

Federal Court



Cour fédérale

**Date: 20191220**

**Docket: T-663-19**

**Citation: 2019 FC 1648**

**Ottawa, Ontario, December 20, 2019**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**ANDRIY VOLODYMYROVYCH PORTNOV**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Mr. Portnov is a citizen of Ukraine. From 2006 to 2010, he was an elected Deputy of the Ukrainian Parliament. He then served as an advisor to former Ukrainian President Viktor Yanukovich until February 2014, when the government changed. A new government formed under President Petro Poroshenko, and Mr. Portnov left Ukraine shortly thereafter.

[2] On March 3, 2014, the new Government of Ukraine sent formal communications to numerous international entities, including Canada, alleging that former government officials, including Mr. Portnov, were involved in the embezzlement of state funds. One of these communications was sent by Ukraine's new Prosecutor General, Oleh Makhnitskyi, to former Prime Minister of Canada, Stephen Harper [Makhnitskyi Letter].

[3] In response to the Makhnitskyi Letter, Canada imposed restrictive measures under the *Special Economic Measures Act*, SC 1992, c 17 and the *Freezing Assets of Corrupt Foreign Officials Act*, SC 2011, c 10 [FACFOA]. Specifically, Canada adopted punitive economic sanctions through the *Special Economic Measures (Ukraine) Regulations*, SOR/2014-60 and the *Special Economic Measures (Russia) Regulations*, SOR/2014-58.

[4] On March 5, 2014, Canada also enacted the *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2014-44 [FACFOA Regulations], which provided a "five-year period for completing criminal investigations and making actionable mutual legal assistance requests to Canada." Mr. Portnov's name was included in the Schedule to the FACFOA Regulations.

[5] On November 3, 2017, Mr. Portnov sought judicial review of the inclusion of his name in the Schedule to the FACFOA Regulations. He argued there was insufficient evidence to establish his involvement in the embezzlement of state funds from Ukraine. Justice Michael Manson dismissed Mr. Portnov's application for judicial review, principally on the ground that the Minister was justified in adding Mr. Portnov's name to the Schedule based solely on the

assertion of impropriety contained in the Makhnitskyi Letter (*Portnov v Canada (Foreign Affairs)*), 2018 FC 1248 [*Portnov*] at paras 33 and 42-43).

[6] On March 4, 2019, the Governor-in-Council issued the *Order Extending the Application of the Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2019-69 [Extending Order]. The Extending Order had the effect of extending the FACFOA Regulations for an additional five years. Two names previously included in the Schedule were omitted from the Extending Order, but Mr. Portnov's name remained.

[7] Mr. Portnov now seeks judicial review of the Extending Order. He says that a new communication from the Government of Ukraine confirming that he remains under investigation was necessary before the Extending Order could be issued. The Minister disagrees.

[8] For the reasons that follow, the application for judicial review is dismissed with costs.

## II. Background

[9] For the past five years, Mr. Portnov has sought to clear his name in the various jurisdictions that imposed restrictive measures against him. He asked the European Council to withdraw its restrictive measures, and he also challenged those measures before the European Court of Justice [ECJ]. On March 6, 2015, the European Council informed Mr. Portnov that it was withdrawing the restrictive measures. The ECJ subsequently determined that the grounds

advanced by the Government of Ukraine to support the measures were insufficient. Switzerland and Norway have also withdrawn their restrictive measures against Mr. Portnov.

[10] Mr. Portnov has sent several letters to the Government of Canada demanding that his name be removed from the Schedule to the FACFOA Regulations. He included with his correspondence the following official communications from Ukrainian state officials:

- (a) letters from Ukraine's Security Service, Chief Investigations Department, State Fiscal Service, National Anti-Corruption Bureau, and Prosecutor General;
- (b) a resolution from Ukraine's General Prosecutor's Office;
- (c) a certificate from Ukraine's Ministry of Internal Affairs; and
- (d) a judgment of a Ukrainian District Court requiring the Prosecutor General to send a letter to the Prime Minister of Canada to "refute the unreliable information" contained in the Makhnitskyi Letter.

[11] Between March 2016 and July 2018, the Ukrainian Embassy in Canada sent four letters to the Minister confirming that two investigations into Mr. Portnov's alleged misappropriation of state property, unlawful enrichment and abuse of office were ongoing. One letter alleged that Mr. Portnov had organized "pre-meditated murders", and recommended that his name remain in the Schedule to the FACFOA Regulations.

