

Federal Court



Cour fédérale

Date: 20200528

Docket: T-1317-19

Citation: 2020 FC 649

[CERTIFIED ENGLISH TRANSLATION, REVISED BY THE AUTHOR]

Ottawa, Ontario, May 28, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

MICHEL COURTEMANCHE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Michel Courtemanche is seeking judicial review of the revocation of his Canadian passport, based on criminal charges against him. He contends that the identity of the decision-maker and the reasons why his file was selected for investigation ought to have been disclosed to him. He also claims that the revocation of his passport violates the presumption of innocence and

does not sufficiently take into account his rights under the *Canadian Charter of Rights and Freedoms*.

[2] I am dismissing his application. I find that the alleged failures did not prevent Mr. Courtemanche from presenting his case and do not constitute a breach of the requirements of procedural fairness. I also find that Mr. Courtemanche's passport could reasonably be revoked solely on the basis of the charges against him and that he has not adduced sufficient evidence to invoke Charter rights.

I. Background

[3] In 1996, Mr. Courtemanche was charged with a number of sexual offences committed against a minor at various locations between 1979 and 1992. He was acquitted of all of those offences.

[4] In 2018, new charges for similar offences were laid against Mr. Courtemanche. Three counts relate to the same victim as in the charges on which he was acquitted in 1996. These charges, however, relate to acts that took place in other judicial districts in 1987 and 1988. Two counts relate to another victim and involve conduct that took place in 1982 and 1983.

[5] On June 4, 2019, a security investigator from the Passport Entitlement and Investigation Division [the Division] of the Department of Immigration, Refugees and Citizenship sent Mr. Courtemanche a letter informing him of the decision to revoke his passport. This decision was based on the combination of paragraph 9(1)(b) and subsection 10(1) of the *Canadian*

Passport Order, SI/81-86 [the Order]. Paragraph 9(1)(b) of the Order provides that the Minister may refuse to issue a passport to a citizen who “stands charged in Canada with the commission of an indictable offence”. Subsection 10(1) of the Order provides that the Minister may revoke a passport for the same reason. The letter also invited Mr. Courtemanche to put forward any grounds that might lead to reconsideration of the decision.

[6] On July 3, 2019, counsel for Mr. Courtemanche wrote to the investigator requesting reconsideration of the decision. She argued, in essence, that Mr. Courtemanche intended to raise valid defences to the charges and that only a conviction could lead to the revocation of the passport.

[7] On July 11, 2019, the investigator wrote again to Mr. Courtemanche to acknowledge receipt of his counsel’s comments and to inform him that the decision to revoke his passport was maintained.

[8] Mr. Courtemanche is now seeking judicial review of the revocation of his passport.

II. Analysis

[9] Even today, passports are issued pursuant to the royal prerogative. The exercise of this prerogative is nevertheless governed by the Order, which sets out the procedure for applying for a passport and the grounds for refusing an application for a passport or revoking a passport already issued. It is now well established that the exercise of the royal prerogative in relation to passports is subject to judicial review: *Black v Canada (Prime Minister)* (2001), 199 DLR (4th)

228 (Ontario Court of Appeal); *Khadr v Canada (Attorney General)*, 2006 FC 727, at paragraph 35, [2007] 2 FCR 218 [*Khadr*].

[10] Moreover, when reviewing an administrative decision, this Court relies solely on the evidence before the decision-maker. Indeed, the role of this Court is to ensure that the impugned decision was reasonable based on the evidence presented to the decision-maker. Except in very specific cases, it is therefore not possible to present new evidence before this Court: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 12 at paragraphs 86 and 98.

A. *Procedural fairness*

[11] Mr. Courtemanche first raises two grounds related to procedural fairness. First, he attacks the fact that the letters informing him of the decision to revoke his passport did not indicate the identity of the investigator who signed the letter and made the decision. He relies on the *Khadr* decision. In that case, however, my colleague Justice Michael Phelan criticized the Minister for personally interfering in the decision-making process set out in the Order, as it then read. Nothing of the sort occurred in this case.

[12] Since Mr. Courtemanche did not make detailed submissions on this issue, I will refrain from making general pronouncements about the right to know the identity of the decision-maker. While it is in principle desirable for individuals to know the identities of those who make decisions about them, there are many reasons why some forms of anonymity may be appropriate, particularly in high-volume decision-making processes.

