Federal Court Cour fédérale

Date: 20221026

Docket: T-215-22

Citation: 2022 FC 1465

Ottawa, Ontario, October 26, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

SERGEY KAKUEV

Plaintiff

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] The Plaintiff, Sergey Kakuev, who is self-represented and resides in Russia, objects to the Government of Canada's COVID-19 vaccination requirements for foreign nationals wishing to travel to Canada. He commenced an action seeking:

> An Order requiring Government of Canada to eliminate discrimination of unvaccinated international travelers arriving to and departing from Canada by air and to give access to

> international flights the recovered travelers, i.e., having positive PCR-test result and travelers having negative PCR-test result.

[2] In support of his claim, he alleges that the Government of Canada breached his rights under Articles 1 and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11, and relies heavily on a number of international instruments, the case law of the European Court of Human Rights [ECHR], practice of the courts of the United Kingdom, and other foreign law and jurisprudence.

[3] The background facts discernable from the statement of claim are that the Plaintiff resides in Russia, is not a Canadian citizen, and wishes to travel to visit his daughter living in Quebec. The statement of claim did not specifically identify which vaccine requirements he alleges are discriminatory.

[4] The Defendant moved to strike the statement of claim under Rule 221(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] on the basis that: (i) the statement of claim discloses no reasonable cause of action (Rule 221(1)(a)); and (ii) it is scandalous, frivolous or vexatious (Rule 221(1)(c)). Specifically, the Defendant pleads that: (i) the remedy sought cannot be obtained in an action; (ii) there is a failure to set out the material facts establishing the Plaintiff's standing; (iii) the Plaintiff failed to disclose material facts establishing a cause of action that could lead to the relief sought; (iv) the Plaintiff relies on legal arguments grounded in instruments that do not have force of law in Canada; and (v) that the claim is so deficient in factual material that it leaves the Defendant unable to answer.

[5] The Plaintiff's response to the motion to strike sought to include additional facts and clarifications, specified that he was challenging specified orders under the *Aeronautics Act*, RSC 1985, c A-2 and under the *Quarantine Act*, SC 2005, c 20, argued that the authorities relied upon are applicable to his claim, submitted that the specified orders are *ultra vires*, and addressed the Defendant's arguments on Rule 221 and the costs of this motion.

[6] On September 30, 2022, Order in Council Number 2022-0836, entitled "Minimizing the Risk of Exposure to COVID-19 in Canada Order", made under section 58 of the *Quarantine Act* [Order], expired. Subsection 4(1), Division 1, Part 2 of Schedule 3 provides:

4 (1) A foreign national is prohibited from entering Canada unless they are a fully vaccinated person and they comply with the applicable requirement under Part 3 to provide evidence of COVID-19 vaccination.	**4 (1)** Il est interdit à l'étranger d'entrer au Canada à moins d'être complètement vacciné et de se conformer à l'exigence applicable prévue à la partie 3 de fournir une preuve de vaccination contre la COVID-19.

[7] Consequently, as of October 1, 2022, non-vaccinated foreign nationals wishing to travel to Canada are no longer prohibited from entering. In light of the foregoing, the Court provided the parties with the opportunity to file submissions on the issue of whether there remained a live controversy between the parties, or in other words, whether the claim is now moot. In response, both parties filled submissions.

II. Preliminary Issue

[8] The Plaintiff designated both the Attorney General of Canada and Her Majesty the Queen as defendants. I agree with the Defendant that the style of cause as identified by the Plaintiff does

not reflect the proper designation of the Defendant. Given that the present proceeding is an action and not a judicial review, and that there is no relief claimed in an individual capacity from the Attorney General, a minister or other Crown servant, it is not appropriate to designate the Attorney General.

[9] The style of cause shall therefore be changed so that only His Majesty the King appears as the Defendant.

III. Issue

[10] The issue in the present matter is whether the Plaintiff's claim should be struck without leave to amend.

IV. Analysis

[11] I shall address the issue of mootness first, as I find this to be the determinative issue.

[12] The Respondent pleads that there is no longer a live controversy between the parties and that the Court should decline to exercise its discretion to hear the matter despite its mootness. The Respondent submits that the Plaintiff has failed to address the issue of mootness.

[13] In his submissions in response to the direction on the issue of mootness, the Plaintiff agrees that the vaccination requirements "are abolished" but raises for the first time a request for compensation for the "moral damage caused by unlawful prohibition to enter Canada during the

11 months." The Plaintiff asserts, "during 11 month I was discriminated, mocked, humiliated, and degradingly treated by Canadian government. I asked them to cancel the vaccination mandates promptly, and in such a case I would not demand compensations but the Defendants did not wish to hear me and also many Canadian politicians and ordinary people and stubbornly insisted on their continuation". As to the quantum of compensation, the Plaintiff suggests that in "accordance with case-law of the [ECHR] the compensation may be $4000".