[12] On February 5, 2019, Mr. Portnov asked the Minister to investigate the veracity of the Ukrainian Embassy's allegations against him, and not to include his name in any renewal of the FACFOA Regulations. He received no response.

[13] On February 20, 2019, the Pecherskyi District Court of Kyiv ruled that Mr. Portnov was never officially identified or charged as a suspect, or accused in the investigations mentioned in the letters from the Ukrainian Embassy in Canada.

[14] On February 25, 2019, the District Administrative Court of Kyiv ruled that the Embassy of Ukraine in Canada had violated Mr. Portnov's rights by reporting false information about his involvement in criminal offences. On February 26, 2019, the Pecherskyi Court ordered the Ukrainian Ministry of Foreign Affairs to correct the false information.

[15] Mr. Portnov notified the Minister of the Ukrainian judgments. Canada agreed to share Mr. Portnov's correspondence with the Ukrainian Embassy.

[16] On the same day that the Governor-in-Council issued the Extending Order, the *Regulations Amending the Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations*, SOR/2019-68 [Amending Regulations] were also enacted. The *Regulatory Impact Analysis Statement* for the Extending Order and Amending Regulations states that “[i]nformation received by the Government of Canada supports an extension of the Regulations in relation to 16 of the 18 individuals currently listed.” No further details were provided.

[17] Mr. Portnov's application for judicial review of the Extending Order included a request under Rule 317 of the *Federal Courts Rules*, SOR/98-106, for materials comprising the record of the Governor-in-Council's decision. The Minister replied as follows:

The materials requested are not relevant to the Application. The materials requested pertain to the 2014 decision under s. 4 of the Act to include Mr. Portnov in the Regulations, and are not relevant to the decision under s. 6 to extend the application of those Regulations; and,

To the extent that the materials constitute advice or recommendations made to the Governor-in-Council, those materials are Confidences of the Queen's Privy Council for Canada pursuant to s 39 of the *Canada Evidence Act*; and,

The materials requested may also be subject to privilege under s 38 of the *Canada Evidence Act*, as sensitive information relating to international relations.

[18] Mr. Portnov did not seek an order from this Court compelling production of further documents. Nor did the Minister bring an application under ss 38 or 39 of the *Canada Evidence Act*, RSC 1985, c C-5, to withhold any documentation on the ground of injury to international relations or Cabinet confidentiality.

[19] At the hearing of this application, Mr. Portnov provided a supplementary affidavit to demonstrate that he has kept the Minister apprised of pertinent Ukrainian court judgments and correspondence. These include:

- (a) a decision of the Sixth Administrative Court of Appeal dated May 16, 2019, upholding the District Administrative Court of Kyiv's ruling of February 25, 2019;

- (b) a decision of the Kyiv Court of Appeal dated June 12, 2019, affirming the Pecherskyi Court's ruling of February 26, 2019;
- (c) a letter from Ukraine's Ministry of Foreign Affairs dated June 21, 2019, which appears to confirm that the information previously sent by the Ukrainian Embassy in Canada to the Minister was false. However, the letter also states that criminal investigations into Mr. Portnov's actions are ongoing, and the Attorney General of Ukraine asks that Mr. Portnov remain on the Schedule to the FACFOA Regulations; and
- (d) a letter from the Prosecutor General of Ukraine to Global Affairs Canada dated July 16, 2019, stating that there are no criminal charges against or ongoing cases that concern Mr. Portnov.

### III. Issues

[20] The Minister initially took the position that this application for judicial review was an attempt to relitigate the matters previously adjudicated by Justice Manson in *Portnov*, and was therefore an abuse of process. However, the Minister abandoned this argument in oral submissions.

[21] The sole remaining issue is whether the Extending Order was issued without jurisdiction.

#### IV. Analysis

[22] When this case was argued on December 2, 2019, the Supreme Court of Canada had not yet issued its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. In *Portnov*, Justice Manson held that the question of whether a regulation has been enacted within the jurisdiction of its enabling statute is a legal question attracting the correctness standard (*Portnov* at paras 25-26, citing *Canada v Canada (Council for Refugees)*, 2008 FCA 229 at para 57; *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz Group*]; *Canada (Attorney General) v Mercier*, 2010 FCA 167 at paras 78-79). The parties therefore accepted that the Governor-in-Council's issuance of the Extending Order is subject to review by this Court against the standard of correctness.

[23] In *Vavilov*, a majority of the Supreme Court of Canada held that it would “cease to recognize jurisdictional questions as a distinct category attracting correctness review” (para 65). The categories of decision that remain subject to correctness review are now confined to those delineated by clear legislative intent (paras 34-52), or where this is required by respect for the rule of law, *i.e.*, constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies (paras 55-68). None of these exceptions apply here.