[13] At the hearing, Mr. Courtemanche placed more emphasis on the fact that his counsel would have preferred to speak with the decision-maker in person to better understand the reasons for the revocation and to be able to better present his case. However, while such informal discussions may be common practice in other areas of law, procedural fairness does not require that the person whose passport the Division proposes to revoke be able to speak to the decision-maker.

[14] In *Haddad v Canada (Attorney General)*, 2017 FC 235 [*Haddad*], my colleague Justice Luc Martineau provided a detailed review of this Court's case law regarding the scope of the procedural fairness requirements applicable to passport revocation. He concluded that the threshold for procedural fairness in such cases was relatively low and that it was sufficient that the person concerned be made aware of the facts against him or her and have an opportunity to make submissions. There is nothing to suggest that a hearing or interview with the decision-maker is necessary. The scope of these requirements may vary depending on the ground for revocation that is invoked. For example, more extensive disclosure may be required when the revocation is based on the grounds mentioned in subsection 10(2) of the Order, such as allowing another person to use his or her passport. On the other hand, in a case covered by paragraph 9(1)(b), the only evidence required is the fact that the passport holder has been charged with a criminal offence.

[15] In this case, I am of the opinion that the letter sent by the Division on June 4, 2019, sufficiently identified the criminal offence with which Mr. Courtemanche was charged and gave

him the opportunity to present his case in writing. The Division has taken into account the comments sent by Mr. Courtemanche on July 3, 2019. Procedural fairness did not require more.

[16] Mr. Courtemanche also complained about the inconsistent application of the provisions of the Order regarding the revocation of passports and the [TRANSLATION] “lack of transparency in the file selection process”. The basis for this allegation is found in the Division’s record. The first element of the file is a report on the CBC’s website, which describes the new sexual assault complaints against Mr. Courtemanche. Everything seems to indicate that it was the publication of this report that prompted the Division to open an investigation and obtain the information that led to the revocation of Mr. Courtemanche’s passport.

[17] At first glance, such a way of proceeding may seem surprising. However, I do not have to assess the Division’s practices from the perspective of good public administration. Rather, in the context of an application for judicial review, the issue is whether the requirements of procedural fairness have been met.

[18] Mr. Courtemanche did not cite any authority in support of the proposition that procedural fairness allows this Court to review the process by which the Division selects certain files for investigation, and I am not aware of any authority to that effect. Moreover, there is no information in the record that raises any doubt whatsoever as to the impartiality of the decision-maker. The mere fact that a CBC report may have motivated the Division to initiate an investigation does not amount to a breach of procedural fairness. Without evidence regarding the

file selection process and without a more fulsome argument, I think it best not to comment further on the matter.

B. *Reasonableness of revocation*

[19] Mr. Courtemanche also raised arguments going to the merits of the decision. In this regard, reasonableness is the standard of review: *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at paragraph 19. In other words, my role is not to substitute myself for the administrative decision-maker. I can only intervene if Mr. Courtemanche succeeds in showing that the impugned decision is unreasonable.

[20] Mr. Courtemanche's main argument is that it would be unreasonable to revoke his passport when he intends to enter a plea of *autrefois acquit* against the charges against him. He also invoked the presumption of innocence.

[21] However, this argument runs against the wording of paragraph 9(1)(b) of the Order, which, combined with subsection 10(1), allows the Minister to revoke the passport of a citizen who is "charged in Canada with an indictable offence". The person need not have been convicted: *Haddad*, at paragraph 23. There is no doubt that Mr. Courtemanche is charged in Canada with an indictable offence. When revoking a passport for the reason set out in paragraph 9(1)(b), the Minister is not required to consider the merits of the charges or the defences that the accused could raise: *Haddad*, at paragraph 26. These issues are a matter for the criminal courts.

[22] In any event, the charges laid against Mr. Courtemanche in 2018 involve two victims. Even assuming that his defence of *autrefois acquit* is successful, it would only concern one of the two victims. At the hearing, Mr. Courtemanche acknowledged that there were no grounds to oppose the revocation of his passport with respect to the charges related to the second victim.

[23] The argument based on the presumption of innocence may be rejected on similar grounds. The text of paragraph 9(1)(b) indicates that a person may have his or her passport taken away before being convicted. The presumption of innocence cannot be invoked against a provision drafted in this manner. Furthermore, Mr. Courtemanche did not challenge the constitutional validity of paragraph 9(1)(b).

