

CANADA / JUDGMENT

Bigio v. Canada (Governor General in Council)

2025 FC 888

COURT
Federal CourtDECIDED
14 May 2025

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Source record

Bigio v. Canada (Governor General in Council)

Court (s) Database

Federal Court Decisions

Date

2025-05-14

Neutral citation

2025 FC 888

File numbers

T-122-23

Decision Content

Date: 20250514

Docket: T-122-23

Citation: 2025 FC 888

Ottawa, Ontario, May 14, 2025

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

GILBERT BIGIO

Applicant

and

THE GOVERNOR GENERAL IN COUNCIL,
THE MINISTER OF FOREIGN AFFAIRS AND
THE ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

I. Overview [1] The Applicant Gilbert Bigio appeals an Order of Associate Judge Michael Crinson, made in his capacity as Case Management Judge [CMJ]. The CMJ granted a motion by the Attorney General of Canada [AGC] to strike the Applicant's Notice of Application without leave to amend.

[2] The CMJ determined that s 8 of the Special Economic Measures (Haiti) Regulations, SOR/2022-226 [Haiti Regulations] provided the Applicant with an adequate alternative remedy that he had yet to exhaust. The CMJ therefore concluded that the application for judicial review was bereft of any chance of success.

[3] The Applicant has identified a number of procedural irregularities that preceded the CMJ's Order striking the application for judicial review [CMJ Order]. However, none of these warrants remitting the matter to the CMJ for redetermination. The CMJ Order was otherwise factually supported and legally correct.

[4] The appeal is dismissed.

II. Background [5] The Applicant is a retired Haitian businessman and founder of the GB Group, a Haitian industrial conglomerate. He is a dual citizen of Haiti and France.

[6] The Haiti Regulations came into force on November 3, 2022 pursuant to the Special Economic Measures Act, SC 1992, c-17 [SEMA]. The Haiti Regulations impose sanctions on persons listed in Schedule 1 [Sanctions List]. Any person in Canada, and any Canadian outside Canada, is prohibited from engaging in specified financial transactions and activities with persons on the Sanctions List.

[7] Under s 2 of the Haiti Regulations, a person's name may be added to the Sanctions List if the Governor in Council [GIC], on the recommendation of the Minister of Foreign Affairs [Minister], is satisfied that there are reasonable grounds to believe the person falls into one of the categories listed in s 2. Neither the SEMA nor the Regulations provide persons with a right to advance notice that they will be added to the Sanctions List, or an opportunity to make submissions prior to the decision to list. Instead, s 8 sets out the process by which persons may apply to have their names removed from the Sanctions List.

[8] Sections 2 and 8 of the Haiti Regulations provide as follows:

2 A person whose name is listed in the schedule is a person who is in Haiti, or is or was a national of Haiti who does not ordinarily reside in Canada, and in respect of whom the Governor in Council, on the recommendation of the Minister, is satisfied that there are reasonable grounds to believe is

2 Figure sur la liste établie à l'annexe le nom de toute personne qui se trouve en Haïti ou qui est ou était un de ses nationaux ne résidant pas habituellement au Canada à l'égard de laquelle le gouverneur en conseil est convaincu, sur recommandation du ministre, qu'il existe des motifs raisonnables de croire qu'il s'agit de l'une des personnes suivantes :

(a) a person engaged in activities that directly or indirectly undermine the peace, security and stability of Haiti;

a) une personne se livrant à des activités qui, même indirectement, compromettent la paix, la sécurité et la stabilité d'Haïti;

(a.1) a person who has participated in gross and systematic human rights violations in Haiti;

a.1) une personne ayant participé à des violations graves et systématiques des droits de la personne en Haïti;

(b) a current or former senior official of the Government of Haiti;

b) un haut fonctionnaire, ou un ancien haut fonctionnaire, du gouvernement d'Haïti;

(c) an associate of a person referred to in any of paragraphs (a) to (b);

c) un associé d'une personne visée à l'un des alinéas a) à b);

(d) a family member of a person referred to in any of paragraphs (a) to (c) and (g);

d) un membre de la famille d'une personne visée à l'un des alinéas a) à c) et g);

(e) an entity owned — or held or controlled, directly or indirectly — by a person referred to in any of paragraphs (a) to (d);

e) une entité appartenant à une personne visée à l'un des alinéas a) à d) ou détenue ou contrôlée, même indirectement, par elle;

(f) an entity owned — or held or controlled, directly or indirectly — by Haiti; or

f) une entité appartenant à Haïti ou détenue ou contrôlée, même indirectement, par lui;

(g) a senior official of an entity referred to in paragraph (e) or (f)

g) un cadre supérieur d'une entité visée aux alinéas e) ou f).