[24] In light of *Vavilov*, the Governor-in-Council's issuance of the Extending Order is subject to review by this Court against the standard of reasonableness. However, as Justice Manson held



in *Portnov* at paragraph 27, nothing ultimately turns on this question. The result is the same whether the applicable standard of review is correctness or reasonableness.

[25] Mr. Portnov says that the Governor-in-Council lacked jurisdiction to issue the Extending Order because the Government of Ukraine did not send a new communication requesting that he remain subject to the FACFOA Regulations.

[26] The FACFOA provides in relevant part:

**Orders and regulations**

**4 (1)** If a foreign state, in writing, asserts to the Government of Canada that a person has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship and asks the Government of Canada to freeze property of the person, the Governor in Council may

**(a)** make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (3) in relation to the person's property that the Governor in Council considers necessary; and

**(b)** by order, cause to be seized, frozen or sequestered in the manner set out in the order any of the person's property situated in Canada.

**Décrets et règlements**

**4 (1)** Si un État étranger, par écrit, déclare au gouvernement du Canada qu'une personne a détourné des biens de l'État étranger ou a acquis des biens de façon inappropriée en raison de sa charge ou de liens personnels ou d'affaires et demande au gouvernement du Canada de bloquer les biens de la personne, le gouverneur en conseil peut :

**a)** prendre tout décret ou règlement qu'il estime nécessaire concernant la restriction ou l'interdiction, à l'égard des biens de la personne, des activités énumérées au paragraphe (3);

**b)** par décret, saisir, bloquer ou mettre sous séquestre, de la façon prévue par le décret, tout bien situé au Canada et détenu par la personne.

**Conditions**

(2) The Governor in Council may make the order or regulation only if the Governor in Council is satisfied that

(a) the person is, in relation to the foreign state, a politically exposed foreign person;

(b) there is internal turmoil, or an uncertain political situation, in the foreign state; and

(c) the making of the order or regulation is in the interest of international relations.

...

**Duration**

**6** An order or regulation made under section 4 in respect of a politically exposed foreign person ceases to have effect on the day that is five years after the day on which it comes into force unless the Governor in Council, by order, extends it for the period specified in the order. It may be extended more than once.

**Conditions**

(2) Il ne peut toutefois prendre le décret ou règlement que s'il est convaincu que les conditions ci-après sont remplies :

a) la personne est, relativement à l'État étranger, un étranger politiquement vulnérable;

b) il y a des troubles internes ou une situation politique incertaine dans l'État étranger;

c) la prise du décret ou règlement est dans l'intérêt des relations internationales.

...

**Période de validité**

**6** Le décret ou règlement pris en vertu de l'article 4 à l'égard d'un étranger politiquement vulnérable cesse d'avoir effet cinq ans après sa date d'entrée en vigueur à moins que le gouverneur en conseil ne prolonge, par décret, sa période de validité de la période qui y est précisée. La période de validité peut être prolongée plus d'une fois.

[27] According to Mr. Portnov, s 6 is a “sunset” provision that limits the duration of orders and regulations made under s 4(1) to five years, unless they are renewed by the Governor-in-Council. While s 6 does not explicitly prescribe conditions of renewal, its purpose, like that of all sunset provisions, is to require orders and regulations to be reviewed to ensure they are not premised on stale information. A new written statement is therefore needed from the requesting state, in this case Ukraine, asserting misappropriation and requesting that Canada freeze the

allegedly misappropriated assets, before an order or regulation issued under s 4(1) may be renewed.

[28] The Minister replies that a regulation is presumed to have been validly enacted (citing *Katz Group* at paras 25-26). The burden is on the party alleging invalidity to demonstrate that the regulation was issued without jurisdiction. The Court should favour an interpretation that reconciles a regulation with its enabling statute. An assertion that a regulation was beyond the Governor-in-Council's jurisdiction does not permit the Court to assess the policy merits of regulations to determine whether they are necessary, wise, or effective in practice.

[29] According to the Minister, Parliament's decision not to require an updated or new written statement from a foreign state before permitting a renewal under s 6 of the FACFOA is presumed to be deliberate. Furthermore, adopting the interpretation of s 6 favoured by Mr. Portnov could undermine the objectives of the FACFOA. As Justice Martine St-Louis held in *Djilani v Canada* (Foreign Affairs), 2017 FC 1178 [Djilani] at para 100:

[The FACFOA] was enacted to enable the states faced with an uncertain political situation to ask Canada to freeze property that may have been misappropriated by certain individuals until the situation has been restored and that state can obtain evidence and carry out investigations of these persons or property.

