Federal Court Cour fédérale

Date: 20170616

Docket: IMM-3099-16

Citation: 2017 FC 602

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 16, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DIDACE SHIRAMBERE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This case has taken an unexpected and largely inappropriate turn. An application for judicial review in the nature of *mandamus* was transformed by the applicant into an inquiry into his admissibility to Canada. This attempt is irrelevant with respect to the only legal remedy before this Court.

[2] It is therefore essential to clearly define the context of the application for judicial review to be dealt with exclusively by this Court. Pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA], the applicant applies for judicial review seeking the following conclusions in *mandamus*:

- Cancel the seizure of his passport issued by Burundi, his country of citizenship, in order to have the passport returned to him within 30 days of the judgment;
- Order the closure of the respondent's investigation into allegations of misrepresentation.

I. Facts

[3] The facts are simple. Married since 2003 and the father of two children, the applicant said he had been the victim of threats and blackmail. On February 12, 2007, he left his wife and children in Burundi and went to the United States, for which he had a visa. He crossed the Canadian border on March 2, 2007 and sought refugee protection.

[4] The Refugee Protection Division [RPD] rejected his claim on December 9, 2008. Essentially, the decision was based on the applicant's credibility. Paragraph 11 reads as follows:

> [TRANSLATION] [11] From the outset, the applicant's testimony was vague and general, not to mention completely inconsistent, even implausible, when it came to his alleged business.

The applicant had supposedly been in the business of buying and reselling cows in Burundi since 1988. The RPD explained how it had arrived at its conclusions.

[5] The inconsistency was significant not only because a witness's credibility is obviously affected when his story about the work he says he has being doing for nearly 20 years is completely inconsistent and disjointed (paragraph 19), but also because the applicant claimed he had an employee who became the source of the alleged problems with the National Liberation Front that, according to him, led to his seeking refuge in Canada. Ultimately, [TRANSLATION] "(t)he panel does not believe this story of persecution and risk to life."

[6] Nevertheless, the application for permanent residence was allowed on humanitarian and compassionate grounds, and he became a permanent resident in 2012 (permanent resident card issued on December 12, 2012).

[7] On December 3, 2014, the respondent summoned the applicant to an interview scheduled for December 15. The letter stated that a report under subsection 44(1) of the IRPA could be written indicating that the appellant was inadmissible for misrepresentation under subsection 40(1) of the IRPA. I reproduce the provisions in question below:

Misrepresentation	**Fausses déclarations**
40 (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40 (1)** Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	**a)** directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
(b) for being or having been	**b)** être ou avoir été parrainé

sponsored by a person who is determined to be inadmissible for misrepresentation;	par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(c) on a final determination to vacate a decision to allow their claim for refugee protection or application for protection; or	**c)** l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile ou de protection;
…	(…)
Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	**44 (1)** S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

[8] The letter added that if a report were written, a delegate of the Minister could decide to refer the matter to the Immigration Division for an admissibility hearing under subsection 44(2) of the IRPA.

[9] At this December 15, 2014 meeting, the officer introduced himself as a member of the Canada Border Services Agency's Security and War Crimes Unit. Whereas the applicant said he was a businessman in his country of origin, the officer alleged that the applicant had in fact been a member of the armed forces in Burundi. Starting at this interview, the applicant suggested it could be a case of mistaken identity. He maintained that he had never been in the army. The officer gave the applicant 15 days to make submissions. The officer claimed that he had [TRANSLATION] "official documents" from the Burundian authorities, but refused to allow the

applicant's lawyer, who was present at the interview, to see them, indicating that they would be disclosed at the hearing (presumably the Immigration Division admissibility hearing).

[10] The applicant's Burundian passport was seized during the interview. The officer later said it was common practice. Inadmissible persons could be subject to a removal order. To enforce the removal order, the possession of travel documents is obviously essential.

[11] The following day, the applicant was sent a notice of seizure of documents, which, according to him, was not the notice that should have been used. This notice explained not only the grounds for the seizure but also how to apply for return of the thing seized. Furthermore, the certified copy of the passport was not returned to him.

[12] It was later learned that, in the days following the interview, the applicant claimed it was a case of mistaken identity (letter dated December 29, 2014 from his lawyer). Taking this allegation seriously, the officer continued his investigation during the next two years. It took that long apparently because of delays in obtaining relevant information from foreign authorities. In this case, the officer was seeking official confirmation of the applicant's service in the Burundian armed forces.