[...]

[...]

Removal from list

Radiation

8 (1) A listed person may apply to the Minister in writing to have their name removed from the schedule.

8 (1) La personne dont le nom figure sur la liste établie à l'annexe peut demander par écrit au ministre d'en radier son nom.

Reasonable grounds

Motifs raisonnables

(2) On receipt of an application, the Minister must decide whether there are reasonable grounds to recommend the removal to the Governor in Council.

(2) À la réception de la demande, le ministre décide s'il existe des motifs raisonnables de recommander la radiation au gouverneur en conseil.

[9] On December 2, 2022, the Haiti Regulations were amended to add three names to the Sanctions List, including "Gilbert Bigio (born in 1953)" (SOR/2022-258). According to the Regulatory Impact Assessment Statement [RIAS] that accompanied the amendment, the new additions to the Sanctions List were people "considered among the economic elite in Haiti, [who] have used their influence and resources to protect and/or support the activities of criminal gangs, including through money laundering and other acts of corruption".

[10] The Applicant was born in 1935, not 1953. The Haiti Regulations were amended on December 15, 2022 to replace the previous addition to the Sanctions List with "Gilbert Bigio (born in 1935)" (SOR/2022-280).

[11] The Applicant commenced an application for judicial review on January 12, 2023, asserting that the decision to add his name to the Sanctions List was procedurally unfair and unreasonable. The Applicant did not apply under s 8 of the Haiti Regulations to have his name removed from the Sanctions List.

[12] On November 3, 2023, the AGC brought a motion for an Order striking the Notice of Application on the ground that it was premature.

[13] On November 5, 2024, the CMJ granted the AGC's motion and struck the Notice of Application without leave to amend, because the Applicant had not yet availed himself of the process provided by s 8 of the Haiti Regulations.

III. Issues [14] This appeal raises the following issues:

Was the CMJ Order procedurally fair?

Was the CMJ Order factually supported and legally correct?

IV. Analysis [15] A discretionary order of an associate judge is subject to review in accordance with the standards articulated by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33 [Housen] (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [Hospira] at paras 2, 79). Questions of law are reviewed against the standard of correctness, and findings of fact or mixed fact and law may be revisited only where there is palpable and overriding error (*Hospira* at paras 66; *Housen* at paras 26-28).

[16] The palpable and overriding error standard is highly deferential. "Palpable" means an obvious error, while an "overriding" error is one that affects the decision-maker's conclusion (*Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64).

[17] In the context of an appeal under Rule 51, “a case management judge is assumed to be very familiar with the particular circumstances and issues in a proceeding”, and their “decisions are afforded deference, especially on factually-suffused questions” (*Hughes v Canada (Human Rights Commission)*, 2020 FC 986 at para 67).

A. Was the CMJ Order procedurally fair? [18] The Applicant challenges the procedural fairness of the CMJ Order on numerous grounds:

(a) the AGC’s motion to strike was heard on December 20, 2023, but no decision was rendered until November 5, 2024, almost 11 months later;

(b) at the time the parties argued the motion to strike, Associate Judge John Cotter had not yet issued his decision in *Mobile Telesystems Public Joint Stock Company v Attorney General of Canada*, 2024 FC 1237 [MTS], and Associate Judge (now Justice) Benoit Duchesne had not yet issued his decision in *Saint-Rémy v Canada (Attorney General)*, 2024 FC 1380 [Saint-Rémy], but the CMJ relied on both of these authorities without giving the parties an opportunity to address them;

(c) the CMJ struck the affidavit of Greg Kanargelidis sworn on November 24, 2023 [Kanargelidis Affidavit] without hearing submissions from the parties regarding its admissibility;

(d) the CMJ appears to have conflated the Kanargelidis Affidavit with a similar, but not identical, affidavit of Mr. Kanargelidis that was submitted on behalf of the applicant in MTS;

(e) the CMJ wrongly stated in paragraph 11 of the CMJ Order that “two of the uncontested documents attached are Exhibits E and F to the Kanargelidis Affidavit”, but in fact none of the exhibits to the affidavit was specifically contested; and

(f) the CMJ awarded costs “payable by the Applicant forthwith and calculated on the basis of the high end of column III of Tariff B to the Rules”, despite the agreement of the parties, conveyed to the CMJ, that costs should be awarded to the successful party in the all-inclusive amount of \$3,000.

