Federal Court Cour fédérale

Date: 20240621

Docket: T-681-23

Citation: 2024 FC 972

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 21, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

RÉGIS BENIEY

Applicant

and

CANADA BORDER SERVICES AGENCY

Respondent

JUDGMENT AND REASONS

[1] Régis Beniey [the applicant] has filed a motion entitled [TRANSLATION] *Motion for leave to appeal the order by Associate Judge Duchesne dated November 22, 2023, and for the production of relevant material requested by the applicant* dated December 4, 2023, under section 364 of the *Federal Courts Rules*, SOR/98-106 [Rules], to obtain an order of the Court requiring the Canada Border Services Agency [CBSA] to provide without delay a certified copy of material in its possession and an order granting the request for a case management conference to inquire about relevant information and key documents.

[2] The respondent objects to the motion, stating that sections 317 and 318 of the Rules cited by the applicant for the purposes of his motion do not apply in this case. The respondent also alleges that the applicant is seeking to appeal a direction of Associate Judge Duchesne dated November 22, 2023, dismissing the May 10, 2023, request for a management conference, despite the fact that a direction cannot be appealed.

I. Analysis

[3] On March 31, 2023, the applicant filed a notice of application with the Court, initiating an application for a remedy against the CBSA under sections 77 and 79 of the *Official Languages Act*, RSC 1985, c 31 (4th supp) [OLA]. According to the application, the applicant [TRANSLATION] "seeks a decision that imposes meaningful consequences, damages, punitive damages, an official letter of apology, and answers in French, as the [CBSA] continues to refuse to comply with its obligations under the [OLA]".

[4] At the heart of the application are several complaints that the applicant submitted to the Commissioner of Official Languages of Canada [Commissioner]. The applicant alleges that he was the subject of violations when the CBSA failed to communicate with him in French. In his notice of application, the applicant submitted a list of material he wants to receive from the CBSA: [TRANSLATION] "a request for material in the possession of tribunals". The applicant relied on section 317 of the Rules to justify his request.

[5] More specifically, the applicant is seeking the production of (a) any administrative policies and practices on which the CBSA relied; (b) any internal briefing documents, regardless of their

source, to the extent that it was created by the CBSA in the context of the complaints; (c) any documents attached or appended to documents and any documents mentioned in documents relating to the complaints mentioned, regardless of the nature; (d) any documents created by or for CBSA officials and consultants as a result of and in relation to the impugned complaints; and (e) the sole original copy of the applicant's harassment complaint as submitted to the CBSA in September 2016.

[6] On April 24, 2023, the respondent filed an objection under section 318 of the Rules to avoid an order allowing the request filed by the applicant on March 31, 2023, to obtain the certified record. The respondent's grounds for objecting to this request were that [TRANSLATION] "the applicant's application for a remedy under subsection 77(1) of the OLA is an application that is heard and determined as a new proceeding (*de novo* review) rather than as a judicial review of a decision by a tribunal".

[7] The respondent cited *Lavigne v Canada Post Corporation*, 2009 FC 756 [*Lavigne*] at paragraphs 23 to 28, and *Canada (Health) v Preventous Collaborative Health*, 2022 FCA 153 [*Preventous*] at paragraph 9, to support its argument that rule 317 of the Rules sets out an obligation to produce material (such as the certified record) in the context of judicial review, particularly when an applicant is challenging a decision. This rule does not apply to applications for a remedy under section 77 of the OLA, as these do not concern decisions of the Commissioner, but rather the merits of complaints filed with the Commissioner.

[8] On May 4, 2023, the applicant filed a response to the respondent's letter dated April 24, 2023. The applicant explained that he was [TRANSLATION] "unable to refer to certain key documents that [were] only in the possession of the respondent and that were prepared by the applicant." The applicant asked that the Court invite the parties to participate in a virtual management conference to discuss the documents and agree on the documents that would allow the applicant to submit a complete affidavit.

[9] On May 9, 2023,[1] the respondent responded to the Court's invitation to take a position on the applicant's May 4, 2023, request for a management conference, which followed the respondent's April 24, 2023, objection under section 318 of the Rules.

[10] The respondent's position was that a management conference was neither necessary nor in the interests of justice, and that the Court already had all the information needed to determine the merits of the respondent's objection. The respondent submitted that nothing prevented the applicant from relating in his affidavit the facts supporting his application, [TRANSLATION] "which were evidence in themselves".

[11] The respondent cited paragraphs 16 to 18 of *Preventous* to argue that there were other mechanisms for obtaining evidence. Those paragraphs describe how to develop the evidentiary record in an application, by serving affidavits, conducting cross-examinations and filing records (*Preventous* at paragraph 17, citing sections 306 to 310, namely Part 5 of the Rules). The Federal

[1] At the hearing, the respondent corrected the date of the letter. Although the letter is dated November 9, 2022, it is an error. The correct date of the correspondence is May 9, 2023.