[13] On January 11, 2017, the section 44 report was completed. The officer claimed to have received satisfactory documents from the Burundian Embassy in Canada. The application for leave to apply for judicial review was filed on August 11, 2016. Many procedural incidents

followed, including the cross-examination on affidavit of the officer on May 9, 2017. The parties filed five memoranda of fact and law.

II. Argument

A. *Applicant*

[14] The applicant submits that he meets the conditions for obtaining an order of *mandamus*. He relies on the description in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 FCR 742 [*Apotex*]. In his first memorandum, the applicant chose to reproduce only seven of the eight conditions listed. He did not reproduce condition 4. I prefer to present them as they appear on pages 766 to 769, without, however, the many references to case law:

> 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 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 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; and
>
> (*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. . . .
>
> 5. No other adequate remedy is available to the applicant . . .
>
> 6. The order sought will be of some practical value or effect . . .
>
> 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought . . .
>
> 8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue. . . .
>
> [Emphasis in the original.]

[15] The applicant presented his arguments in this regard in his first memorandum of fact and law. At the hearing and in the two other memoranda, he focused on the section 44 report, despite the fact that the remedy sought is a *mandamus*. Though it concerns the return of the passport and the end of an investigation, the matter has turned into an attack on the proceedings to have the applicant found inadmissible.

[16] The applicant says he satisfies the seven conditions set out in *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] 4 FC 189. No one raised the fourth condition from *Apotex*.

[17] Claiming he was summoned to an interview for failure to comply with his permanent residency obligation, the applicant says that he answered the question raised in the interview, which means that there is a legal duty to return his passport and close a case that cannot be kept open indefinitely. He argues that this is a clear right, especially since, according to him, there was no need to continue the investigation after December 15, 2014. He complains that the respondent gave no reason for the delay. In fact, the respondent's explanation was that the investigation had to continue in Burundi since, at the interview and then through a letter from his lawyer, the applicant denied the respondent's arguments and claimed his identity had been stolen in Burundi. As a result, many steps were taken in 2015 and 2016. The applicant simply said he had no other remedy and that the order would be of some practical value or effect.

[18] The respondent's challenge focuses solely on the legal duty to act given the clear right to performance of the duty in favour of this applicant. The Minister argues that the applicant's right is not clear, which is sufficient to reject the *mandamus* application. The respondent also suggests that the balance of convenience favours him because an admissibility hearing must be held before the Immigration Division. If a removal order is made, the government will want to keep the passport to prevent the person subject to removal from evading deportation.

[19] Mr. Shirambere counters that his rights were infringed, whereas there is no inconvenience for the respondent.

[20] In his second memorandum of fact and law, prepared after having learned of the drafting of the section 44 report, the applicant made a series of allegations related to what is described as

breaches of procedural fairness, clarifying general allegations in the first memorandum. He also attacked the maintenance of the unlawful seizure of his passport.

[21] Specifically, the applicant submits that procedural fairness was breached in that:

a) he was summoned to the December 15, 2014 interview under false pretenses, as the December 3 letter had led him to believe the interview concerned his residency obligation, but he was questioned about other matters;

b) at the interview to hear the applicant's version before the report was written, the officer did not reveal the evidence he said he had;

c) the officer chose to ignore the applicant's claim about an informant seeking revenge on him;

d) the officer refused or neglected to weigh the evidence. In the same breath, it was said that [TRANSLATION] "the corruption of document forgery [is] rampant in Burundi." According to the applicant, this gives him reason to claim that procedural fairness was breached by failing to show him this evidence;

e) the case was kept vague;

f) the interview was conducted in an atmosphere of animosity;

g) the applicant was sent a notice of seizure of his passport using the wrong form, in contravention of an operational manual, and he did not receive a true copy of the seized passport. He relies on the doctrine of legitimate expectations.

The applicant argues that these breaches can only be remedied by returning his passport.

