Federal Court Cour fédérale

Date: 20150211

Docket: IMM-1955-14

Citation: 2015 FC 171

Ottawa, Ontario, February 11, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

EMILE JEAN BARAKAT

Applicant

and

THE MINISTER OF PUBLIC SECURITY & THE CANADA BORDER SERVICES AGENCY

Respondents

ORDER AND REASONS

I. Introduction

[1] The Applicant seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection* Act, SC 2001, c 27 (the Act) of the decision of the Canadian Border Services Agency (CBSA) to seize two documents under the authority of section 140(1) of the Act (the Seizure). These documents (the Identity documents) consist of a birth certificate and a police

certificate regarding a Theodora Lorraine Clarke Iselma (Ms Clarke), a citizen of Saint Vincent and the Grenadines who is believed to have been in Canada illegally since 2008.

[2] Subsection 140(1) of the Act confers on designated CBSA officers the power to seize any document where the officer believes on reasonable grounds; (1) that the document was fraudulently or improperly obtained or used; or (2) that the seizure is necessary (i) to prevent its fraudulent or improper use or (ii) to carry out the purposes of the Act.

[3] The Identity documents were seized on March 6, 2014 as they were couriered from Georgetown, Saint Vincent and the Grenadines, to an address in Brossard, Québec. They were sent by a certain Ms Juliana Paris to "Émile Barakat."

[4] The next day, that is on March 7, 2014, the Applicant received notice from the CBSA that the Identity documents, photocopies of which were provided with the notice, had been seized under subsection 140(1) of the Act.

[5] The Applicant, a lawyer from Brossard, Québec, to whom the envelope containing the Identity documents was addressed, claims that the Seizure violates solicitor-client privilege as these documents were sent to him for the purposes of preparing an application for Canadian Permanent Residence on behalf of Ms Clarke and that, as a result, it should be quashed and the Identity documents, returned to him.

[6] On March 16, 2014, the Applicant sent a letter of demand to the Respondent Minister, the Honorable Steven Blaney, requesting that the Identity documents be returned to him by March 18, 2014. Then, on March 27, 2014, he filed a judicial review application on his own behalf seeking to quash the Seizure.

[7] There is no evidence on record that an application under section 254 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), which provides the owner of a document seized pursuant to subsection 140(1) of the Act or the person from whom it was seized with the right to apply for its return**,** was ever made in respect of the Identity documents.

[8] The Respondent claims that the Applicant lacks standing to challenge the Seizure. Alternatively, it contends the Applicant should have applied for the return of the Identity documents under section 254 of the Regulations before applying for judicial review. Finally, the Respondent argues that, in any event, the Identity documents are not covered by solicitor-client privilege.

II. Analysis

[9] According to subsection 18.1(1) of the *Federal Courts Act*, RSC, 1985, c F-7, a judicial review application may be brought by the Attorney General of Canada "or by anyone directly affected by the matter in respect of which relief is sought."

[10] The Respondent claims that in determining whether someone is directly affected by the challenged decision, the focus must be placed on the impact of the decision and on whose rights are affected. Considering that Ms Clarke is the owner of the Identity documents and that she is the one that needs them for her permanent residence application, the Respondent submits that Ms Clarke is the sole person affected by the Seizure.

[11] There is no doubt that Ms Clarke is affected by the Seizure and that she would have standing to challenge the Seizure either through an application for return of the Identity documents under section 254 of the Regulations or through an application under subsection 18.1 of the *Federal Courts Act*. In my view however, there is more to it than that.

[12] The words "directly affected" are to be interpreted in the context of the ground of review on which the application relies (*Irving Shipbuilding Inc. v Canada (Attorney General)*, 2009 FCA 116, [2010] 2 FCR 488, at para 28, leave to appeal refused, 33208, 2009). In this case, the ground for the review, as stated in the judicial review application, is that the Seizure contravenes solicitor-client privilege. This privilege is that of the client, and not that of the solicitor. It is a personal right operating for the client's benefit (*Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General) [Lavallee]; R v Fink*, 2002 SCC 61, [2002] 3 SCR 209; *R v Frater*, 2008 CanLII 68903 (ON SC), at para 17-18; Hubbard, Magotiaux and Duncan, *The Law of Privilege in Canada*, Aurora, Ontario, Canada Law Book, 2008 at pp 11-56.1).