[30] The Minister maintains that the "sunset" provision found in s 6 of the FACFOA is meaningful without requiring a new written communication from the requesting state: the Governor-in-Council has an unfettered discretion to revisit orders and regulations made under s

4(1) to determine whether their renewal accords with the FACFOA's objectives and Canada's public interest.

[31] To overcome the presumption of validity, Mr. Portnov must demonstrate that the Extending Order is “inconsistent with the objective of the enabling statute or the scope of the statutory mandate” to the point, for example, of being “‘irrelevant’, ‘extraneous’ or ‘completely unrelated’” (*West Fraser Mills Ltd v British Columbia (Workers’ Compensation Appeal Tribunal)*, 2018 SCC 22 at para 12, citing *Katz Group* at paras 24 and 28). However, a plain reading of s 6 of the FACFOA does not support Mr. Portnov’s argument that an order or regulation made under s 4(1) may be renewed only upon a further request by a foreign state to freeze the assets of a politically exposed person. Nothing in the FACFOA requires that such a condition be read into the scheme. An unfettered ministerial discretion to recommend the continuation of restrictive measures against foreign politically exposed persons is consistent with the FACFOA’s objectives, as expressed by this Court in *Djilani*.

[32] In *Portnov*, Justice Manson held that regulations under the FACFOA may be enacted without any proof of the allegations made by the foreign state. Subsection 4(1) of FACFOA requires only a written statement, such as the Makhnitskyi Letter. Justice Manson rejected Mr. Portnov’s argument that the Minister could not rely on the Makhnitskyi Letter without verifying the substance of the allegations it contained. He also rejected Mr. Portnov’s argument that the Minister could not recommend his continued inclusion in the Schedule to the FACFOA Regulations, given the contrary evidence he had provided (*Portnov* at paras 33-43).

[33] The only basis upon which an individual may challenge his or her inclusion in a schedule to regulations enacted under the FACFOA is found in s 13, pursuant to which an application may be made in writing to the Minister “to cease being the subject of the order or regulation on the grounds that the person is not a politically exposed foreign person”. Mr. Portnov concedes he is a politically exposed foreign person as defined in the statute.

[34] Consistent with Justice Manson’s analysis in *Portnov*, I conclude that the Minister was justified in maintaining Mr. Portnov’s name on the Schedule to the FACFOA Regulations without a further communication from the Government of Ukraine confirming that he remains under investigation for the misappropriation of state funds. The Minister was not legally obliged to independently verify the allegations contained in the Makhnitskyi Letter, determine whether they remain current, or refute the evidence provided by Mr. Portnov to the contrary. The Minister’s recommendation to enact the Extending Order was a valid exercise of the Crown’s prerogative over the conduct of foreign affairs.

[35] Mr. Portnov objects that this reading of the FACFOA confers upon the Governor-in-Council an unlimited power to interfere arbitrarily and indefinitely with the assets of a politically exposed foreign official. The statutory scheme offers minimal checks and balances, and no opportunity for meaningful review. Regulations and orders issued under the FACFOA may have a significant impact on someone who finds himself the political target of a foreign state.

[36] These are legitimate concerns, and I do not foreclose the possibility that, in an appropriate case, the Court may enquire into the Minister’s motivations for recommending that

the Governor-in-Council issue an order or regulation under s 4(1) of the FACFOA, or renew an order or regulation under s 6. While this Court lacks expertise in the conduct of foreign affairs, and decisions made in this context are not ordinarily justiciable, the Court retains a supervisory jurisdiction to ensure that the powers conferred by the FACFOA are not exercised capriciously, arbitrarily, or for an improper purpose.

[37] However, the onus is on the party asserting the invalidity of a renewal under s 6 of the FACFOA to demonstrate that the Governor-in-Council has acted in a manner not authorized by statute. There is no evidence before this Court that the Governor-in-Council's renewal of the FACFOA Regulations, or that the decision to retain Mr. Portnov's name in the Schedule, was motivated by improper considerations. On the contrary, the evidence establishes that the Minister has considered the information provided by Mr. Portnov respecting his innocence, and is taking reasonable steps to resolve the dispute in a manner consistent with the Minister's responsibility for the conduct of Canada's international relations.

## V. Conclusion

[38] The application for judicial review is dismissed with costs.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed  
with costs.

"Simon Fothergill"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-663-19

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