Federal Court  Cour fédérale

Date: 20170705

Docket: IMM-5338-16

Citation: 2017 FC 652

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 5, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

EKOMODI TOTSHINGO PATRICE

Applicant

and

MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] Patrice Ekomodi Totshingo filed an application for leave and judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The application is in the nature of *mandamus* and the applicant is seeking the following conclusion:

> [TRANSLATION]
>
> Compel Citizenship and Immigration Canada to immediately and without delay act on the first stage of sponsorship application

> **No. F000472465**, filed by the applicant on September 7, 2016, and received by CIC on September 14, 2016.

[2] Essentially, the application is based on what the applicant considers abnormal delays in the processing of his application to sponsor his spouse, who apparently currently lives in Belgium.

I. Introduction

[3] With respect to the conclusion added to the applicant's first memorandum of fact and law seeking an order from the Court to stop the alleged abusive questioning and searches of him at the border crossing when he returns to Canada, it is simply struck. It does not belong in a *mandamus* application. Moreover, the border police are not the responsibility of the Minister of Citizenship and Immigration, the respondent in this case. This confusion of roles is not permitted under rule 302 of the *Federal Courts Rules*, and a legal remedy must be put to the right party so that it can respond. This means that only the sponsorship application, at the first stage (establishment and admissibility), is before this Court.

II. The facts

[4] The sponsorship application was apparently received by the respondent on September 14, 2016. The applicant claims that he saw on an Internet site that the first stage of such an application should take 33 days. At the time of his application for judicial review, on December 23, 2016, the applicant argued that his application had still not been processed. According to him, this is sufficient for a *mandamus* based on the above-mentioned conclusion.

While the application for leave and judicial review was taking its course, the respondent determined, on May 25, 2017, that the applicant had met the eligibility requirements. Therefore, the applicant's sponsorship application had been successful at the first stage.

III. Is the application moot?

[5] As a result, the respondent filed a motion under rule 369 of the *Federal Courts Rules*, SOR/98-106 [Rules], for the Court to declare the application for *mandamus* now moot. The motion was filed on June 12, 2017, and the rule states that the respondent to the motion must serve and file a respondent's record within 10 days. From that point in time the moving party, in this case the respondent, would have had four days to reply. Clearly, it was impossible to meet those deadlines because the application for judicial review was to be heard on June 21, 2017. The applicant submitted a short memorandum on June 19, 2017, a memorandum that was received and that I consulted. The Court therefore chose to hear the parties on the possibility that the issue is now moot. The Court also chose to hear the parties regarding the merits of the case.

[6] On its face, the *mandamus* application is now moot. The applicant received what he asked for. There is no longer any remedy for this Court to grant.

[7] The leading case on this point, which cannot be disregarded, is *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. The following is stated on page 353 of that decision:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The 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. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[8] There is a discretionary power for hearing the matter despite the fact that it is moot. In *Borowski*, the Court identified three considerations in the exercise of that discretion:

(a) Because courts of justice resolve disputes in the context of the adversary system, an adversarial context must exist despite the mootness; for example, there could be collateral consequences which make the interest in the outcome of the dispute sufficiently substantial. The dispute here, which specifically deals with the first stage of the sponsorship process, does not give rise to any collateral consequences;

(b) Concern for judicial economy must be taken into account. Recurring matters and matters of brief duration that imply that the dispute will have disappeared before it is resolved could militate in favour of a hearing even though the issue is moot. In this case, the issue is neither recurring nor of brief duration. One may also consider under this heading the balance between the expenditure of judicial resources and the uncertainty in the law, which itself has a social cost. This case is clearly not that significant;

(c) The Court must note its law-making function. This consideration has no value in this case.

[9] The discretion must thus not be exercised in this case, a matter that is limited by a very specific factual framework. It seems evident to me that the substratum of the dispute disappeared when the remedy sought by Mr. Ekomodi Totshingo was granted. His file has now been sent for complete processing as he desired. I see no reason for this dispute, which is now moot, to be resolved on another basis.

IV. Broadening of the application

[10] However, the applicant, who is the respondent to the motion under rule 369, does not appear to request that a hearing take place despite the mootness of his recourse. Instead, in what he called the applicant's memorandum in reply to the respondent's motion dated June 12, 2017, he wanted to broaden the discussion to force the respondent to finalize the sponsorship application in the second stage of processing. As justification, the applicant claims to have reason to believe that his application would be [TRANSLATION] "blocked" at the second stage.

[11] Two reasons converge to rebut this claim. First, the applicant has no proof that his application will not be processed in a reasonable manner. He therefore cannot meet the *mandamus* test because this is mere speculation. As justification, the applicant claims that he has [TRANSLATION] "strong reasons to fear that the processing of his application at the second stage will take a long time;" (para 16). Such fears do not give rise to *mandamus*. It would be a completely new dispute while the Court does not have any evidence before it. One of the fundamental rules of our adversary system is that the parties present to the Court their argument based on a well-established procedural framework. Here, that framework has not been established. In fact, it would be a whole new framework for a whole new application that was not even considered when the applicant filed his application for leave and judicial review.

[12] Thus, the Court has no doubt that the *mandamus* application does not constitute a live controversy that merits being disposed of. The applicant received what he was asking for. That disposes of the issue before this Court.

V. *Obiter*

[13] I would add that if the Court had had to decide the merits of the application in the event that the remedy had not already been granted by the Minister, it would have been difficult to make a decision in favour of the applicant. The criteria that must be met for the issuance of a writ of *mandamus* have not been met in this case. In *Khalil v Canada (Secretary of State)* (FCA), [1994] FCR 661, the criteria set out by the same Court in *Apotex Inc. v Canada*, [1994] 1 FCR 742 (FCA), were reiterated. The Court of Appeal set out seven criteria:

> (a) there must be a public legal duty to act under the circumstances;
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> (b) the duty must be owed to the applicant;
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> (c) there must be a clear right to performance of that duty, and in particular the applicant must have satisfied all conditions precedent giving rise to the duty;
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> (d) no other adequate remedy is available to the applicant;
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> (e) the order sought must have some practical effect;
>
> (f) in the exercise of its discretion, the Court must find no equitable bar to the relief sought; and
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> (g) on a balance of convenience, an order of *mandamus* should issue.

[14] I am far from convinced that there is a public legal duty to act that is such that its performance gives him a clear right. In my opinion, an unreasonable delay may give rise to a *mandamus* application (*Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FCR 33 (FC)). But that is not the case here. The problem is that the applicant claims to have a clear right even though the time period that he complains of was only four or five months

compared with a standard (33 days) that he did not establish and that would resemble, at best, a service standard for files that do not have any problems.

[15] The Minister must be allowed a time frame for processing sponsorship applications. The evidence in the record demonstrates that processing times at the admissibility stage vary depending on the circumstances of the case. I see no reason to doubt such a simple statement. On the basis of the evidence presented to the Court, the respondent's additional memorandum states the following at paragraph 13:

> [TRANSLATION]
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> 13. The applicant's case required additional verifications. His sponsorship application was sent for second review to establish his admissibility because criminal offences were identified. As indicated by Ms. Ocquaye, the next step is thus to evaluate the inadmissibility identified to determine whether it will have an effect on the applicant's eligibility. Therefore, the applicant's application was not suspended but was instead placed in a queue (in chronological order) for that type of file because a review of his criminal record is now necessary to ensure that he meets the sponsor criteria. The applicant's file was assigned to Ms. Ocquaye on April 24, 2017.
>
> [Emphasis added.]

[16] The applicant claims that his criminal record is the result of a vendetta against him by people who are upset with him. Perhaps. But it is the Minister's duty to verify that information to rule on the applicant's eligibility at the initial stage. The applicant did not demonstrate that he has the clear right to performance of the duty. To the contrary, the Minister could be blamed for failing to carry out the required checks. The very nature of *mandamus* is to have a clear right

recognized. In this case, that right was not clear, but instead uncertain at best, because the applicant's circumstances meant that his case needed to be examined further. An applicant's desire alone to have a prompt response does not create a legal duty. As often noted, *mandamus* is an exceptional remedy when the right of an individual to performance of a duty is clear and not where the delay in performance of a duty may be the subject of debate.

VI. Conclusion

[17] It is therefore necessary to conclude that the application for judicial review, in the nature of *mandamus*, is moot and, therefore, the respondent's motion dated June 12, 2017, is well founded and is allowed. The judicial review is therefore dismissed. I will not allow the respondent's request for costs to be ordered against Mr. Ekomodi Totshingo. Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, states that no costs shall be payable unless there are special reasons for doing so. It seems fair to apply such a provision even though, legally, the application for judicial review is dismissed by a motion under rule 369 of the *Federal Courts Rules*. In any event, no specific reason was given for costs to be ordered and I exercise the discretion that exists under the Rules to not impose any in this case.

VII. Certified question

[18] Supposing that the matter had been considered on the merits, Mr. Ekomodi Totshingo purportedly believed that there was a serious question of general importance that could have been stated, pursuant to section 74 of the Act. As I understand it, the applicant wanted the question to deal with the discretion of an official, which cannot be exorbitant. This results from

complaints made over time by Mr. Ekomodi Totshingo concerning various incidents that he claims to be a victim of, including delays crossing the Canadian border when returning from abroad.

[19] The only issue before this Court was that it took four months for the applicant's sponsorship application to succeed at the first stage. This is a matter that is highly dependent on the facts of the case. It is difficult to see how it could be of general importance given the specificity of the facts in this case. The issue of the exercise of power, and of the exorbitant exercise of a discretionary power, is certainly a serious question according to the decision in *Roncarelli v Duplessis*, [1959] SCR 121, which dates back 60 years. But the facts of this case prevent it from having the required general importance.

[20] The Federal Court of Appeal specified the conditions under which certifying a question would be appropriate. It is now settled law that the question needs to not only be of general importance, but it also must dispose of the dispute, thus preventing a specific question from looking like a question of general importance (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, 372 DLR 4th 539; *Lai v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 258). Paragraph 9 of *Zhang v Canada*, 2013 FCA 168 seems to summarize the state of the law:

> [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).

In this case, the applicant tried to broaden a debate that was limited by the application that he made. The attitude of officials that he complains of is not before this Court on *mandamus*. Moreover, that issue does not dispose of the dispute because the issue here is the absence of a clear right to the remedy. As a result, no question will be certified.

ORDER in IMM-5338-16

THIS COURT ORDERS that the application for judicial review in the nature of *mandamus* is dismissed because it is moot. No question is certified.

There will be no costs.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5338-16
STYLE OF CAUSE:	EKOMODI TOTSHINGO PATRICE v MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 21, 2017
ORDER AND REASONS	ROY J.
DATED:	JULY 5, 2017

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