[14] The Plaintiff submits that:

> [T]he litigation should continue and fairness need come because not only me but also many other foreign members of families of Canadian citizen and residents whose rights and freedoms were destroyed suffered from lawlessness of Federal Government. This case has crucially important public meaning, and all involved in creation of the lawlessness must be accountable for the committed. This case will revitalize the positive reputation of the Canada as democratic country with the rule of law, strictly obeying the human rights when the arbitrariness and lawlessness committed are publicly recognized and declared void and all suffered from lawlessness get the compensation of the moral damage.

[15] The remainder of the Plaintiff's submissions reiterate the issues raised in his prior pleadings objecting to the vaccination requirements, namely issues of fundamental justice, human rights, and discrimination. In doing so, the Plaintiff relies on case law from the ECHR and submits that because the United Kingdom and the King follow the principles contained in ECHR case law, and the Defendant and the judges administering justice are the servants of the King, ECHR case law is therefore applicable to the matter at hand.

[16] The leading case regarding the principles of mootness remains *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. As described by the Supreme Court in

Borowski, the doctrine of mootness is an aspect of the general policy or practice pursuant to which a court may decline to decide a case that raises merely a hypothetical or abstract question. If a decision will have no practical effect on such rights, then a court will decline to decide a case. Consequently if, subsequent to the initiation of a proceeding, events occur which affect the relationship of the parties such that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The matter will therefore not be heard unless the court exercises its discretion to depart from this general policy or practice (*Borowski* at 353).

[17] In order to determine whether an application is moot, a two-step analysis must be undertaken. The Federal Court of Appeal summarized this analysis in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 at para 10 [*Democracy Watch*]:

> As the leading authority on mootness – the Supreme Court's decision in *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342 at 353-363 – makes clear, the mootness analysis proceeds in two stages. The first question is whether the proceeding is indeed moot: whether a live controversy remains that affects or may affect the rights of the parties. If the proceeding is moot, a second question arises: whether the court should nonetheless exercise its discretion to hear and decide it.

[18] As to the first step of the analysis, whether there is a live controversy, the Federal Court of Appeal has recently stated that this step requires an assessment of whether the tangible and concrete dispute between the parties has disappeared (*Fibrogen, Inc v Akebia Therapeutics, Inc*, 2022 FCA 135 at para 30 [*Fibrogen*]).

[19] As to the second step of the analysis, when the Court considers whether to nonetheless exercise its discretion, three factors are relevant: (1) the presence of an adversarial relationship

between the parties; (2) the concern for judicial economy; and (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 18; *Borowski* at paras 31, 34, 40; *Democracy Watch* at para 13).

A. *Is the Proceeding Moot?*

[20] As quoted in the introduction to this judgment, the statement of claim seeks an order requiring the Government of Canada to allow unvaccinated international travellers to access international flights and travel to Canada. On September 30, 2022, the Order prohibiting foreign nationals from entering Canada unless they are fully vaccinated against COVID-19 expired.

[21] The restrictions on travel to Canada that the Plaintiff sought to have removed are no longer in force. This is plead by the Defendant and acknowledged by the Plaintiff. Based on the statement of claim, I am of the view that these proceedings are now moot. The tangible and concrete dispute between the parties, the COVID-19 vaccination requirements for foreign nationals wishing to travel to Canada, no longer exists.

[22] In the statement of claim, the only relief sought was to order that unvaccinated travellers be permitted to travel by air to Canada. The subject of compensation was not raised, nor did the Plaintiff state any legal bases or material facts relating thereto. Nor was the subject of compensation raised by the Plaintiff in response to the Defendant’s motion to strike, albeit and in any event, deficiencies in a statement of claim cannot be cured through a response to a motion to strike.

[23] The subject of compensation was only raised for the first time by the Plaintiff in his submissions in response to the direction of the Court on the issue of mootness. The Plaintiff describes it as "compensation for damage caused by the violation of Plaintiff's rights" and also refers to "moral damage". The basis for the compensation is that the Plaintiff states that he "was discriminated, mocked, humiliated, and degradingly treated by the Canadian government", because the Defendant, the "Canadian politicians and ordinary people" wished to continue the vaccination requirement. The legal basis for the "compensation of moral damage" is the "case-law of the European Court of Human Rights".

