Federal Court Cour fédérale

Date: 20180117

Docket: T-643-16

Citation: 2018 FC 43

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 17, 2018

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

JEAN-PIERRE MARTIN SIBOMANA,
JEANNETTE MUKASINE,
CHANTAL UWIDUHAYE,
RUTIGUNGA HERVÉ SIBOMANA,
ITUZE LOIC SIBOMANA,
ISHEMA TRACY SIBOMANA

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
FRANÇOIS JOBIDON
ÉMÉLIE AUDET
N.M. EGAN
RAOUL DELCORDE
HUBERT ROISIN
PATRICK STEVENS

Defendants

ORDER AND REASONS

[1] Three motions are brought before the Court, all filed by the plaintiffs. The first is a motion for default judgment; the second, a motion for summary judgment; and the third, which has two components, is a motion to allow an amendment to the statement of claim and to require the defendants, on the basis of Rules 225 and 227 to 229 of the *Federal Courts Rules*, SOR/98-106 [the Rules] to disclose documents deemed relevant.

I. Background

[2] A brief background is in order. The plaintiffs are all members of the same family. Two of the plaintiffs, Ituze Loic Sibomana and Ishema Tracy Sibomana, are minors. In April 2016, the principal plaintiff, Jean-Pierre Martin Sibomana [Mr. Sibomana], being the only plaintiff at the time, brought an action against the defendants in which he sought a series of remedies, all related to the processing of his immigration file by certain officials of Citizenship and Immigration Canada [CIC] and the Canada Border Services Agency. Such remedies include the award of damages and interest and an order requiring CIC to grant him permanent resident status or Canadian citizenship. With regard to the amendments made to his statement of claim in May 2016, he increased the amount of damages sought from $20 million to $66.5 million.

[3] In late June 2016, the defendants represented by the Attorney General of Canada (Her Majesty the Queen in Right of Canada, federal ministers John McCallum and Ralph Goodale, and federal public servants François Jobidon and Émélie Audet) filed a motion to strike Mr. Sibomana's action on the grounds that it discloses no reasonable cause of action. For their part, defendants Raoul Delcore, Hubert Roisin and Patrick Stevens are Belgian nationals on duty

in Canada on behalf of their government [the Belgian defendants]. State immunity is being claimed for them.

[4] In June 2016, Mr. Sibomana had already sought to obtain a summary judgment, followed by a default judgment a month later. He was not permitted to file his motion for summary judgment, because there was still no defence on record. Regarding the motion for default judgment, it was deemed premature since the Attorney General's motion to strike was already before the Court.

[5] On August 18, 2016, my colleague Justice Yvan Roy dismissed, for all intents and purposes, the Attorney General's motion to strike, finding on the basis of the jurisprudential tests that apply to this type of motion that it was not plain and obvious that Mr. Sibomana's action was certain to fail (*Sibomana v Canada*, 2016 FC 943 [*Sibomana*]). However, Justice Roy struck the names of ministers McCallum and Goodale as defendants and ordered that the references to the remedies sought in favour of any person other than Mr. Sibomana—in this case, his family members—be deemed struck because he is not authorized to act for anyone other than himself.

[6] Moreover, Justice Roy granted the Attorney General 30 days from the date of his order to file a defence. On August 31, 2016, the plaintiffs filed a re-amended statement of claim. On or around September 23, they filed a new motion for default judgment. At the direction of the Court on September 23, the plaintiffs were informed that said motion would not be scheduled for the General Sitting on October 6, 2016, as the plaintiffs had hoped, on the grounds that it was premature, since, as the direction noted, the defendants had until September 30, 2016, to file their

defence. The defence was indeed filed on September 30. The plaintiffs nevertheless insisted on proceeding on October 6, but through a new direction issued on October 3, 2016, the Court reiterated that their motion for default judgment would not be scheduled, since the defendants had filed their defence.

[7] Regardless, the defendants insisted on filing a new motion for default judgment in late October 2016 in response to a direction issued by the Chief Justice of this Court setting a special date—November 24, 2016—for the hearing of the new motion for summary judgment filed by the plaintiffs on October 4, 2016. In fall 2016, the plaintiffs also filed their motion to gain access to certain documents that they deemed relevant. At the same time, they sought to amend their statement of claim again in order to increase their monetary claim against the defendants to $650 million.

[8] On November 24, 2016, following the special sitting scheduled by the Chief Justice and presided over by Justice Michel Shore, the case was suspended until a decision was made on a potential application for leave and judicial review of the decision that, according to the plaintiffs, was the root of the issues that would lead Mr. Sibomana to bring the present action. That decision, made by CIC authorities on June 25, 2010, was to deny Mr. Sibomana permanent residence on the grounds of inadmissibility related to a theft that he had allegedly committed in Belgium in 2006.

