Federal Courts Reports

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[2022] 1 F.C.R. D-3

ETHICS

Related Subjects: Citizenship and Immigration; Public Service

Appeal from Federal Court judgment (2019 FC 1215) dismissing appellant's application for judicial review of Public Sector Integrity Commissioner decision — Appellant, Senior Program Officer with Canada Border Services Agency (CBSA), making three disclosures — Commissioner deciding not to conduct investigation into disclosures of wrongdoing appellant making under *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (Act) in which appellant alleged having witnessed wrongdoings by CBSA, Immigration, Refugee and Citizenship Canada (IRCC) officials, Immigration and Refugee Board of Canada (IRB) member, in application of *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), *Citizenship Act*, R.S.C., 1985, c. C-29, as it read from April 17, 2009 to February 5, 2014 — Only two disclosures at issue in present appeal — First disclosure on appeal (disclosure 335) concerning actual removal of detained individual, found to have obtained Canadian citizenship by fraud, through combined efforts of IRCC, CBSA officials — Appellant claimed that such individual could not be removed from Canada because Canadian citizenship needed first to be revoked through formal revocation process set out in *Citizenship Act* — Argued that although that process initiated, officials decided not to pursue it, opting to proceed with removal of individual — Second disclosure at issue (disclosure 336) involving decision of IRCC officials to delay, due to inadmissibility concerns, issuance of travel documents to two permanent residents having outstanding matters before Immigration Appeal Division (IAD), wishing to travel back to Canada — According to appellant, individuals entitled to these documents pursuant to IRPA, no legal justification for delaying their issuance — Appellant claimed, in particular, that officials involved in these decisions committed wrongdoing within meaning of Act, s. 8(a) by contravening Act of Parliament; that conduct disclosed amounted to criminal conduct prohibited by *Criminal Code*, R.S.C., 1985, c. C-46, s. 126(1); in case of disclosure 336 alone, conduct prohibited by IRPA, s. 129(1)(a) — Commissioner refused to commence investigation into these disclosures; found that there was valid reason, as per Act, s. 24(1)(f), for not dealing with them as not appearing that wrongdoing occurring in either instance — Federal Court refused to interfere with Commissioner's decision — Noted that proper forum to address legal validity of removal decision, decision to not issue travel documents was judicial review, not disclosure mechanism set out in Act — Was satisfied that Commissioner's refusal to take further action in present case reasonable, noting that Commissioner's decisions under Act, ss. 8, 24 owed significant degree of deference, given broad discretion Parliament granting Commissioner — Appellant contended that Commissioner's decision not to investigate disclosures 335, 336 unreasonable — Whether Commissioner's decision reasonable; specifically whether Commissioner's finding that no wrongdoing occurred reasonable; if so, whether reasonably open to Commissioner not to investigate disclosures at issue — *De novo* reasonableness review of Commissioner's decision leading to conclusion that no basis to interfere with it — Thrust of that decision is that no wrongdoing within meaning of Act, s. 8 occurred, be it in circumstances set out in disclosures 335, 336 — In Commissioner's view, appellant's complaint was in nature of disagreement as to manner in which *Citizenship Act*, IRPA were applied in two fact-specific instances — Appellant arguing that any alleged error of law or mixed fact, law committed by public servants in application of statute or regulation amounting to "contravention" of law (or regulation) — As such, triggering Commissioner's duty to investigate when error not judicially challenged — Interpretation of Act, s. 8(a) put forward by appellant far-reaching, one that Commissioner was reasonably entitled to reject — Ordinary meaning of expression "contravention of" in Act, s. 8(a) ("la contravention d'une " in French version) generally conveying idea of breach,

infraction, violation, transgression, trespass, infringement — Same idea conveyed in French — Could be reasonably said that this hardly encompasses concept of reviewable or appealable errors — Committing that kind of error, on one hand, transgressing, breaking or violating law on other, not generally carrying same legal connotation — Reviewing courts called upon to review administrative action almost daily — Looking at text of Act, s. 8(a), doubtful that Parliament intended reviewable or appealable errors to be "wrongdoings" or that Commissioner be vested with some sort of surrogate authority to review legality of government action in matters where no legal challenge was brought against such action by person directly affected by it — Context not supporting expanded view appellant advocating either — Review of parliamentary debates that led to adoption of Act clearly showing that legislation (Bill C-11 at time) meant to address "serious" wrongdoings, not any type of wrongdoing — In eyes of parliamentarians, Bill C-11 not just about disclosures, but mainly about protecting public servants who believe serious wrongdoing occurring, wishing to disclose it — No indicia whatsoever in parliamentary debates that proponents of Bill C-11 intended that notion of "wrongdoing" be expanded to include concept of reviewable or appealable errors — Further *indicium* is presence of Act, s. 9, which subjects wrongdoers, in addition to any penalty provided for by law, to disciplinary action, including termination of employment — This, again signaling that conduct contemplated by Parliament at s. 8(a) closer to penal or quasi-penal conduct than is to concept of reviewable or appealable errors — Is indeed entirely conceivable that conduct associated with wrongdoings set out in Act, ss. 8(b) to (e) (misuse of public funds, gross mismanagement, act or omission creating a substantial risk to life, health or safety of persons or to environment, etc.) could give rise to penalties or disciplinary action — However, such connection becoming less obvious in respect of Act, s. 8(a) — In sum, position taken by Commissioner resting on reasonable interpretation of Act, s. 8, when read in context — Contrary to appellant's contention, purposive reading of that provision not altering reasonableness of that position — Appellant contended that Commissioner's position in this case upsetting Parliament's stated objective of maintaining, enhancing public confidence in integrity of public servants — Key word in stated objective is "integrity" but ordinary meaning of that term referring to notion of moral uprightness — One could reasonably be forgiven for not immediately associating concept of integrity to commission of reviewable or appealable error — All of this equally applying to s. 8(e) wrongdoing allegation — Issues raised in both disclosure cases well within sphere of what is generally characterized, in administrative law, as alleged (and judicially reviewable or appealable) errors of law or of mixed fact, law — Was therefore reasonably open to Commissioner to find that neither disclosure exhibited wrongdoing within meaning of Act, s. 8 as neither could reasonably be said to exhibit conduct normally associated with lawbreaking or with serious breaching of code of conduct — Instead, Commissioner found that these allegations were in nature of disagreements as to way IRPA, *Citizenship Act* to be interpreted, applied to these two fact-specific instances; that legal recourses were open to individuals directly affected by conduct that was subject of appellant's complaints — As such, did not appear to Commissioner that wrongdoing as contemplated under Act occurring — Such finding reasonably open to Commissioner — Commissioner entitled not to take further action regarding disclosures at issue — According to Act, s. 22(b), it is Commissioner's duty to receive, record, review disclosures of wrongdoings in order to establish whether there are sufficient grounds for further action — That is what Commissioner did in present case — Act, s. 24(1)(f) interpreted as recognizing possibility for overlap between enumerated reasons Commissioner may refuse to deal with disclosure at ss. 24(1)(a) to (e), s. 24(1)(f) — Commissioner can hardly be faulted for having resorted to Act, s. 24(1)(f) in manner that has been, so far, permitted by Federal Court case law — Court not to undertake *de novo* analysis of question or ask what correct decision would have been — Task, in case such as this one, is to determine whether interpretation that stems from decision maker's decision falling within range of possible, acceptable outcomes — Interpretation that stems from Commissioner's decision falling within range of possible, acceptable outcomes — Narrower interpretation of s. 24(1)(f) advocated by appellant would, contrary to Parliament's intent, especially when Act, s. 24(1) read together with s. 22(b), unduly restrict Commissioner's discretion not to investigate disclosure in matter such as this one — Appellant not succeeding in establishing that Act, s. 24(1)(f), in light of text, context, purpose, only open to his own watertight-driven interpretation, prohibiting any overlap with preceding paragraphs — Commissioner's exercise of discretion was well rooted in language of Act, read in context, purposively; could reasonably sustain conclusion that there was valid reason not to investigate disclosures at issue — While would have been desirable for Commissioner to provide more detailed reasons, Commissioner's reasons for decision providing, in

present matter, intelligible, transparent justification — Appeal dismissed.

BURLACU V. CANADA (ATTORNEY GENERAL) (A-407-19, 2022 FCA 10, LeBlanc J.A., reasons for judgment dated January 19, 2022, 31pp.)