[22] The applicant also attacked the [TRANSLATION] "maintenance of the unlawful seizure of the passport." Here, it seems that the applicant is attacking not only the seizure but also the section 44 report. Thus, the report that was supposedly written on January 11, 2017 was apparently prepared in response to the application for judicial review, five months earlier. In addition, the applicant claims that the officer had a duty to provide him with what he had

received from the Burundian authorities between his written claim on December 29, 2014 about the theft of his identity in Burundi and the section 44 report. Relying on case law where the administrative decision-maker rendered a decision, the applicant claims that he was entitled to the extrinsic evidence against him. The applicant does not explain how he could attack the report, within a *mandamus* application with completely different conclusions, when the report is not under judicial review.

[23] In another part of his passport detention argument, the applicant submits that the duration of the detention is unreasonable, in particular because detention was not necessary to move the investigation forward. The applicant does not mention that, rather, the evidence is that detaining his passport was required to enforce a removal order in the event that such an order were made following the Immigration Division hearing.

[24] A third memorandum was filed on behalf of the applicant on May 18, 2017. Here again, the applicant claims that procedural fairness was breached. Essentially, the applicant reiterates that the officer did not follow the operational manual. The same three elements are revisited:

i. The officer used a different form to notify the applicant of the seizure.

ii. A true copy of the seized passport was not given to the applicant.

iii. The doctrine of legitimate expectations requires full compliance with the operational guide.

Also, the applicant again mentions the documents collected after he claimed identity theft. He complains about the quality of these documents. He does not explain how the quality of the evidence in support of the section 44 report, which is sure to be debated before the Immigration

Division, could have any impact on an application for judicial review relating to the seizure and detention of a passport. Whether or not the evidence to be submitted to the Immigration Division is sufficient is a completely different issue from the possibility of having a passport returned.

B. *Respondent*

[25] For its part, the Crown filed two memoranda of fact and law. In its first memorandum, it argues that four of the conditions for *mandamus* have not been met in this case:

- Public legal duty to act
- Duty to the applicant
- Clear right to performance of the duty
- Balance of convenience

It also argues that there were no breaches of procedural fairness.

[26] With respect to the conditions for *mandamus*, the respondent submits that:

a) The seizure was lawful. It was performed under subsection 140(1) of the IRPA because it was necessary for the purposes of the Act. Indeed, it was done to prevent the applicant from evading deportation if a removal order were made; his passport would be needed to enforce the removal order. The *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] are satisfied by the notice of seizure sent the day after the interview, which explained the grounds for the seizure and how to apply for return of the thing seized. As it was seized lawfully, the respondent has grounds to keep it until the investigation has been completed. Moreover, the investigation led to the section 44 report once the additional information was received from Burundi. As a result, the respondent did not fail to fulfill a public legal duty to act by detaining the passport and continuing an investigation that ended in January 2017.

b) The respondent therefore argues that he has no duty to the applicant, for the reasons stated in paragraph (a) above. The seizure was lawful and there are no provisions forcing him to return the passport or close an ongoing investigation.

c) There is also no clear right to performance of a duty, because the detention period in this case is reasonable. If there is a public legal duty to act, the respondent argues that detaining the passport was not unreasonable, because delaying its return was justified (*Conille v. Canada (Minister of Citizenship and Immigration)* [1999] 2 FCR 33 [*Conille*]): there is no clear right to performance of a duty. In order to justify the delay, the respondent claims to have acted with all due dispatch in confirming the information challenged by the applicant at the December 2014 interview and in his lawyer's follow-up letter two weeks later. He also states that the applicant did not cooperate, but the respondent does not indicate why the applicant should have helped him in his efforts to establish misrepresentation, which alone can result in inadmissibility.

d) According to the respondent, the balance of convenience is in his favour. Essentially, the respondent argues that the government must be able to detain the passport to enforce a possible removal order, even though the applicant has not demonstrated any prejudice from not being able to use his passport, especially since his family has joined him in Canada. The respondent, who fears that the applicant may evade deportation if the passport is returned to him because it is difficult to obtain a passport in Burundi (paragraph 39 of the memorandum), inappropriately states two paragraphs later that the applicant is not prejudiced since there is nothing stopping him from applying to his country of origin to [TRANSLATION] "have a new travel document re-issued" (paragraph 41). One would think that if obtaining a travel document with the help of the Canadian government were difficult, it would not be easier to get one without this help even though it is known that a valid passport exists.