[9] The suspension ordered by Justice Shore was lifted on June 28, 2017, by order of the Court following Mr. Sibomana's unsuccessful attempt to obtain leave to challenge that decision. The plaintiffs' three motions were finally heard on October 23, 2017.

II. The motion for default judgment

[10] Despite the plaintiffs' assertions, their motion for default judgment is now moot because the Attorney General's defence was filed on time. The directions issued by the Court on September 23 and October 3, 2016, are clear in this regard. Pursuant to Rule 204 of the Rules, the amendments made to the statement of claim on August 31, 2016, resulted in the time limit set by Justice Roy for the filing of the Attorney General's defence being extended to September 30, 2016. The 30-day time limit provided under Rule 204 applies equally in cases where defendants must respond to the initial statement of claim and in those where they must respond to an amended or re-amended statement (*Oakwood Lumber & Millwork Co. v Classic Millwork Co.* (1989), 28 CPR (3d) 142 at page 144). In these circumstances, I have neither the inclination nor the authority to depart from the Court's directions that, in connection with Justice Roy's order, dictated the final time limit for the filing of the Attorney General's defence and thereby grant the plaintiffs' motion.

[11] Moreover, I note that the Attorney General showed the necessary due diligence in responding to Mr. Sibomana's action, first by expressing the intention early in the process to file a motion to strike, then by expeditiously filing that motion following the first amendments to the statement of claim in late May 2016, and, lastly, on the heels of Justice Roy's judgment, by filing a defence within the time set out in the Rules following the amendments to the statement of

claim on August 31, 2016. There is nothing unusual about wanting to submit a motion to strike before the defence is filed. In terms of judicial economy, this is even desirable (Letarte, Veilleux, Leblanc and Rouillard-Labbé, *Recours et procédures devant les Cours fédérales*, Lexis Nexis, Montreal, 2013 [*Recours et procédures devant les Cours fédérales*], at paragraph 4-62). Therefore, assuming he were unable to file his defence on time, I would have no hesitation, in the circumstances of this case, to relieve the Attorney General of his failure.

[12] Lastly, it is relevant to recall that, pursuant to section 25 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, no default judgment may be issued against the Crown without leave of the Court obtained on an application served at least 14 clear days before it is filed, during which time it may, without further formality, be remedied by default to render said application moot (*Recours et procédures devant les Cours fédérales*, at paragraph 4-38). No such motion has been filed in this case.

[13] Lastly, I can take no action against the Belgian defendants, since a certificate issued under section 11 of the *Foreign Missions and International Organizations Act*, SC 1991, c 41, was filed in the Court record in regard to each of them. In each case, this certificate seems to have been issued under the authority of the Minister of Foreign Affairs, which, pursuant to the same section, confirms the facts stated in the certificate without proof of the signature or official character of the person appearing to have signed the certificate being required. This grants the Belgian defendants civil and administrative immunity in Canada. As the matter stands, the Court therefore has no authority over them. Regarding the *State Immunity Act*, RSC 1985, c S-18, cited by the plaintiffs, it does not apply in this case, as the Attorney General correctly points out.

III. The motion for summary judgment

[14] The motion for summary judgment also cannot succeed. The plaintiffs are clearly convinced of the merits of their claim and would like to settle the matter as quickly as possible by obtaining the remedies to which they believe they are entitled without further delay. Unfortunately for them, it is not that simple. In an adversarial system such as ours, the positions of both opposing parties matter.

[15] As mentioned above, Justice Roy refused to grant the Attorney General's motion to strike, finding that, in presuming the facts in the statement of claim to be true, it could not be found that Mr. Sibomana's remedy (now also that of all the plaintiffs) was destined to fail. In other words, he found that, assuming that the plaintiffs would be able to prove the facts they allege to support their claim to the trial judge's satisfaction, there was a genuine issue for trial. However, he made a point of noting that the plaintiffs "may be facing a very difficult task" insofar as they would need to make a "demonstration of bad faith, wilful negligence, unlawful conduct or actions deliberately inconsistent with the performance of statutory duties" (*Sibomana* at paragraph 19). However, he urges readers to be cautious not to draw any inferences regarding the merits of Mr. Sibomana's action as a result of the dismissal of the Attorney General's motion to strike (*Sibomana* at paragraph 47).