[19] The AGC does not take issue with the Applicant’s complaints regarding the procedural irregularities that preceded the CMJ Order. The AGC nevertheless maintains that no useful purpose would be served by remitting the matter to the CMJ for redetermination, as the outcome is inevitable: the application for judicial review was properly struck on the ground that it was premature.

[20] The mere fact that a judge refers to cases not cited by the parties is not, by itself, an error of law or a breach of procedural fairness (*Heron Bay Investments Ltd v Canada*, 2010 FCA 203 [Heron Bay] at para 22). While it may have been preferable for the CMJ to give the parties an opportunity to address MTS and Saint-Rémy, the CMJ’s reliance on jurisprudence that became available only after the parties had completed their arguments did not “take the case on a substantially new and different analytical path” (*Heron Bay* at para 24). The CMJ’s failure to give the parties the opportunity to address these authorities did not result in a breach of procedural fairness.

[21] The same may be said of the CMJ’s mischaracterization of the Kanargelidis Affidavit and the parties’ positions respecting its admissibility. The Court must ensure that the rules of evidence and the rules of procedure are followed, regardless of whether deficiencies are raised by a party or not (*Akme Poultry Butter & Eggs Distributors Inc v Canada (Public Safety and Emergency Preparedness)*, 2024 CanLII 30068 (FC) at para 26).

[22] The AGC took the position before the CMJ that the Kanargelidis Affidavit was wholly irrelevant to the motion to strike. The Applicant says that at least three of the exhibits to the affidavit were potentially admissible: Exhibits X, Y and Z, comprising an exchange of correspondence between counsel for the AGC and counsel for the Applicant regarding a possible resolution of the application for judicial review.

[23] Exhibit Y is a letter marked “With Prejudice” dated May 18, 2023, in which counsel for the Applicant offered to have the application for judicial review held in abeyance if the Minister undertook to render a decision within 45 days of receipt of the Applicant’s request to remove his name from the Sanctions List. If the Minister failed to render a decision within 45 days, then the Applicant would be free to proceed with the application without further objection from the AGC regarding the availability of an alternative remedy. Exhibit Z is the AGC’s letter in response, dated May 24, 2023, which included the following:

Abeyance/motion to strike: The AGC cannot fetter the Minister’s discretion by agreeing to terms that would impose a time limit for a decision to be based on materials that have yet to be submitted. We have instructions to decline to agree to put the matter in abeyance in accordance with the terms you have proposed. The AGC will proceed with a motion to strike. [...].

[24] The Applicant says this correspondence was admissible evidence to demonstrate that the alternative remedy proposed by the AGC was not timely, and therefore inadequate.

[25] Exhibit Z cannot be reasonably interpreted as an admission on the part of the AGC that the Minister was unable or unwilling to render a decision regarding a request to remove the Applicant’s name from the Sanctions List in a timely way. The letter stated only that counsel could not bind the Minister to a 45-day deadline without being apprised of the materials that would be submitted in support of the request. This is an unsurprising position for a lawyer to take in the absence of complete information.

[26] I agree with the AGC that Exhibits X, Y and Z to the Kanargelidis Affidavit were not relevant to the motion to strike, and the CMJ’s refusal to admit them did not render the CMJ Order procedurally unfair. The remainder of the Kanargelidis Affidavit consisted of improper opinion evidence or factual assertions arising from other proceedings, and was not admissible.

[27] The Supreme Court of Canada has recognized that “[d]eclining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose” (Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at para 142). In light of the analysis that follows, none of the procedural irregularities identified by the Applicant warrant remitting the matter to the CMJ for redetermination.

B. Was the CMJ Order factually supported and legally correct? [28] The Applicant acknowledges that this appeal is largely indistinguishable from the Court’s recent decision in Mobile Telesystems Public Joint Stock Company v Canada (Attorney General), 2025 FC 181 [MTS Appeal]. In that case, I dismissed an appeal of Associate Judge Cotter’s Order striking the applicant’s application for judicial review without leave to amend, on the ground that it had yet to exhaust the remedy provided by s 8 of the Regulations Amending the Special Economic Measures (Russia) Regulations, SOR/2023-163 [Russia Regulations].