Court of Appeal sets out the procedure for making such applications, including the possibility of applying for a production order (*Preventous* at para 18).

[12] On May 10, 2023, the applicant replied to the respondent's letter dated May 9, 2023. He emphasized the importance of a case management conference.

[13] On November 22, 2023, Associate Judge Duchesne issued a direction in which he rejected the request for a management conference. He stated that, [TRANSLATION] "as the case is not a specially managed proceeding, there is no need to convene the parties to a management conference".

[14] On December 4, 2023, the applicant filed this motion, stating in his motion record that he is asking the Court to issue an order for a case management conference, to issue an order requiring that the respondent file the certified record with the Court, and to set aside and quash Associate Judge Duchesne's November 22, 2023, decision.

[15] The applicant stated in his oral submissions that he is seeking an order from the Court to impose a case management conference and that this is not an appeal from Associate Judge Duchesne's direction. I disagree. Despite his oral submissions, it is nonetheless an appeal.

[16] Note the title of the motion filed by the applicant on December 4, 2023: [TRANSLATION] *Motion for leave to appeal the order by Associate Judge Duchesne dated November 22, 2023, and for the production of relevant material requested by the applicant*. The

applicant is challenging the associate judge's direction rejecting his request for a case management conference. He is seeking the same thing with this motion.

[17] An order by an associate judge may be appealed under section 51 of the Rules. However, I am of the view that the Associate Judge's communication is a direction, not an order. The jurisprudence of this Court is well settled: "no appeal lies from a direction": *Froom v Canada*, 2003 FCA 141, at paragraphs 2–3; *Peak Innovations Inc v Simpson Strong-Tie Company, Inc*, 2011 FCA 81, at paragraph 2; and *Kostic v Canada*, 2023 FC 508, at paragraph 64. No appeal lies from the associate judge's direction.

[18] Moreover, the Court must be able to control its process and has discretion in respect of specially managed proceedings (s 384 of the Rules), as well as requests for management conferences. Even if it were an order, I see no palpable and overriding error by the associate judge to justify the Court's intervention (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215). The associate judge did not depart from the Rules. I therefore see no reason to interfere with the associate judge's direction.

[19] In his motion for an order under section 317, the applicant cites *Lukács v Canada (Transportation Agency)*, 2016 FCA 103 [*Lukács*] at paragraph 20, to argue that the transmission of relevant material is mandatory, as this is what the administrative decision maker relied on. However, the decision in *Lukács* is distinct and does not apply to the applicant's case. In *Lukács*, the Federal Court of Appeal considered the issue of section 317 of the Rules and how this rule applies in the context of judicial review. This is not a judicial review.

[20] An application for a remedy under section 77 of the OLA is different from an application for judicial review. Among other things, this application seeks to verify the merits of the complaint made to the Commissioner, not of the Commissioner's decision or report (*Lavigne* at paras 26–28). In other words, section 317 of the Rules does not apply here.

[21] The shortcomings that the applicant presents as obstacles to his ability to build his record in this proceeding cannot be addressed by section 317 of the Rules. This is not a "technicality". The Rules set out the procedure to be followed, among other things. The applicant is seeking an order under a rule that simply does not apply in his case. I note again that *Preventous* describes other mechanisms that exist for disclosing and obtaining evidence.

[22] The Court notes that the applicant confirmed that he is also the author of some of the material he is seeking from the respondent. The applicant did not submit any evidence that he contacted the respondent to attempt to resolve this issue of material. Similarly, the applicant did not submit any evidence to demonstrate why he is unable to access the relevant material. I note that the OLA complaint concerns communications between the CBSA and the applicant.

[23] The Court therefore dismisses the applicant's motion.

II. Costs

[24] In its motion record in response to the applicant's motion, dated June 13, 2024, the respondent asked the Court to dismiss the motion with costs. However, the Court notes that the respondent did not submit any documents concerning costs or submit a quantum at the end of the

hearing, in accordance with section 74 of the *Amended Consolidated General Practice Guidelines, December 20, 2023*. Although the respondent has defended this motion successfully, I am not in a position to award costs.

[25] In accordance with my discretion under section 400 of the Rules, I do not award costs in the circumstances.

[26] The applicant's motion is dismissed, without costs.

"Phuong T.V. Ngo"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-681-23
STYLE OF CAUSE:	RÉGIS BENIEY v CANADA BORDER SERVICES AGENCY
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 19, 2024
JUDGMENT AND REASONS:	NGO J
DATED:	JUNE 21, 2024

APPEARANCES:

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Michèle Plamondon	FOR THE RESPONDENT

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