[16] This case should therefore normally proceed to trial. However, in the interests of access to justice and judicial economy, Rules 214 and 215 of the Rules provide for the possibility of obtaining a summary judgment without needing to hold a trial in certain circumstances. The

purpose of this procedure is to allow the Court to summarily dispense "with actions that ought not to proceed to trial because they do not raise a genuine issue to be tried" (*Canada (Citizenship and Immigration) v Houchaine*, 2014 FC 342 at paragraph 26 [*Houchaine*]). In other words, it allows the Court to summarily dispense "with cases which ought not proceed to trial because there is no genuine issue to be tried in respect of the claim" (*Timm v Canada*, 2015 FC 1391 at paragraph 48 [*Timm*]).

[17] Therefore, when the Court must decide on a motion for summary judgment, its role is to determine whether the success of the position advanced by the party against whom the motion is filed "is so doubtful that it does not deserve consideration by the trier of fact at a future trial" (*Houchaine* at paragraph 27). The burden falls onto the shoulders of the party seeking the summary judgment (*Timm* at paragraph 49). In this case, that burden was not met.

[18] As noted by Justice Roy, the plaintiffs' statement of claim "is wordy, full of exaggeration and not organized" (*Sibomana* at paragraph 11). He rightly adds that it is "at times difficult to follow" and that the language used in making allegations of bad faith, malice and unlawful motivation is "needlessly flowery" (*Sibomana* at paragraph 29). However, regardless of its stylistic peculiarities and lack of organization, I think it is permissible—and the hearing of this motion seemed to confirm this—to summarize the central allegations in the plaintiffs' statement of claim as follows:

a) On June 25, 2010, Mr. Sibomana's permanent residence application was refused on grounds of a theft that he had allegedly committed in Belgium and failed to report to the Canadian authorities. In addition to denying having committed that crime, he

alleges that he was never informed of the decision deeming him inadmissible for permanent resident status, depriving him of his right to seek judicial review of that decision and jeopardizing his status in Canada, with all the resulting inconveniences for him and his family. He accuses the CIC authorities of having intentionally hidden that decision from him and of having even created a [TRANSLATION] "ghost file" of inadmissibility that will haunt his subsequent relations with CIC for the sole purpose of causing him harm;

b) That decision is therefore the pretext for the subsequent decision-making that is just as detrimental to him: on November 11, 2011, after he was denied the renewal of a work permit, an exclusion order was issued against him as a result of his inadmissibility, an order that was subsequently set aside by a judgment of this Court (*Sibomana v Canada (Citizenship and Immigration)*, 2012 FC 853). In addition, in June 2013, as he was returning from Europe, Mr. Sibomana was arrested and detained for a few days because he was inadmissible and there was a risk that he would evade examination and potential removal, all on the basis of false accusations;

c) Mr. Sibomana sees other examples of bad faith, wilful negligence, unlawful conduct or actions deliberately inconsistent with the performance of their statutory duties on the defendants' part, especially considering that the Immigration Division waived his inadmissibility in July 2013; in Mr. Sibomana's view, the defendants were guilty of intentional and slanderous harassment and sabotage against him.

[19] The Attorney General argues in defence that the allegations associated with the decision on June 25, 2010, and the supposed inability to challenge that decision by filing an application for leave and judicial review in a timely fashion, which constitute the starting points and basis of the entire proceedings undertaken by the plaintiffs, are without merit. Although he recognizes that he cannot file the letter containing said decision because of CIC's "thin file" document retention and disposal policy, he points out that the notes in the *Field Operations Support System* [FOSS], of which he submitted a copy, clearly indicate that said decision was sent to Mr. Sibomana by letter the same day it was rendered, on June 25, 2010.

[20] As for the allegation that Mr. Sibomana was deprived of his right to seek judicial review of that decision, the Attorney General argues that, under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], the time limits for the judicial review of a decision made under the Act are calculated from the date the applicant is first advised or becomes aware of the decision. He adds that the Court always has the power to extend the time limits set out in the Act when there are valid reasons to do so.

[21] Thus, he argues, even if he did not receive a copy of the decision on June 25, 2010, as the notes in the FOSS suggest, Mr. Sibomana still had the right to challenge that decision from the time he first became aware of it, which he did not do. Moreover, insofar as Mr. Sibomana is now suggesting that this decision was never really even made, the notes in the FOSS contradict that assertion. Lastly, the Attorney General denies Mr. Sibomana's criticisms about the very merits of that decision, adding that he would first have to assert them by means of a judicial review.