[27] According to the Minister, there were no breaches of procedural fairness, contrary to the applicant's allegations. The applicant knew full well that the allegations against him were related to his identity. In fact, twice during the interview, when confronted with allegations that he had served in the armed forces of his country (number, name, year of birth, name of father and mother), he said that it was someone else and that someone may have made misrepresentations. Also, the seizure was lawful, and the notice of seizure explained the grounds for the seizure and how to apply for return of the thing seized (according to the Minister, the passport was a thing rather than a document). The choice of form — which the applicant complains about — has no bearing on procedural fairness.

[28] In his second memorandum, the respondent largely reiterates the contents of his first memorandum. Two arguments are worth mentioning:

a) Without supporting authority, the respondent argues that the *mandamus* remedy is now moot because the section 44 report has now been issued and the matter has been referred to the Immigration Division. In any event, says the respondent, the passport could be seized again, as soon as it has been returned pursuant to an order of this Court. The Court gave short shrift to this argument. In *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*], the Court held that there must be a live controversy or concrete dispute. Has the *raison d'être* of the action disappeared? In *Borowski*, the issue involved the constitutionality of provisions of the *Criminal Code* (R.S.C., 1985, c. C-46) that were struck down before the case reached the Supreme Court of Canada. The issue in this case is very far from hypothetical or abstract. All that the respondent is suggesting is that he will start over if he loses. Other than the fact that such an action could itself generate new remedies, I find it rather obvious that performing another seizure, even if it were wise, has no connection with the dispute before this Court. Attacking the constitutionality of a repealed provision makes the dispute hypothetical or abstract, yet there is nothing abstract or hypothetical about an individual wanting to have his passport returned because he is entitled to it. Suggesting that it can be seized again does not render the issue of the initial seizure moot. In *Borowski*, the Supreme Court wrote that "(t)he general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties" (page 353). It may well be that the respondent is confusing the resolution of the inadmissibility case involving the applicant with the resolution of the present dispute. Moreover, nothing will prevent the case from continuing (if the investigation is not stopped by way of *mandamus*) even if the passport is returned on the resolution of this dispute.

b) The respondent is asking the Court to keep the matter before this Court circumscribed. The argument is that the applicant is attempting to turn his application for *mandamus* into a motion on the sufficiency of the respondent's grounds to issue the section 44 report. These issues have nothing to do with the application for judicial review in the nature of *mandamus*.

III. Standard of review

[29] The applicant does or does not meet the conditions for an application for judicial review in the nature of *mandamus*. It is far from clear how the allegations of breaches of procedural fairness pertain to issuing a *mandamus* for the return of a seized passport. Such a breach would generally result in an application for judicial review in the nature of *certiorari* against a government decision, i.e. the seizure of a thing or document. But then, it may be necessary to

consider this remedy to be out of time. The seizure performed in December 2014 was not challenged until May 2016, far outside the 30-day time limit expressly set out in subsection 18.1(2) of the *Federal Courts Act* (R.S.C., 1985, c. F-7).

[30] The applicant filed his application seeking a *mandamus* order, but also asking [TRANSLATION], "Was there a breach of natural justice, procedural fairness or other procedure that provides grounds for this Court to intervene by issuing the order sought?" (Part II – Issues, memorandum of fact and law #1). It was never explained how such "breaches" could warrant Court intervention by way of *mandamus*.

[31] Another difficulty caused by the procedural conundrum created by the applicant is that there could be a conflict with Rule 302 of the *Federal Courts Rules*, SOR/98-106, which limits an application for judicial review to a single order. It reads as follows:

Limited to single order **302** Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.	**Limites** **302** Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

[32] The respondent did not raise these issues. Ultimately, he simply argued that the seizure was lawful, that detaining the passport was appropriate, that some of the conditions for issuing a writ of *mandamus* were not satisfied, and that, in any event, the administrative file had to continue with the Immigration Division hearing.

[33] Issues of procedural fairness are reviewable on a standard of correctness (*Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 SCR 502, at paragraph 79). I therefore reviewed them on this basis.

IV. Analysis

[34] The respondent was right to note that the legal debate should be circumscribed. As the Supreme Court pointed out in *Saadati v. Moorhead*, 2017 SCC 28, "each party is entitled to know and respond to the case that it must answer" (paragraph 9). Pleadings have their *raison d'être*. The rules of procedure and the rules of court are there to ensure orderly debate, which is believed to provide fair and equitable results for the parties involved.