[29] Most of the arguments advanced in the Applicant’s Memorandum of Fact and Law are fully addressed in MTS Appeal, and need not be canvassed at length here. Briefly:

(a) the CMJ properly struck the Kanargelidis Affidavit on the grounds that it consisted of improper expert opinion or evidence that was irrelevant to the motion to strike (MTS Appeal at paras 18-33);

(b) the CMJ properly adopted the reasoning in Saint-Rémy at paragraphs 59 to 61, which considered the factors identified in Strickland v Canada (Attorney General),

2015 SCC 37 and *CB Powell Limited v Canada* (Border Services Agency), 2010 FCA 61 [CB Powell] (MTS Appeal at paras 34-37); and

(c) the CMJ properly found that the remedy provided by s 8 of the Haiti Regulations does not amount to the GIC's reconsideration of its previous decision, citing Saint-Rémy at paragraphs 36 to 39 and MTS at para 32 (MTS Appeal at paras 38-43).

[30] The Applicant notes that one material difference between the Russia Regulations and the Haiti Regulations is that the former impose a 90-day time limit on the Minister's decision respecting a removal request, while the latter do not. The CMJ held (at para 19): "while there is no stated number of days within which the Minister must make a decision pursuant to section 8 of the Haiti Regulations, the decision must be made 'on receipt of an application'. This language suggests the Minister must act more expeditiously in making a decision than if the Minister were given an extended period of 90 days to make such a decision" (citing Saint-Rémy at paras 41-43).

[31] I see no reason to depart from the analysis of Justice Duchesne in Saint-Rémy or the CMJ. Furthermore, nothing turns on this point. A person who asks the Minister to remove his name from the Sanctions List and does not receive a decision within a reasonable time may seek an order in the nature of mandamus from this Court.

[32] In oral argument, the Applicant emphasized the lack of procedural fairness preceding the GIC's decision to add his name to the Sanctions List. He says that the process prescribed by s 8 of the Haiti Regulations does not permit him to raise this issue, or for an effective remedy to be granted. The Applicant relies on *CB Powell*, in which the Federal Court of Appeal said the following (at para 33):

[...] Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted. [...]

[33] The Minister's decision-making power under s 8 of the Haiti Regulations is sufficiently broad to address arguments respecting procedural shortcomings in the initial decision to add a person's name to the Sanctions List. As I observed in MTS Appeal at paragraph 46, the Applicant could in theory limit the grounds for his removal request to the absence of any basis to add his name to the Sanctions List in the first place.

[34] This is not to suggest that the Applicant's complaints about the absence of notice or opportunity to respond before his name was added to the Sanctions List are without foundation. The AGC says this is an essential feature of the sanctions regime, without which it could not function effectively. The Applicant disagrees. Ultimately, this is a question of policy. Any reform is best pursued through the legislative process, rather than the courts.

V. Costs [35] The CMJ awarded costs "payable by the Applicant forthwith and calculated on the basis of the high end of column III of Tariff B to the Rules", despite the agreement of the parties that costs should be awarded to the successful party in the all-inclusive amount of \$3,000. According to counsel for the AGC, this figure is roughly equivalent to costs calculated in accordance with the Tariff. Furthermore, the parties remain at liberty to abide by their agreement respecting costs, notwithstanding the CMJ Order.

[36] The parties have similarly agreed to the quantum of costs payable to the successful party in this appeal. However, given the shortcomings in the process that led to the CMJ Order, I will exercise my discretion not to award further costs against the Applicant.

VI. Conclusion [37] The CMJ's decision to strike the Applicant's Notice of Application without leave to amend was factually supported and legally correct. The procedural irregularities identified by the Applicant do not warrant remitting the matter to the CMJ for redetermination.

[38] The appeal is dismissed without costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is dismissed without costs. "Simon Fothergill" Judge
FEDERAL COURT SOLICITORS OF RECORD DOCKET: T-122-23 STYLE OF CAUSE: GILBERT BIGIO
v THE GOVERNOR GENERAL IN COUNCIL, THE MINISTER OF FOREIGN AFFAIRS AND THE
ATTORNEY GENERAL OF CANADA PLACE OF HEARING: Toronto, Ontario DATE OF HEARING:
April 16, 2025 JUDGMENT AND REASONS: FOTHERGILL J. DATED: May 14, 2025 APPEARANCES:
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Prepared on 29 October 2026 · Esheria