[22] I cannot say that the Attorney General's position in response to the allegations in the statement of claim concerning the decision on June 25, 2010, is so doubtful that it does not deserve consideration by the trier of fact at a future trial. I must add that those allegations now need to be examined in light of new information, that is, this Court's dismissal of the application for leave and judicial review filed by Mr. Sibomana against said decision following the suspension of this case by Justice Shore on November 24, 2016 (*Sibomana v Canada (Citizenship and Immigration),* April 20, 2017, Docket IMM-526-17). I am not certain that this new information necessarily helps the plaintiffs' case and increases the Attorney General's burden. At the very least, it does not favour granting the summary judgment the plaintiffs are seeking on this matter.

[23] Next, with respect to the decision on November 11, 2011, to issue an exclusion order against Mr. Sibomana, the Attorney General responds by describing in detail the role of defendant Jobidon; the nature of the decision he made; the history of Mr. Sibomana's immigration file; the procedures to renew the work permit under which Mr. Sibomana had legally been in Canada since his arrival in Quebec in June 2008; the investigation led by CIC in connection with that renewal application, which was ultimately rejected on October 25, 2011; the Court's setting aside of the exclusion order issued by defendant Jobidon; the reasons behind that judgment; and the confusion that might have resulted from CIC accidentally assigning Mr. Sibomana two identification numbers.

[24] Moreover, the Attorney General denies all responsibility with respect to this part of the plaintiffs' claim. Specifically, he denies the allegations of abusive behaviour made against

defendant Jobidon, argues that the reasons for the Court's judgment setting aside the exclusion order do not in any way support this part of the plaintiffs' claim, and submits that, in any event, this falls under the three-year limitation period set out in section 32 of the *Crown Liability and Proceedings Act* and article 2924 of the *Civil Code of Québec* and is therefore statute-barred.

[25] Once again, I cannot say that the Attorney General's defence regarding this part of the plaintiffs' claim raises no genuine issues. As I mentioned above, the plaintiffs' proceeding relies entirely on the allegations of bad faith, wilful negligence, unlawful conduct and actions inconsistent with the performance of statutory duties. These types of allegations, when the defendant refutes them by way of a detailed file that is supported by documentary evidence and that suggests, at least *prima facie*, a serious defence, are ill suited to the summary judgment proceeding. In this type of scenario, there are necessarily two versions of the facts, and it is normally the trial judge who is in the best position, in light of all the evidence, to decide between them and choose one over the other.

[26] The same observation applies to the allegations concerning Mr. Sibomana's arrest and detention upon his return to Canada on June 13, 2013. Here again, the Attorney General gives a detailed account of his version of the facts, namely with regard to the process of the examination conducted by defendant Audet when Mr. Sibomana's plane landed; the content of the discussions that took place during that examination; the nature of the powers exercised by that defendant and what motivated her to arrest and detain Mr. Sibomana; Mr. Sibomana's release on June 17, 2013, under certain conditions; the decision made by the Immigration Division [ID] on July 25, 2013, finding that Mr. Sibomana was not inadmissible, as the ID found that he did not have the *mens*

rea required to commit the theft for which he had been convicted in absentia by the Belgian judge; and the real impact that decision had on the plaintiffs' allegations with regard to this third part of the proceedings.

[27] Once again, the Attorney General vigorously denies the allegations of wrongdoing against defendant Audet and the federal authorities in general. He notes that the authorities responsible for enforcing the Act have the power, under the conditions and circumstances set out therein, to arrest and detain a foreign national in Canada without a warrant; that such decisions, contrary to what the plaintiffs allege, have no criminal law connotations; and that, in this case, the conditions imposed by the ID upon Mr. Sibomana's release demonstrate that defendant Audet exercised that jurisdiction judiciously and without bad faith, as she was only doing her job.

[28] At the hearing of this motion, counsel for the Attorney General argued that the plaintiffs had not discharged their burden of proving that the defence filed against their statement of claim did not raise any genuine issues, and that they had simply rehashed the allegations in the statement without addressing the defences cited by the Attorney General. That observation is fair, but regardless, as I already noted, I am satisfied that this is not a case where a trial is unnecessary because it raises no serious question to be tried with regard to the claim. That is not counting the difficulties associated with certain remedies sought by the plaintiffs, which, as the Attorney General notes in his defence, raise concerns that are sometimes related to the Court's jurisdiction to grant them, and sometimes to their pure and simple admissibility.

[29] As this case is already being specially managed under an order issued on December 6, 2016, I will dismiss the motion with costs, nothing more.