[24] The Plaintiff's vague and imprecise assertion of damages, without disclosing any material facts relating to loss, damage, or harm suffered, appearing for the first time in response to the issue of mootness raised by the Court, does not serve to cure the fact that the tangible and concrete dispute between the parties disappeared once the Order expired on September 30, 2022 (*Wojdan v Canada (Attorney General)*, 2022 FCA 120 at para 4; *Fibrogen* at para 30).

B. *Should the Court Exercise its Discretion?*

[25] Having determined that the present matter is moot, I now turn to the question of whether I should nonetheless exercise my discretion to permit this action to continue. Having considered the three factors guiding the Court's exercise of discretion in departing from the usual practice of declining to hear cases that are moot, cited above, I am of the view that exercising my discretion to permit this action forward is not warranted.

[26] As to the adversarial context, such a context clearly remains as both sides take opposing positions. There are however significant deficiencies in the Plaintiff's statement of claim, which the Defendant has, rightly in my view, raised in their motion to strike. Such deficiencies hamper the Defendant's ability to answer, not the least of which are deficiencies in factual material and the reliance on general references to foreign law.

[27] As to judicial economy, meaning whether there is any practical utility in deciding the matter or whether it is a waste of judicial resources (*Canadian Union of Public Employees (Air Canada Component) v Air Canada*, 2021 FCA 67 at para 9 [*CUPE*]), I find this factor weighs strongly in favour of not deciding the moot issue. The Plaintiff's claim as pleaded in the statement of claim suffers from significant deficiencies and the Order, along with the prohibition generally, that is the subject of the proceedings is no longer in effect.

[28] The Plaintiff submits that this action should continue on the basis of fairness so that he "and many other foreign members of families of Canadian citizens and residents whose rights and freedoms were destroyed from the lawlessness of Federal Government" may ensure that "all involved in creation of lawlessness must be accountable for the committed [*sic*] ." The Defendant pleads that the scope and nature of this proceeding is vague, undefined, and comprised of hypothetical rights presented in a factual vacuum.

[29] I find that the basis upon which the Plaintiff wishes to continue this action is vague, overly broad, unspecified, and ultimately conjecture. The Federal Court of Appeal has cautioned that to permit a matter to proceed on the basis of conjecture is an error, as such a rationale has

"none of the immediacy, certainty and precision to constitute an exception to the general rule that moot issues should not be heard." (*Fibrogen* at para 28).

[30] The third consideration is the need for the Court to be sensitive to its role as the adjudicative branch. Put otherwise, the issue is whether the Court would be exceeding its proper role by making law in the abstract, a task reserved for Parliament (*CUPE* at para 9). Given the Order is no longer in effect, the jurisprudential interest is itself moot. As stated by the Federal Court of Appeal "gratuitously interpreting the former wording of the provision in issue, in a case with no practical consequences, just to create a legal precedent, would be a form of law-making for the sake of law making. That is not our proper task." (*CUPE* at para 13).

[31] Ultimately, the Plaintiff is in essence urging this Court to create a legal precedent. In line with the guidance of the Federal Court of Appeal, I therefore decline to engage in the task of law-making for the sake of law-making.

[32] Accordingly, I decline to exercise my discretion to permit this action to move forward despite being moot.

[33] Having found the matter to be moot and declining to exercise my discretion to permit it to proceed, I find it unnecessary for me to address the remaining issues raised by the parties on this motion to strike.

V. Conclusion

[34] For the foregoing reasons, I am not persuaded that in these circumstances there remains a live controversy between the parties, nor would it be appropriate to exercise my discretion to permit this action to proceed. Consequently, the Plaintiff's statement of claim is struck without leave to amend.

[35] The Defendant seeks costs. Considering the facts of the matter, the Plaintiff's submissions on costs, and my discretion pursuant to Rule 400 of the Rules, costs in the amount of $250.00 are awarded to the Defendant.

JUDGMENT in T-215-22

THIS COURT'S JUDGMENT is that:

1. The Plaintiff's statement of claim is struck in its entirety without leave to amend;
2. The style of cause is amended to name His Majesty the King as the sole Defendant;
3. Costs in the amount of $250.00 are awarded to Defendant.

"Vanessa Rochester"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-215-22
STYLE OF CAUSE:	SERGEY KAKUEV v HIS MAJESTY THE KING

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	OCTOBER 26, 2022

WRITTEN REPRESENTATIONS BY:

Sergey Kakuev	FOR THE PLAINTIFF (SELF-REPRESENTED)
Pascale-Catherine Guay Émilie Tremblay	FOR THE DEFENDANT

SOLICITORS OF RECORD:

His Majesty the King Montréal, Quebec	FOR THE DEFENDANT