[35] Here, the applicant has applied for a *mandamus*, a remedy that compels the performance of an act or a public duty. But because of its coercive nature, the remedy is governed by strict rules (D.J.M. Brown & J.M. Evans, *Judicial Review of Administrative Action in Canada*, (loose leaf), Thomas Reuters Canada, §1:3100 (updated April 2017)). The legal duty to act has to be clear for a reason.

[36] The conclusions of the application for leave are an unauthorized amalgamation in that, while it is described as [TRANSLATION] "an application for *mandamus*," the applicant also has conclusions that are inconsistent with a *mandamus*. Indeed, he also seeks to have his case closed even though he claims to satisfy the conditions for *mandamus*. Where is the clear right to performance of a legal duty to close a case?

[37] The fact is that the applicant spent most of the hearing attacking the section 44 report. However, this report did not even exist when the *mandamus* application was made. More importantly, the decision to issue a report, which implies that the officer is of the view that the applicant is inadmissible (subsection 44(1) of the IRPA), is not and cannot be the subject of this application. At best, one could consider an application for a decision as being subject to *mandamus*, but to attack a decision already rendered falls outside the scope of this remedy. Yet that is what the applicant attempted to do.

[38] I have had doubts as to the appropriateness of *mandamus* in terms of the stated conclusions of returning the passport and closing the case, which seem to involve an underlying debate about the lawfulness of the government's actions. Since the applicant chose to proceed in *mandamus*, I examined the conditions to be met and found that not all conditions are satisfied.

[39] Thus, the insurmountable difficulty faced by this applicant is the absence of a clear public legal duty to act. The applicant has been unable to satisfy the Court of his clear right largely because he has been much more declaratory than analytical, merely looking for problems that have more to do with form than substance. Perhaps the dilemma is that if unlawfulness must be established, it is difficult to assert a clear right.

[40] The starting point must be the seizure. It was performed in accordance with subsection 140(1) of the IRPA, which states:

Seizure	**Saisie**
140 (1) An officer may seize and hold any means of transportation, document or other thing if the officer believes on reasonable grounds that it was fraudulently or improperly obtained or used or that the seizure is necessary to prevent its fraudulent or improper use or to carry out the purposes of this Act.	**140 (1)** L'agent peut saisir et retenir tous moyens de transport, documents ou autres objets s'il a des motifs raisonnables de croire que la mesure est nécessaire en vue de l'application de la présente loi ou qu'ils ont été obtenus ou utilisés irrégulièrement ou frauduleusement, ou que la mesure est nécessaire pour en empêcher l'utilisation irrégulière ou frauduleuse.

Thus, the applicant was never able to argue that there were no reasonable grounds to believe that the seizure was unnecessary for the purposes of the Act, i.e. the need for a passport to enforce a possible removal order.

[41] With respect to this seizure, the applicant argued that he was summoned to the interview on the false pretense that the authorities only wanted to confirm that he was physically present in Canada in order to satisfy the conditions of permanent residence. This argument must be firmly rejected. It is true that the letter requires that the applicant come with his passport to verify his residency obligation, but the letter summoning the applicant is unequivocal as to the primary purpose of the meeting. It clearly states that the officer was considering writing a report indicating that he was inadmissible for misrepresentation. The letter conclusively states that the report might be referred to the Immigration Division; it specifically mentions section 44. Nothing is hidden. However, the applicant's lawyer knew, or ought to have known, that the report cannot be referred "in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation," under subsection 44(2), which states:

Referral or removal order	**Suivi**
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	**(2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[42] Simply put, the mere fact that the report can be referred, as the letter states, left no doubt that the applicant was not summoned for failure to comply with the residency obligation. Failure to comply with the residency obligation does not result in a referral to the Immigration Division. Finally, at the start of the interview, the officer stated that [TRANSLATION] "(t)he purpose of this interview is to verify certain statements you made regarding your past in Burundi" (transcript of the December 15, 2014 interview).

[43] The basis of the *mandamus* application, the existence of a legal duty to act, which entails a clear right to performance of this duty, is that this matter is related to the residency obligation. This is not the case. On its face, the applicant has failed. But there is more.