IV. The motion to amend the statement of claim and require the defendants to disclose documents deemed relevant

[30] The plaintiffs wish to amend their statement of claim in order to increase their claim for damages and interest to $650 million. Pursuant to Rule 200 of the Rules, the Court's leave is required for this, since the Attorney General has already responded in his defence to the most recent version of the plaintiffs' statement of claim, dated August 31, 2016.

[31] To be given leave, the amendment sought must present a "reasonable prospect of success" (*Teva Canada Limited v Gilead Sciences Inc.*, 2016 FCA 176 at paragraphs 29 to 31 [*Teva Canada*]). For that purpose, the Federal Court of Appeal instructs that it is necessary to examine the chances of success "in the context of the law and the litigation process, and a realistic view must be taken" (*Teva Canada* at paragraph 30). Here, it is evident that the plaintiffs have no chance of obtaining that kind of sum. In fact, in their best-case scenario, they can only hope to receive, in light of the compensation principles in force in Canada, a tiny fraction of the $66.5 million that they are currently claiming. The amount of $650 million is so unorthodox in the context of our law that it is outlandish. I note in passing that this number seems to have arisen from the plaintiffs' desire to [TRANSLATION] "cut short" a claim that they otherwise believe is worth $100 billion. This view of the damages suffered requires no comment as it is beyond comprehension in our legal realm.

[32] In addition, I cannot grant the part of this motion that aims to require the Attorney General to disclose documents the plaintiffs deem relevant. In fact, this motion was filed in response to the affidavits of documents produced by the Attorney General under Rule 223 of the Rules. The plaintiffs, who were given a copy of all the documents mentioned in said affidavits, want the Attorney General to grant electronic access to the contents of two CIC databases (FOSS and GCMS), the files concerning Mr. Sibomana (6001-2088 and 6199-9991), and [TRANSLATION] "all physical files kept at Archives Canada".

[33] At the hearing of this motion, Mr. Sibomana quite candidly informed the Court that he wished to obtain this access to confirm for himself whether the two affidavits of documents filed by the Attorney General are complete and adequate. However, that is not the purpose of the remedy provided in Rule 227 of the Rules, which permits the Court to inspect any document and order, in particular, that an accurate or complete affidavit be served to the other party. However, the Court will not issue such an order unless it is satisfied that the affidavit of documents in question is inaccurate or deficient.

[34] A party's mere desire to confirm that the affidavit filed by the opposing party is accurate and complete is insufficient to trigger the application of Rule 227. Further, the moving party that has [TRANSLATION] "the burden to submit convincing evidence to demonstrate that available documents exist but were not produced" must also explain how the documents they are seeking to have added to the affidavit are relevant to the dispute (*Recours et procédures devant les Cours fédérales* at paragraph 4-78).

[35] That was not demonstrated. Rule 227, which is the only one that allows the Court to intervene in the filing of affidavits of documents, was not intended to allow for fishing expeditions to be done in the opposing party's records in the hopes of possibly finding something that would support the argument put forth. Other mechanisms that are not governed by the rules of relevance or judicial law can be used to this end.

[36] At the motion hearing, Mr. Sibomana also seemed to be challenging the authenticity or validity of certain documents included in the affidavits of documents filed by the Attorney General. As I had the opportunity to mention to Mr. Sibomana, this type of argument is largely outside the scope of Rule 227. In other words, Rule 227 is not the appropriate vehicle for raising this type of concern.

[37] The plaintiffs' three motions will therefore be dismissed, with costs, given the outcome of said motions.

[38] As this case is being specially managed, the plaintiffs can hope to proceed to trial quickly. To do so, they will nevertheless have to cease to add, as they have tended to do thus far, to the lengthy and ill-advised proceedings and applications for directions that burden and unduly prolong the process. This is, without a shadow of a doubt, a case where the presence of counsel acting on behalf of the plaintiffs would be beneficial for all. The involvement of counsel would also resolve the problem of the plaintiffs' representation, especially that of Mr. Sibomana's two minor children. Mr. Sibomana certainly has the right to represent himself, but he is not permitted, under the Rules of this Court, to speak on behalf of other plaintiffs. As the matter

stands, this problem, which remained somewhat in the background during the hearing of these motions, is likely to arise sooner or later, as evidenced by Justice Roy's judgment and the defence filed by the Attorney General.

ORDER

THE COURT ORDERS that:

1. The motion for default judgment is dismissed;

2. The motion for summary judgment is dismissed;

3. The motion to amend the statement of claim and require the defendants to disclose documents deemed relevant is also dismissed;

4. With costs against the plaintiffs in all three cases, payable in any event of the cause.

"René LeBlanc"
Judge

Certified true translation
This 28th day of January 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-643-16
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