[24] Mr. Courtemanche also alleges that the Division's decision does not demonstrate a balancing process between the policy objectives pursued by the Order and the impact of the decision on his rights guaranteed by the *Canadian Charter of Rights and Freedoms* [the Charter]. Mr. Courtemanche identifies more specifically the rights guaranteed by sections 6 and 11 of the Charter, i.e. mobility rights and the rights of an accused person in the criminal process. Section 11 arguments can be dismissed out of hand: in the process initiated by the Division, Mr. Courtemanche is not an "accused", and section 11 does not apply. The arguments based on section 6, however, deserve further attention.

[25] Subsection 6(1) of the Charter states that "[e]very citizen of Canada has the right to enter, remain in and leave Canada". Since *Kamel v Canada (Attorney General)*, 2009 FCA 21, [2009] 4 FCR 449, it has been established that refusing to issue a passport or withdrawing a passport

infringes the right guaranteed by subsection 6(1). In this case, however, the Federal Court of Appeal found that the provisions of the Order authorizing the revocation of a passport on national security grounds were valid, since they had been shown to be justified under section 1 of the Charter.

[26] Subsequently, certain decisions of this Court have held that a person whose passport was revoked could challenge this decision on the grounds that it did not constitute a reasonable balancing of the policy objectives pursued by the revocation and the impact on the passport holder's right to leave Canada as guaranteed by section 6 of the Charter: see in particular *Thelwell v Canada (Attorney General)*, 2017 FC 872, [2018] 3 FCR 3 [*Thelwell*]; *Alsaloussi v Canada (Attorney General)*, 2020 FC 364; see also *Kamel v Canada (Attorney General)*, 2013 FCA 103. These decisions are based on *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], in which the Supreme Court of Canada held that an administrative decision that infringes a Charter right must be the result of a balancing exercise between the importance of the policy objectives pursued by the decision and the impact on the rights of the individual. Cases such as *Thelwell* usually involve misrepresentations made in the context of a passport application. The application of the analytical approach laid down in *Doré* has led this Court to impose a form of proportionality requirement between the period of ineligibility for a passport and the seriousness of the applicant's conduct.

[27] It is not easy to transpose the reasoning of cases such as *Thelwell* to the present case. In this case, the decision-maker did not have to determine the length of a period of ineligibility based on the seriousness of the acts alleged against Mr. Courtemanche.

[28] In any event, the manner in which the case has been presented precludes me from commenting on this issue. In the letter that his counsel sent to the Division, Mr. Courtemanche does not ask the Division to take into account an infringement of his rights under section 6 of the Charter. He does not provide any information on the concrete impacts of the revocation of his passport. For example, he does not explain when and why he was planning to travel outside Canada. We do not know whether he intends to travel for compelling work or family reasons. In such circumstances, Mr. Courtemanche cannot blame the decision-maker for not considering the impacts of the revocation of his passport on his right to leave Canada.

[29] I do not intend to rule on the possibility of raising such arguments for the first time at the judicial review stage. See, in this regard, *Buffone v Canada (Attorney General)*, 2017 FC 346 at paragraph 59. Nonetheless, assuming that it is possible, evidence of the actual effects of the decision on the applicant is necessary in order to assess the seriousness of the infringement of Charter rights. Mr. Courtemanche did not provide any such evidence. I am therefore unable to conclude that the decision to revoke his passport is a disproportionate infringement of his right under section 6 of the Charter.

III. Conclusion

[30] Given that Mr. Courtemanche has not demonstrated a breach of the requirements of procedural fairness or the unreasonableness of the decision to revoke his passport, his application for judicial review will be dismissed.

[31] The respondent is not claiming costs. Therefore, I will not make any order as to costs.

JUDGMENT in T-1317-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. There is no order as to costs.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1317-19

STYLE OF CAUSE: MICHEL COURTEMANCHE v THE ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: HEARING HELD VIA VIDEOCONFERENCE
BETWEEN OTTAWA, ONTARIO AND MONTRÉAL,
QUEBEC

DATE OF HEARING: MAY 27, 2020

JUDGMENT AND REASONS: GRAMMOND J.

DATED: MAY 28, 2020

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