Federal Court Cour fédérale

Date: 20220608

Docket: IMM-5751-20

Citation: 2022 FC 851

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 8, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MAMADOU KONATÉ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Mamadou Konaté [the "Applicant"] is seeking an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "Act"]. This application for judicial review is primarily in the nature of an application for *mandamus*.

[2] The Applicant is inadmissible to Canada. He seeks to rely on section 42.1 of the Act, which allows the Minister to waive such inadmissibility. It reads as follows:

Exception — application to Minister	**Exception — demande au ministre**
42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest	**42.1 (1)** Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.
. . .	. . .
Considerations	**Considérations**
(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.	**(3)** Pour décider s'il fait la déclaration, le ministre ne tient compte que de considérations relatives à la sécurité nationale et à la sécurité publique sans toutefois limiter son analyse au fait que l'étranger constitue ou non un danger pour le public ou la sécurité du Canada.

I. The facts

[3] The Applicant is a citizen of Côte d'Ivoire. In 2002 and 2003, he was part of the Mouvement Patriotique de Côte d'Ivoire, an armed group fighting against President Laurent Gbagbo. It appears that the Applicant left this movement in 2003, but was found and imprisoned for a time because of his desertion.

[4] The Applicant arrived in Canada on February 1, 2016. On February 16, 2016, he made a claim for refugee protection, but his claim was suspended as he is the subject of a report under section 44 of the Act. This is the section of the Act that allows an officer to refer a report to the Minister regarding the inadmissibility of a foreign national. The Minister may then refer the matter to the Immigration Division for an admissibility hearing.

[5] The Applicant was declared inadmissible by the Immigration Division under paragraphs 34(1)(b) and (f) of the Act. A deportation order was then issued and this Court confirmed the decision on judicial review (*Konate v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 129).

[6] The application for a pre-removal risk assessment was denied on May 15, 2018. In addition, a motion to stay his removal was granted by this Court in July 2018 (*Konaté v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 703).

[7] This was followed, one year later, by an application for permanent residence from within Canada, on humanitarian and compassionate grounds (section 25 of the Act). This application for permanent residence on humanitarian and compassionate grounds was rejected on June 1, 2020. The application for leave and judicial review was allowed because the Respondent argued that, as the Applicant is inadmissible, the immigration officer had no jurisdiction to consider the application for permanent residence. The parties' agreement in this regard was the subject of a consent judgment on December 17, 2020. In conjunction with these proceedings, the Applicant applied for an exemption, pursuant to section 42.1, on July 23, 2019. This request for exemption

was made to the Minister of Immigration. A few months later, on November 9, 2020, the Applicant filed an application for leave and for judicial review to obtain an order of *mandamus* against the Minister of Citizenship and Immigration, in order for the Minister to rule on the exemption application. However, the Respondent, through his counsel, advised on December 1, 2020 that the application for exemption was not before the Minister responsible for granting such relief in appropriate cases. Indeed, it is the Minister of Public Safety and Emergency Preparedness who is responsible for such applications under the Act. The letter adds that a form prescribed by the Canada Border Services Agency is required to process the request. The Applicant therefore redirected his application with the appropriate form on December 30, 2020. The application was incomplete but was improved on January 5, 2021. This is the date on which the time limit for processing the application begins.

[8] The application for judicial review was authorized on February 25, 2022.

II. Arguments of the parties

[9] The application for judicial review is somewhat unclear. The Applicant would like the Court to order [TRANSLATION] “the Minister to determine the application under section 42.1 of the Act and state that Mr. Konaté is admissible to Canada, and to assess whether there are no humanitarian and compassionate grounds for Mr. Konaté to remain in Canada”.

[10] The Applicant states in his memorandum of fact and law that he is seeking an order of the Court for the Minister to make a decision on his application under section 42.1 of the Act. The memorandum also addresses the merits of his application, arguing that it should be granted. In

fact, the Applicant raised several issues that suggest that he may be asking the Court to rule on them. For example, he claims that *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 SCR 678 [*Ezokola*] applies. Another paragraph states that section 34 of the Act is contrary to section 2 of the *Canadian Charter of Rights and Freedoms*. Finally, he questions whether the national interest referred to in section 42.1 would be satisfied if the Applicant's inadmissibility were lifted, suggesting that the Court should rule on the merits of the application for exemption under section 42.1, thereby substituting itself for the responsible Minister.

[11] Thus, the Applicant sought to develop an argument around the *Ezokola* decision. *Ezokola* dealt with Article 1F(a) of the United Nations *Convention Relating to the Status of Refugees*. A person who has committed a crime against peace, a war crime or a crime against humanity cannot, under section 98 of the Act, claim the protection of Canada as a refugee (section 96 of the Act) or as a person in need of protection (section 97 of the Act). The Supreme Court examined what participation in these crimes may entail. It is not clear how the decision is relevant to the present case since the Applicant's inadmissibility is based on section 34 of the Act and, more specifically, in his case, because there are reasonable grounds to believe that he participated in acts aimed at overthrowing the government of Côte d'Ivoire by force. If there is any relevance, it has not been explained.

[12] As for the inadmissibility of someone under section 34 of the Act and its intersection with the *Canadian Charter of Rights and Freedoms*, we are presented with a rather generic argument without elaborating on the alleged violation of freedom of association and freedom of thought in this case.

[13] Finally, the Applicant comments on the fact that the Minister's discretion is exercised on the basis of what would not be contrary to the national interest, under the very terms of section 42.1, as meaning that the discretion [TRANSLATION] "should be exercised in a manner that is respectful of the Supreme Court's jurisprudence and that the fundamental rights of freedom of expression and freedom of belief must be given considerable weight in the decision-making process" (Applicant's memorandum of fact and law, para 34). This is another reference to *Ezokola*. In the end, the Applicant's arguments take on the trappings of a request that is supported by humanitarian considerations.

The Applicant's memorandum concludes simply by requesting that the application for *mandamus* be granted and that the Court order [TRANSLATION] "the Minister to make a decision within 60 days of the Court's decision".

[14] The Respondent notes that the Applicant's memorandum addresses issues that are not relevant to the issuance of a writ of *mandamus*. Rather, the Respondent argues that the requirements for a writ of *mandamus* have not been met in this case and therefore the application should be summarily dismissed. Among the conditions for obtaining the writ, the Respondent insists on there being a reasonable amount of time for the decision maker to follow up on the application. The Respondent states that this condition was not met in a manner that would have allowed the Minister of Public Safety and Emergency Preparedness to make a decision. The original request was sent to a minister who is not responsible for dealing with these matters.

[15] In this case, the Respondent points out that the initial request for an exemption was not made until the end of July 2019, in the form of a letter sent to the Backlog Reduction Office at the Department of Citizenship and Immigration. However, the letter was sent to the wrong minister without using the form prescribed by the Department of Public Safety and Emergency Preparedness. It would be another 17 months before the request for exemption was sent to the [TRANSLATION] “right minister”, at the end of December 2020.

[16] This is how, according to the Respondent, the matter did not come before the appropriate minister until January 5, 2021. On April 20, 2022, the day on which the Respondent’s additional memorandum was filed with this Court, 15 months had passed since the application was received. The decision to be made by the Minister cannot be delegated, so 15 months can definitely be a reasonable time frame.

[17] The evidence offered by the Respondent is that the Applicant’s file is awaiting processing with many others in the same situation. According to the Respondent, it would be inequitable to allow the Applicant privileged access to the responsible Minister. The Respondent complained loudly that the Applicant has not in any way explained why the issuance of a writ of *mandamus* would be warranted in the circumstances. This alone would defeat the application for judicial review in the nature of a writ of *mandamus*.

III. Analysis

[18] The leading case on *mandamus* in the Federal Court remains *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 [*Apotex*], affirmed by the Supreme Court of Canada at

[1994] 3 SCR 1100. My colleague, Justice Martine St-Louis, described the necessary conditions well in paragraph 26 of her decision in *Onghaei v Canada (Citizenship and Immigration)*, 2020 FC 1029:

> [26] All of the conditions must be met in order for the Court to grant the extraordinary remedy of *mandamus*. The conditions set out in *Apotex* are:
>
> 1) There must be a public legal duty to act.
>
> 2) The duty must be owed to the applicant.
>
> 3) There is a clear right to the performance of that duty, in particular:
>
> a) the applicant has satisfied all conditions precedent giving rise to the duty;
>
> b) there was:
>
> (i) a prior demand for performance of the duty;
>
> (ii) a reasonable time to comply with the demand unless refused outright; and
>
> (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay.
>
> 4) where the duty is discretionary, the discretion is fettered and spent.
>
> 5) No other adequate remedy is available to the applicant.
>
> 6) The order sought will be of some practical value or effect.
>
> 7) There is no equitable bar to the relief sought.
>
> 8) On a "balance of convenience", an order in the nature of mandamus should issue.

[19] The complete failure to demonstrate that the Applicant meets each of the conditions required for the issuance of the remedy is fatal. The Applicant did not even attempt to demonstrate these criteria in his written memorandum or at the hearing. I would add that it is clear to me that it has not been established that the reasonable time period has expired. The time limit would not start running until an application has been made to the proper Minister.

[20] Finally, at the hearing, the Court asked the Applicant to further discuss point number 4 of the eight *Apotex* criteria, as articulated in the judgment, which reads as follows:

> 4) Where the duty sought to be enforced is discretionary, the following rules apply:
>
> a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>
> b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
>
> c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
>
> d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way;
>
> e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
>
> [Emphasis in original.]

[21] It is clear to me that these conditions are not present in this case. I have no doubt that the discretion that exists under section 42.1 is limited, such that a *mandamus* could be granted. On

the other hand, such a *mandamus* can only be granted to direct the exercise of discretion in exceptional circumstances.

[22] It should be understood that a public authority may not indefinitely choose not to discharge a duty to exercise the discretion conferred on it by Parliament (*Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55). The decision in *Thomas v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 164, is a clear signal that the Court will intervene when a sufficient period of time has elapsed without a decision. In that case, the time limit was four years and the Court in *Thomas* referred to other cases where time limits of three, four and five years had been found to be excessive. In the present case, the time limit is fifteen months, and this Court concludes that there is no need to intervene.

[23] In the circumstances of this case, and in accordance with the expressed wishes of the parties, there is no need to apply section 74 of the Act.

JUDGMENT in IMM-5751-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question under section 74 of the Act is certified.

"Yvan Roy"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5751-20
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