[44] Referring extensively to the operational manual, the applicant made much of the fact that the wrong form was used for the notice of seizure that was sent to him. Indeed, it appears that the

officer used the form he had at that time, a form that had recently been changed. This argument is not valid, because it favours form over substance. The operational manual is of no assistance to the applicant. It does not set out a clear, unambiguous and unqualified procedural framework for decision making. It merely describes the forms containing the information whose disclosure is required by a regulation that is binding on the Minister. We are far from *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 (paragraphs 94–98) and much closer to *Sharma v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 (paragraphs 26–28). As Justice De Montigny stated, "that kind of governmental guideline [is] not binding on courts." Part 16 of the Regulations contains the rules pertaining to seizures. Under paragraph 253(1)(b), written notice of, and reasons for, the seizure must be provided. In this case, both requirements were met. No one has disputed this. I would add that the form used reproduced the provisions of the Regulations on the return of a seized thing.

[45] The applicant only stated in his written representations that the Minister had detained his passport for too long. However, the IRPA does not set out a time limit. Sections 255 and 256 of the Regulations do not provide for a time limit either:

255(4) A thing seized shall only be returned if its return would not be contrary to the purposes of the Act.	**255(4)** L'objet est restitué si cela ne compromet pas l'application de la Loi.
…	(…)
256(3) An applicant shall be notified in writing of the decision on the application and the reasons for it. If the applicant is notified by mail, notification is deemed to have been effected on the seventh day after the day on which the notification was mailed.	**256(3)** La décision sur la demande, accompagnée de ses motifs, est notifiée au demandeur par écrit. Si la notification est faite par courrier, elle est réputée faite le septième jour suivant la mise à la poste.

[46] I do think that there should be a time limit for detaining a thing seized. Without one, a seizure could become abusive. I agree with the words of Justice Tremblay-Lamer in *Conille*:

> [20] It is too easy to argue, as does the respondent, that the Registrar has no legal obligation to act as long as the inquiries have not been completed. By that reckoning, an investigation could go on indefinitely and the Registrar would never have a duty to act. The difficulty lies essentially in the fact that there is no time limit provided in the Regulations for completing these inquiries. In fact, the source of the problem is a defective statutory framework. For one thing, the powers of the Registrar to direct that an investigation be conducted in order to ascertain that the requirements of the Act have been met are not subject to any temporal or pragmatic parameters, apart from the obligation to await completion of the inquiries provided for in section 11 of the Regulations, and for another, no time limits are placed on the powers of the investigators, in this instance CSIS. Given these circumstances, the processing time may extend well beyond the time required for conducting the investigation. At what point can that time be regarded as unreasonable?

[47] In this case, it was not demonstrated that the delay was unreasonable. By alleging that his identity could have been stolen, the applicant forced the authorities to confirm their beliefs about his military career. It is not for this Court to confirm this military career in this case: it will be the Immigration Division's task. Rather, it is sufficient to note the authorities' diligence in obtaining the information. Furthermore, the applicant has not challenged the provisions of the Regulations, which do not impose a specific time limit on detention.

[48] Be that as it may, in a *mandamus* application, the applicant has the onus of establishing a clear legal right. Not only has a clear duty regarding the seizure not been established, there is no clear legal duty with respect to the investigation conducted by the federal authorities. If there is to be a limit, it is certainly not clear within the meaning of the conditions for *mandamus*. The applicant is vainly seeking to establish a link between the return of a passport and the closure of

an investigation due to possible misrepresentation. One must not confuse the specific duties under the *Citizenship Act* (R.S.C., 1985, c. C-29), for instance, with the absence of a legal duty in relation to seizures under the IRPA (*Conille*; *Platonov v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 569; *Murad v. Canada (Citizenship and Immigration)*, 2013 FC 1089). *Mandamus* decisions under the *Citizenship Act* are based on a legislative scheme that highlights the differences with the one at issue by specifying certain time limits.

[49] That is sufficient to deal with the application for judicial review. A *mandamus* cannot be obtained with regard to the seizure of the passport and the closure of an investigation. A clear right to performance of a legal duty to act has not been established. Since the applicant spent a great deal of time on what he described as breaches of procedural fairness, I will make a few comments.

[50] The applicant must specify what duty of fairness was breached. The concept of procedural fairness is variable and depends on what the government decides (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, paragraphs 22 and 28). The list of so-called breaches of procedural fairness submitted by the applicant is far from precise. It should be pointed out that the list does not mention the section 44 report; it cannot, because the application for judicial review predates the report. However, the list of breaches submitted in his reply memorandum is largely an attack on this report.

[51] While it is true that the respondent's memorandum in response to the application for leave and judicial review states that a report was issued, it was to establish that the application

for leave had become moot, even suggesting in his second factum that the passport could be seized again. The Court has already dealt with the argument about the *mandamus* application being moot. Moreover, the January 11, 2017 report cannot be used to transform a *mandamus* application for the return of a passport and the closure of an investigation into an attack on the section 44 report that resulted from the investigation. The return of a passport by way of *mandamus* is governed by certain rules, and the drafting of a section 44 report is regulated by very different rules. This explains why Rule 302 was created. The confusion between these rules complicated this case unnecessarily.

[52] When the report is ready to be issued, it is the officer's duty to allow the person to provide their version of the facts if they so wish. The applicant knew from the December 3, 2014 letter that he was suspected of misrepresentation, and it was established at the start of the interview that it was about his alleged employment in Burundi. He was clearly told that there was an allegation of military service, contrary to this statements.

[53] In *Canada (Minister of Public Safety and Emergency Preparedness) v. Cha*, 2006 FCA 126, [2007] 1 FCR 409, the Court of Appeal noted, "Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less" (paragraph 35).

[54] The applicant was seeking to challenge the authenticity of the documentary evidence on which the allegations were based. If I understand correctly, he wanted to do it even before a report was issued. However, as stated by the Federal Court of Appeal in *Sharma*, there is no duty to forward the report to provide an opportunity to respond prior to the section 44(2) referral. The

duty of fairness will have been met "(t)o the extent that the person is informed of the facts that have triggered the process is given the opportunity to present evidence and to make submissions, is interviewed after having been told of the purpose of that interview and of the possible consequences, is offered the possibility to seek assistance from counsel, and is given a copy of the report before the admissibility hearing" (paragraph 34). Despite his numerous allegations of breaches of procedural fairness, the applicant has not demonstrated any. The limited duties under the mechanism of section 44 were satisfied. If these allegations could have been of some relevance, which I doubt, they have not, in any event, been demonstrated as being part of the duties owed to him.

V. Serious question of general importance

[55] The applicant proposed the certification of a question in his reply memorandum:

> [TRANSLATION] 45. Thus, if the Court were to grant this application, the Applicant submits to the Court a certified question which would read as follows:
>
> *What are the criteria governing the maintenance of an unlawful seizure of a valid identity document when identity is not in doubt?*

This is clearly not a question that can be certified under section 74 of the Act. This provision is intended to regulate access to an appeal before the Federal Court of Appeal and the conditions must be present.

[56] In *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168, the Federal Court of Appeal specified the conditions to be met:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the

> immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, 176 N.R. 4, 51 A.C.W.S. (3d) 910 (F.C.A.) at paragraph 4; *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 (C.A.) at paragraphs 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129 at paragraphs 28, 29 and 32).

The question asked does not transcend the interests of the parties. It is limited to the particular facts surrounding the applicant's identity. This is not of general importance. The question, which is complex, does not really have anything to do with the case since the applicant shifted his focus to the issuing of the section 44 report. It must be admitted that, contrary to what the proposed question states, the applicant's identity is in doubt, since he described himself as a cow seller, which is obviously disputed. Also, there is no evidence that the seizure was unlawful. The proposed question appears to be based on a belief that the passport was seized for investigative purposes, when in fact the seizure was permitted and necessary for the purposes of the Act. The passport was seized to ensure that this travel document was available if a removal order needed to be enforced. That measure was necessary for the purposes of the Act. Finally, it is not clear how criteria could govern the maintenance of an unlawful seizure. This proposed question cannot be certified.

VI. Conclusion

[57] The application for judicial review in the nature of *mandamus* must therefore be dismissed, as the applicant has failed to demonstrate that the conditions for *mandamus* are

satisfied. Unlike the applicant, the respondent has not sought costs, and so none are awarded. No question will be certified.

JUDGMENT IN IMM-3099-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs. There is no question to be certified under section 74 of the *Immigration and Refugee Protection Act*.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Patricia Gamliel Alexandre Fournier	FOR THE APPLICANT
Caroline Doyon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dunton Rainville	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT