, it does seem that the applicants stated that the required funds will be coming from the female applicant's father and the couple's friends, and that they will be transited through their lawyers' trust accounts. That is the status quo as for how things have been done for the applicants since they arrived in Canada. The Minister is not opposed to that method.

[24] Moreover, the fact that the applicants have succeeded in maintaining a somewhat luxurious lifestyle since their arrival in Canada is likely to render the Minister's decision reasonable. In fact, even though some of the expenses claimed may be reasonable, the frozen funds were not "necessary" under section 15 of the Act, to meet them. The wording in that provision indicates that there are two relevant criteria, the reasonableness of the expenses and the need to have access to the frozen funds. If all of the expenses of an applicant have been paid by foreign funds since the applicant's arrival in Canada, it may not be necessary to

use the frozen funds and, therefore, to analyze the reasonableness of the expenses submitted.

[25] Despite the fact that the Minister did not accept the Deputy Minister's recommendation, their respective positions are not actually contradictory because the Deputy Minister acknowledged that the applicants' application, as formulated, did not concern the frozen funds.

[26] While it would have been preferable for him to have explained why he rejected the recommendation, upon reading the record in its entirety, it is clear that that decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law. *Newfoundland Nurses* ensures that the focus of judicial review remains on the outcome or decision itself, and not the process by which that outcome was reached. A reading of the record supports the Minister's decision.

[27] Finally, I would like to note that many of the consequences raised by the applicants are hypothetical. They do not claim to hold a job in Canada and their application for a certificate does not concern amounts that could be the product of work in Canada.

Conclusion

[28] In the circumstances of this case, it was reasonable for the Minister to favour maintaining the status quo while their refugee protection claim is being reviewed, unless obviously there was a change to their personal situation. Where necessary, they could file a new application with the Minister.

[29] Consequently, their application for judicial review will be dismissed with costs.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. Costs are awarded to the respondent.

"Jocelyne Gagné"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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