

Federal Court



Cour fédérale

Date: 20200904

Docket: T-1294-19

Citation: 2020 FC 882

Ottawa, Ontario, September 4, 2020

PRESENT: Madam Justice Walker

BETWEEN:

PRABU ELANGO VAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Elangovan seeks the Court's review of a July 11, 2019 decision of the Passport Entitlement and Investigations Division (Passport Division) of Immigration, Refugees and Citizenship Canada. The Passport Division revoked Mr. Elangovan's passport under paragraph 9(1)(b) and subsection 10(1) of the *Canadian Passport Order*, SI/81-86 (*Order*) after he was charged with criminal offences relating to sexual impropriety involving a person under the age of 16.

[2] Mr. Elangovan argues that the Passport Division's decision (Decision) was unreasonable because it does not reflect a proportionate balancing of his mobility rights protected under subsection 6(1) of the *Canadian Charter of Rights and Freedoms (Charter)* and the objectives of Canada's passport program.

[3] I have found that the Passport Division revoked Mr. Elangovan's passport in the reasonable exercise of the Minister's discretion under the *Order*. The revocation was consistent with the mandate of the Canadian passport program in the context of the serious charges against Mr. Elangovan. The Division imposed the period of suspension specifically contemplated by paragraph 9(1)(b) of the *Order*. The Decision is justified based on the evidence in the record and the legal framework within which the Division took action. As a result, I will dismiss this application for judicial review.

[4] By way of preliminary matter, the style of cause in this application is amended to reflect the proper respondent, the Attorney General of Canada, in accordance with Rule 303(3) of the *Federal Courts Rules*, SOR/98-106.

I. Background

[5] Mr. Elangovan is a Canadian citizen. He was issued a Canadian passport on March 31, 2016 and does not hold the passport of any other country.

[6] On February 14, 2019, Mr. Elangovan was charged with offences under the *Criminal Code*, RSC 1985, c C-46, after communicating online with an undercover police officer posing

as a 14-year old student. The charges were laid under paragraphs 171.1(1)(b) and 172.1(1)(b) of the *Criminal Code*. The offences in question can be prosecuted as either summary conviction or indictable offences but for purposes of the *Order* are deemed to be indictable offences.

[7] On May 28, 2019, the Passport Division sent Mr. Elangovan a letter advising him of its preliminary decision to revoke his passport and suspend his entitlement to passport services (May 2019 Letter). The Division explained that his entitlement to passport services was under investigation following receipt of information from the Peel Regional Police that he had been charged with committing indictable offences under the *Criminal Code*. Mr. Elangovan was also advised that he was required to return his existing passport within seven (7) days of receipt of the Letter.

[8] The Passport Division acknowledged the significance of the revocation of a Canadian passport in the May 2019 Letter and advised Mr. Elangovan that he had the opportunity to file information that would contradict or neutralize the information disclosed in the Letter. In the absence of submissions, the decision to revoke would be considered final as of June 28, 2019. The Division concluded the May 2019 Letter by stating that a revocation decision would not imply closure of Mr. Elangovan's case. Rather, his case would remain open for monitoring purposes.

[9] Mr. Elangovan returned his passport to the Passport Division on June 5, 2019.

[10] By way of letter from his counsel dated June 27, 2019, Mr. Elangovan made written submissions requesting reconsideration of the Passport Division's preliminary decision. Mr. Elangovan argued that the revocation of his passport based on criminal charges ignores the fact that he is presumptively innocent of the charges and violates subsection 11(d) of the *Charter*. He also argued that the refusal of passport services may infringe his constitutionally protected mobility rights under section 6 of the *Charter*.

[11] Mr. Elangovan explained the circumstances of his conduct that led to the criminal charges, stating that he did not intend to engage in a sexual relationship with the young woman until she was old enough to legally engage in sexual activity. He emphasized that he was released on surety bail and that the terms of his bail do not restrict him from leaving Canada. In closing, Mr. Elangovan submitted that the revocation of his passport served no legitimate purpose. There is no indication that he poses any security threat or that the security, value and integrity of Canadian passports would be advanced by the revocation.

II. Decision under Review

[12] In the Decision, the Passport Division referred to the May 2019 Letter and acknowledged Mr. Elangovan's return of his passport. The Division also acknowledged receipt of the June 27, 2019 submissions. The substance of the Decision is as follows:

The submissions received in response to the Passport Entitlement and Investigations Division's letter dated May 28, 2019 do not contain any information that contradict or neutralize the information presented in the letter.

After reviewing all the information presented and confirming that the information received from the Peel Regional Police Service remains current and the Canadian Police Information Center (CPIC) still displays the charges under sections 171.1(1)(b) and

172.1(1)(b) of the *Criminal Code*, the Passport Entitlement and Investigations Division revoked passport number HK72786 on July 10, 2019, in accordance with section 9(1)(b) of the *Canadian Passport Order*.

The Passport Investigation Division reminds you that the decision to revoke a passport is based solely on the existence of the charges for indictable offences and should not be interpreted as an evaluation of the merits of the charges you face.

[13] The Passport Division concluded the Decision by stating that, once Mr. Elangovan is no longer subject to the conditions set forth in section 9 of the *Order*, it is open to him to reapply for passport services.

III. Issues and Standard of Review

[14] The parties submit and I agree that the standard of review of a decision to revoke a passport and to withhold passport services is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 (*Vavilov*)). A review of the Decision for reasonableness is also consistent with the pre-*Vavilov* jurisprudence (*Haddad v Canada (Attorney General)*, 2017 FC 235 at para 9 (*Haddad*); see also, the recent decision in *Alsaloussi v Canada (Attorney General)*, 2020 FC 364 at para 24 (*Alsaloussi*)). The reasonableness standard applies equally to my review of Mr. Elangovan's primary submission that the Passport Division failed to reasonably balance the effect of the revocation on his *Charter*-protected mobility rights against the objectives of the *Order* (*Doré v Barreau du Québec*, 2012 SCC 12 at paras 57-58 (*Doré*); *Thelwell v Canada (Attorney General)*, 2017 FC 872 at para 26 (*Thelwell*)).

[15] The majority in *Vavilov* set out guidance for reviewing courts in the application of the reasonableness standard, emphasizing the decision actually made, the decision maker's reasoning

process and the outcome for the person affected by the decision (*Vavilov* at para 83). The Supreme Court stated that the hallmark of a reasonable decision is “an internally coherent and rational chain of analysis [...] that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 32). I have applied the Supreme Court’s guidance to my review of the Decision, the facts of Mr. Elangovan’s case, and the content and objectives of the *Order*.

IV. Preliminary Matter

[16] Mr. Elangovan’s application for judicial review was heard by Justice Boswell on March 11, 2020. Subsequently, the Chief Justice reassigned the application to me pursuant to Rule 39 of the *Federal Courts Rules*. The parties were advised of the reassignment and offered the opportunity to make representations regarding the appropriateness of determining this application on the written and oral submissions previously made. Both parties informed the Court in writing that they were prepared to proceed on that basis.

[17] Accordingly, I have reviewed the written materials in the record and listened to the recording of the parties’ oral submissions made at the March 11, 2020 hearing. As I had no questions for counsel following my review, this judgment is based on those materials and oral submissions.

V. Analysis*Agreed facts and principles*

[18] It is helpful to first set out the facts and legal principles on which the parties agree:

1. Mr. Elangovan has been charged with a number of hybrid offences under the *Criminal Code* relating to sexual impropriety involving a minor. For purposes of the *Order*, a hybrid offence is deemed to be an indictable offence, even if it has been prosecuted summarily (section 2.1 of the *Order*).
2. Paragraph 9(1)(b) of the *Order* permits the Minister to refuse a passport to an individual who “stands charged in Canada with the commission of an indictable offence”. Further, the Minister may revoke a passport on the same ground (subsection 10(1) of the *Order*).
3. Mr. Elangovan does not challenge the constitutionality of the Minister’s power to revoke a Canadian passport on the basis of criminal charges, although he emphasizes that a sizeable proportion of the Canadian public is subject to revocation on this basis, necessitating a careful exercise of the Minister’s discretion in each case.
4. If the Minister refuses or revokes an individual’s passport in reliance on any of the various grounds set out in subsection 9(1) of the *Order* (other than the fact that the individual is already in possession of a valid passport (paragraph 9(1)(g)), the Minister may also refuse passport services to the individual for a maximum period of 10 years (subsection 10.2(1) of the *Order*).
5. Passports are issued pursuant to the royal prerogative, the exercise of which is governed by the *Order*. It is well established that a decision to refuse or revoke a passport or to withhold passport services is subject to judicial review by this Court (see, e.g., *Courtemanche v Canada (Attorney General)*, 2020 FC 649 at para 9, citing *Khadr v Canada (Attorney General)*, 2006 FC 727 at para 35).
6. The Federal Court of Appeal has determined that the refusal of passport services infringes an individual’s mobility rights protected under subsection 6(1) of the *Charter* (*Kamel v Canada (Attorney General)*, 2009 FCA 21 at paras 15, 68 (*Kamel I*); leave to appeal to the Supreme Court of Canada refused, [2009] SCCA No. 124). A decision that fails to take into account such rights or that disproportionately restricts those rights is not reasonable (*Kamel v Canada (Attorney General)*, 2013 FCA 103 at para 35).
7. Mr. Elangovan’s passport was revoked and his ability to access passport services denied until such time as he is no longer subject to the conditions set out in subsection 9(1) of the *Order*. In other words, if the criminal charges are dropped

or he successfully defends the charges, he will be able to submit a passport application for consideration.

[19] The parties' disagreement in this application centres on whether the Decision to revoke Mr. Elangovan's passport until such time as the criminal charges against him are resolved was reasonable. Mr. Elangovan submits that the Decision does reflect any attempt by the Passport Division to balance the restriction of his mobility rights and the Division's mandate. He questions the connection between the admittedly serious criminal charges he faces and the objectives and integrity of Canada's passport program. Mr. Elangovan distinguishes other cases, such as *Kamell* and *Thelwell* (see also *Abaida v Canada (Attorney General)*, 2018 FC 490 (*Abaida*)), that involved terrorist activities or misconduct/fraud by the individual in the passport process itself.

[20] The Respondent contests Mr. Elangovan's submissions, relying in part on the May 2019 Letter as evidence of the Minister's balancing process. The Respondent also argues that the revocation of Mr. Elangovan's passport based on alleged sexual impropriety involving a child is highly relevant to maintaining Canada's international role in assisting the battle against the exploitation of minors. The Respondent emphasizes that the suspension of Mr. Elangovan's access to passport services was subject only to the most minimal restriction. The suspension falls away when the criminal charges are resolved.

General legal principles

[21] Mr. Elangovan’s mobility rights are protected by subsection 6(1) of the *Charter*: “[e]very citizen of Canada has the right to enter, remain in and leave Canada”. Practically, a citizen exercises their mobility rights by obtaining and using a Canadian passport. The importance of a passport to an individual’s mobility rights was described by the Federal Court of Appeal in 2009 (*Kamel I*):

[15] ... To determine that the refusal to issue a passport to a Canadian citizen does not infringe that citizen’s right to enter or leave Canada would be to interpret the Charter in an unreal world. It is theoretically possible that a Canadian citizen can enter or leave Canada without a passport. In reality, however, there are very few countries that a Canadian citizen wishing to leave Canada may enter without a passport and very few countries that allow a Canadian citizen to return to Canada without a passport (A.B., Vol. 7, p. 1406, Thomas Affidavit). The fact that there is almost nowhere a Canadian citizen can go without a passport and that there is almost nowhere from which he or she can re-enter Canada without a passport are, on their face, restrictions on a Canadian citizen’s right to enter or leave Canada, which is, of course, sufficient to engage Charter protection.

[22] The Minister’s authority to revoke an individual’s Canadian passport is set out in sections 9 and 10 of the *Order*. For ease of reference, the parts of those sections relevant to

Mr. Elangovan’s case are as follows:

Refusal of Passports and Revocation

9 (1) Without limiting the generality of subsections 4(3) and (4) and for greater certainty, the Minister may refuse to issue a passport to an applicant who

[. . .]

Refus de délivrance et révocation

9 (1) Sans que soit limitée la généralité des paragraphes 4(3) et (4), il est entendu que le ministre peut refuser de délivrer un passeport au requérant qui :

[. . .]

(b) stands charged in Canada with the commission of an indictable offence;

b) est accusé au Canada d'un acte criminel;

10 (1) Without limiting the generality of subsections 4(3) and (4) and for the greater certainty, the Minister may revoke a passport on the same grounds on which he or she may refuse to issue a passport.

10 (1) Sans que soit limitée la généralité des paragraphes 4(3) et (4), il est entendu que le ministre peut révoquer un passeport pour les mêmes motifs que ceux qu'il invoque pour refuser d'en délivrer un.

Analysis

[23] The *Order* permits the Minister to revoke an individual's passport and suspend passport services if the individual is charged with one or more indictable offences (*Haddad* at para 22). Although paragraph 9(1)(b) does not limit the Minister's authority to specific offences or to specific categories of offences, the Passport Division must in each case respect the objectives of its mandate and Canada's passport program in determining whether to take action on behalf of the Minister. The objectives of the program are not in dispute: domestic and international security, including the international fight against terrorism, and the maintenance of the good reputation of the Canadian passport (*Kamel 1* at para 50; *Thelwell* at paras 27, 30, 31 and 55; *Abaida* at para 51).

[24] I find that the revocation of Mr. Elangovan's passport after he was charged under the *Criminal Code* with serious offences against a minor was a reasonable exercise of the Passport Division's authority consistent with the objectives of the passport program. The Division's action furthers the protection from potential harm of children outside of Canada by temporarily restricting Mr. Elangovan's mobility. As the Respondent notes, the Passport Division states in its publicly available website that the Minister may refuse to issue a passport to a person who is

charged in Canada with the commission of indictable offence(s), including sexual offences against children.

[25] Mr. Elangovan argues that the Passport Division failed to set out in the Decision (1) the substance of the criminal charges against him and (2) an explanation as to why the particular criminal charges resulted in the revocation of his passport. He states that these omissions result in a decision that lacks transparency and justification.

[26] The specific provisions of the *Criminal Code* were cited in the Decision. It is clear from the record that the criminal charges relate to serious sexual impropriety involving a minor. The fact that the Passport Division did not summarize the charges in the Decision is not a reviewable error. Mr. Elangovan is correct in stating that the Division did not analyse the connection between the charges and its mandate in the Decision. While it would be preferable for the Passport Division to have done so, I find that the Division's consideration of the charges and scope of its mandate, and its acknowledgement of the serious consequences inherent in the revocation of a passport are reflected in the record, notably the May 2019 Letter (*Vavilov* at para 126). I also find that the Division's decision to take action was explained to Mr. Elangovan transparently.

[27] Mr. Elangovan's primary submission in this application is that the Decision was unreasonable because it did not consider the impact of the revocation of his passport on his section 6 mobility rights. In support of his submission, Mr. Elangovan relies on jurisprudence of the Supreme Court (*Doré; Trinity Western University v Law Society of Upper Canada*, 2018

SCC 33) that requires a decision maker to balance the infringement of a *Charter*-protected right against its mandate, and jurisprudence of this Court specific to the *Order* and the revocation of a Canadian passport (*Kamel I*; *Thelwell*). Recently, my colleague, Justice Gascon summarized the principles to be applied by the Court on judicial review of a decision in which *Charter* rights are in issue (*Alsaloussi* at para 53):

[53] In *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [*Trinity Western*], the Supreme Court of Canada confirmed the approach for judicially reviewing administrative decision engaging the *Charter*, as established in *Doré*. A decision will be reasonable only if it “reflects a proportionate balancing of the *Charter* protection with the statutory mandate”, and gives effect as fully as possible to the *Charter* protection at stake given the particular statutory mandate (*Trinity Western* at para 35; *Loyola* at para 39). In other words, a decision will be unreasonable if its impact on a *Charter* right is disproportionate (*Trinity Western* at para 35). Ultimately, the question is whether the decision maker furthered his or her statutory mandate in a manner that was proportionate to the resulting limitation on the applicant’s *Charter* rights (*Trinity Western* at para 36).