[13] Therefore, the privilege asserted by the Applicant as the basis for invalidating the Seizure belongs to Ms Clarke and operates for her exclusive benefit. In *R v Claus*, 1999 CanLII 15041 (ON SC), 139 CCC (3d) 47, the Ontario Superior Court stated that the solicitor may assert solicitor-client privilege but only if he or she is acting on behalf of the client.

[14] The point of who can claim and assert solicitor-client privilege was an important part of the decision of the Supreme Court of Canada in *Lavallee* where it found section 488.1 of the *Criminal Code*, aimed at protecting materials possibly protected by solicitor-client privilege in a search and seizure context, to be unconstitutional. In all three instances considered in *Lavalee* materials were seized by the police from law offices pursuant to warrants and to the procedure prescribed by section 488.1 and claims of solicitor−client privilege were made by the law firms on their clients' behalf.

[15] The Supreme Court established guidelines for Parliament placing clear emphasis on the privilege holders, the need that they be contacted by justices of the peace and be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided. It stated in this regard that it is only if notification of potential privilege holders is not possible, that the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so. The Supreme Court made it clear that solicitor-client privilege belongs to the client:

> 39. While I think it unnecessary to revisit the numerous statements of this Court on the nature and primacy of solicitor-client privilege in Canadian law, it bears repeating that the privilege belongs to the client and can only be asserted or waived by the client or through his or her informed consent (*Solosky*, *supra*; *Descôteaux*, *supra*; *Geffen*, *supra*; *Jones*, *supra*; *McClure*, *supra*; *Benson*, *supra*). In my view, the failings of s. 488.1 identified in numerous judicial decisions and described above all share one principal, fatal feature, namely, the potential breach of solicitor-client privilege without the client's knowledge, let alone consent. The fact that competent counsel will attempt to ascertain the whereabouts of their clients and will likely assert blanket privilege at the outset does not obviate the state's duty to ensure sufficient protection of the rights of the privilege holder.

[16] Here, the Applicant is acting on his own behalf and there is no indication on record that Ms Clarke is asserting privilege with respect to the Identity documents or that she could not be contacted so that she could do so herself. The Applicant's standing to challenge the Seizure on the basis that it violates solicitor-client privilege is therefore highly questionable.

[17] At the hearing, the Applicant insisted that the basis of his judicial review application was not so much the alleged violation of solicitor-client privilege from Ms Clarke perspective, but rather the impact seizures made under section 140(1) of the Act could have on his ability to represent his clients. He argued that forcing lawyers to file an application for return every time a seizure occurs would cause "irreparable harm to Solicitors (or lawyers) capacity to properly represent the interest of his (sic) client."

[18] The Applicant's goal, to use his own words, is to "stretch the elastic" of solicitor-client privilege. The only authority submitted by the Applicant is the Supreme Court of Canada decision in *Maranda v Richer*, [2003] 3 SCR 193, which was decided in a criminal law context

and which I find to be of no assistance in respect this matter. Aside from insisting on the importance of solicitor-client privilege as a general principle of substantive law, the Applicant did not propose any principled approach that would allow the Court to extend solicitor-client privilege beyond its current configuration. In particular, he failed to explain how this "stretching" exercise can - or could - be done in a civil or regulatory context. In *Lavallee*, above, the Supreme Court reminds us that in a criminal law context, solicitor-client privilege needs a more robust protection than in any other context:

> 23. In the context of a criminal investigation, the privilege acquires an additional dimension. The individual privilege holder is facing the state as a "singular antagonist" and for that reason requires an arsenal of constitutionally guaranteed rights (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 994). It is particularly when a person is the target of a criminal investigation that the need for the full protection of the privilege is activated. It is then not an abstract proposition but a live issue of ensuring that the privilege delivers on the promise of confidentiality that it holds.

[19] In my view, the Applicant has failed to establish that there is any basis for extending solicitor-client privilege in a way that would protect lawyers from being frustrated in fulfilling their mandates. There is no indication in the case law that providing such protection could be a natural extension of that privilege in a criminal law context, let alone in a civil or regulatory one, as is the case here.

[20] In any event, this, in my view, is not a proper case to explore the possible extension of solicitor-client privilege for at least two reasons. First, there is no evidence of any kind of abuse or of irreparable harm resulting from the exercise of the authority provided for under section 140(1) of the Act when it comes to the seizure of documents that may involve a solicitor-client

relationship. In the case of the Applicant specifically, he admitted at the hearing that this was the first time in his career that documents addressed to him had been seized under the Act. Furthermore, the envelope contained no indication that the documents were sent to a lawyer or a law firm. There is, as a result, a factual vacuum for the proposition that the application of section 140(1) of the Act is causing - or could cause - irreparable harm to lawyers with respect to their capacity to properly represent the interest of their clients.

[21] The second reason is that there is a system in place, sensitive to solicitor-client privilege, that allows for administrative redress. At the hearing, extracts of the CBSA's Policy Manual on search and seizures under the Act were filed on consent. Section 9.3 of that Manual instructs CBSA officers empowered to seized things under section 140(1) of the Act as to how to handle seizures "on the rare occasion" where such officers "are in possession of a document that may give rise to solicitor-client privilege."

[22] The general thrust of the Policy is to ensure CBSA officers refrain from infringing on that privilege. It provides guidelines regarding the identification of documents to which the privilege may apply and as to what the officers should do once such documents have been identified. In this regard, the Policy Manual instructs officers:

1. To determine the rightful holder of the document;

2. To make every effort to obtain consent from the privilege holder, that is the "client";

3. To request that the client sign a declaration if he or she manifests the intention to waive solicitor-client privilege;

4. To seal the document, if it is not sealed, and appropriately mark it; and

5. To make every attempt to obtain legal advice from another source.

[23] The Policy also provides that in the mail examination context, the procedures to protect any potential solicitor-client privilege should be invoked as soon as an officer views documents to which solicitor-client privilege is attached and before a seizure is made under the Act.

[24] There is no evidence before me that this system is not working or is putting an excessive burden on lawyers, and there is no issue before me questioning the system's compliance with the *Canadian Charter of Rights and Freedoms*. More importantly however, there is evidence that there has been no application for return of the Identity documents under section 254 of the Regulations, an administrative recourse where the solicitor-client privilege concerns raised by the Applicant would, or could, normally have been addressed.

[25] It is trite law that the failure to exhaust administrative avenues of redress may constitute a bar to a judicial review application being considered (*Harelkin v University of Regina*, [1979] 2 SCR 561, at 574; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654, at para 23-26). In the peculiar circumstances of this case, I conclude that it does.

[26] The Applicant contends that the issues of solicitor-client privilege raised in this case are of such importance that they trump such a bar. In the context of this case and for the reasons already given, this proposition carries no weight.

[27] Finally, assuming that the Applicant has standing to raise solicitor-client privilege from a privilege-holder standpoint, the claim of such privilege in the circumstances of this case is highly problematic. As is well established, in order for solicitor-client privilege to apply, three conditions need to be met : (1) there must be a communication between solicitor and client; (2) the communication must entail the seeking or giving of legal advice; and (3) it must be intended to be confidential by the parties (*Maranda*, above at para 42). As is also well recognized, not everything that happens in the solicitor-client relationship falls within the ambit of privileged communications (*Foster Wheeler Power Co. v Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 SCR 456, at para 37; *Maranda*, above at paras 30 and 42).

[28] On the basis of these criteria, one wonders how the Identity documents, which were obtained from a third party for the stated purpose of being joined to an application for permanent residence to be filed with a government agency, namely Citizenship and Immigration Canada, could be considered as a communication "intended to be confidential by the parties" or even as a communication "between solicitor and client." I am not persuaded that they are.

[29] The application for judicial review is dismissed.

[30] The parties are given until February 17, 2015, to file and serve written submissions on whether this case raises a serious question of general importance as contemplated by subsection 74(d) of the Act.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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