[28] Mr. Elangovan’s submission that the Passport Division failed to balance the revocation of his passport and the restriction of his mobility rights is not persuasive. First, he relies on jurisprudence of this Court that involved the suspension of passport services for a fixed period of time. Mr. Elangovan’s case is based on a different factual and legal framework. The revocation of Mr. Elangovan’s passport and resulting suspension of his right of access to passport services was imposed under paragraphs 9(1)(b) and subsection 10(1) of the *Order*. Those restrictions cease when he is no longer subject to the criminal charges laid against him. In contrast, cases such as *Thelwell*, *Abaida*, and *Alsaloussi* involved the suspension of the applicants’ right to passport services for a fixed period of time pursuant to subsection 10.2(1) of the *Order*. The Court’s analysis of the decision in those cases was focussed on the length of the suspension

imposed, the nature of the charges in question and the specific consequences to the applicant during the suspension period of the restriction of mobility rights.

[29] When the Passport Division imposes a fixed suspension period, it must weigh the length of the proposed suspension period and the impact of the suspension on the individual's mobility rights (*Thelwell* at paras 29-32). In a case involving the revocation of a passport based on criminal charges, the Passport Division does not determine an appropriate period of time for the revocation and suspension. Paragraph 9(1)(b) itself contemplates that the suspension period ceases when the charges are resolved, as in Mr. Elangovan's case. In other words, there is no proportionality or balancing exercise required of the Division. It follows that the omission of such a balancing exercise from a paragraph 9(1)(b) decision is not typically a reviewable error.

[30] Second, Mr. Elangovan made no submissions in his counsel's June 2019 letter regarding any specific hardship the proposed revocation would cause him. He stated only that his section 6 mobility rights may be infringed by a revocation. Therefore, Mr. Elangovan provided no basis for the Passport Division to consider whether the revocation itself, rather than the length of the suspension of passport services, disproportionately affected his mobility rights.

[31] In summary, paragraph 9(1)(b) of the *Order* permits the Minister to revoke the passport of an individual while they stand charged with the commission of an indictable offence. I have found that the Passport Division acted within its mandate in revoking Mr. Elangovan's passport in light of the nature and severity of the charges. The exercise of its discretion was justified in the Decision and by the evidence in the record. The restriction on Mr. Elangovan's section 6

mobility rights will cease when the criminal charges against him are resolved in accordance with paragraph 9(1)(b). Such a restriction, imposed within the mandate of the Passport Division and in accordance with the authority granted to the Minister by the *Order*, is a proportionate restriction of Mr. Elangovan's mobility rights. Without evidence from Mr. Elangovan regarding his personal circumstances, the Division made no reviewable error in its decision to proceed. There was no basis for the Division to engage in what would have been a speculative balancing of the temporary restriction of Mr. Elangovan's mobility rights and the objectives of Canada's passport program.

[32] Finally, Mr. Elangovan suggests that, in the absence of an explanation as to why these particular criminal charges resulted in the revocation of his passport, the Passport Division acted arbitrarily in taking action. He speculates that the revocation may have been improperly motivated by racism as his picture would have been available to the Division.

[33] Mr. Elangovan presented no evidence in support of his speculation and the record contains no suggestion of any improper motive on the part of the Passport Division. There is no reason for the Court to consider further what is, without such evidence, merely an unfounded suggestion.

VI. Conclusion

[34] The application is dismissed.

[35] The Respondent does not seek costs in this application and no costs are awarded.

JUDGMENT IN T-1294-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The style of cause is amended to reflect the Attorney General of Canada as the Respondent.
3. No costs are awarded.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1294-19

STYLE OF CAUSE: PRABU ELANGO VAN v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: JUDICIAL REVIEW IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO DIRECTION OF JUSTICE WALKER DATED JUNE 15, 2020 (PURSUANT TO THE ORDER OF CHIEF JUSTICE CRAMPTON DATED MAY 19, 2020)

JUDGMENT AND REASONS: WALKER J.

DATED: SEPTEMBER 4, 2020

APPEARANCES AND WRITTEN SUBMISSIONS:

Jordan Donich
Stuart O'Connell

FOR THE APPLICANT

Kevin Doyle

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Donich Law Professional
Corporation
Barristers and Solicitors
Toronto, Ontario

FOR THE APPLICANT

Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT