

Federal Court



Cour fédérale

Date: 20081120

Docket: IMM-1257-08

Citation: 2008 FC 1290

Ottawa, Ontario, November 20, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

MOUCTAR SQUARASY

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), dated March 14, 2008, for a declaratory judgment or a permanent injunction or an order requiring the respondent to assess the application for permanent residence based on humanitarian and compassionate grounds (H&C), supported by a sponsorship, which the applicant filed on February 2, 2008.

I. Facts

[2] The applicant, Mouctar Souaresy, was born on May 5, 1966, at Forecariah, in Guinea. He belongs to the Malinke ethnic group.

[3] He says that he joined the Guinean army on November 1, 1998. He allegedly participated in the defence of the Macenta region, which was attacked by rebels from Sierra Leone in September 2000. Following dissension in the Guinean army, he was arrested and accused of complicity with the Sierra Leonean rebels because his mother was of Sierra Leonean origin and because of his opinions about the assassination of his friend who was mistreated in prison.

[4] He was detained from August 25, 2001, to March 10, 2004, in conditions that he describes as extremely difficult. The applicant escaped and fled the country. He went through Mali, France and the United States. An arrest warrant was issued against him in April 2004.

[5] He arrived in Canada on March 30, 2004, and claimed refugee status on May 11, 2004. On August 3, 2006, the panel dismissed his claim under Articles 1F(a) and 1F(c) of the 1951 *Convention related to the Status of Refugees* (the Convention) because of his work in the Guinean army during the conflicts with the Sierra Leonean rebels.

[6] An application for judicial review of that decision was dismissed on November 22, 2006 (IMM-4708-06).

[7] In the meantime, the applicant met Ms. Fatim Touré, a Canadian citizen of Guinean origin, on May 5, 2005, and they were married on August 7, 2005.

[8] Prior to the panel's decision of August 3, 2006, an application for permanent residence sponsored by his wife in the Spouse or Common-law Partner in Canada class had been filed by the applicant's wife on February 8, 2006. This sponsorship application was denied on January 7, 2008. That decision was not challenged before the Court.

[9] On October 29, 2007, the applicant filed an application for a pre-removal risk assessment (PRRA). The application was rejected on January 10, 2008, and the unfavourable decision was communicated on February 20, 2008. The applicant challenged this decision, but the Federal Court dismissed his application for leave and judicial review on May 5, 2008, because he had not filed his record.

[10] At the beginning of February 2008, he filed an application for permanent residence on humanitarian and compassionate grounds, supported by his wife's sponsorship. In that application, he inserted a component of allegations of risk based on fresh evidence that had not been assessed at the PRRA.

[11] The applicant filed this application on March 14, 2008. He seeks the following relief:

[TRANSLATION]

SET ASIDE the removal officer's decision to deport Mr. Souaresy without a review of his file;

ORDER Citizenship and Immigration Canada to conduct an assessment of humanitarian and compassionate considerations in the applicant's file before another officer;

DECLARE that Mr. Souaresy's removal to his country would violate the Canadian Charter of Rights and Freedoms;

AND MAKE any other order that the Court considers appropriate.

[12] On April 4, 2008, Mr. Justice Lemieux dismissed the stay motion attached to the application for leave and judicial review of the PRRA decision.

[13] On the same day, Justice Lemieux granted the motion for a stay attached to the application for leave and judicial review filed on March 14, 2008, concerning "the lack of a decision on his urgent application for permanent residence in Canada on humanitarian and compassionate considerations" (paragraph 1, IMM-1257-08). The stay is in effect until the Court disposes of this application.

II. Application

[14] The respondent submits that this is an application for a writ of *mandamus* while the applicant submits that he is seeking a [TRANSLATION] “declaratory judgment” or an [TRANSLATION] “injunction”, although he will abide by the terminology chosen by the Court. At the hearing, after a number of questions from the Court, counsel for the applicant stated that the goal of this application is to permanently stay the removal of his client to his country.

[15] In support of this application, he alleges that there is fresh evidence and reiterates the same arguments that were made before Justice Lemieux when the stay was granted on April 4, 2008.

[16] The applicant has not cited any case that may lead the Court could to rule in his favour. However, he cites the following cases: *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, 166 A.C.W.S. (3d) 312; *Perea v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 432, 166 A.C.W.S. (3d) 312; *Omar v. Canada (Solicitor General)*, 2004 FC 1740, 44 Imm. L.R. (3d) 114; *Okoloubu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 83, 145 A.C.W.S. (3d) 889. He also refers the Court to some excerpts from works of authority.

[17] Upon analysis, the Court is of the view that the case law and authorities cited by the applicant cannot support the granting of the relief he is seeking.

[18] First, the Court concurs with the respondent that the applicant does not satisfy the tests for a *mandamus* to compel the respondent to make a decision on his sponsorship application. The H&C

application is dated the beginning of February 2008, and this application was filed on March 14, some 40 days later. This delay is not reasonable; hence, no writ of *mandamus* can issue.

[19] Second, the Court believes that the application for a permanent injunction must be denied. The applicant still has remedies available: a second PRRA or a stay motion if the respondent decides to enforce the removal order. The applicant already sought this relief successfully before Justice Lemieux.

[20] Third, the Court cannot make a decision in the abstract on an application for a declaratory judgment. In this case, a first PRRA application has already been rejected, and there has not yet been a decision on the alleged fresh evidence in the H&C and sponsorship application.

[21] However, in the light of the circumstances, the Court would suggest to the respondent that high priority be given to assessing the applicant's H&C and sponsorship application because the new documentation filed by the applicant appears, at the very least, to support seriously his allegations of risk if he were to return to his country.

[22] The application for judicial review is dismissed.

[23] The applicant proposed that the following question be certified:

[TRANSLATION]

Should the fresh evidence obtained after an administrative decision on humanitarian and compassionate grounds or on the risk of return, that is relevant and conclusive on the main issue, be reviewed prior

to deportation under section 24 of the Canadian Charter of Rights and Freedoms when an attempt is being made to establish a violation of the Charter?

[24] The respondent opposes this question and argues that, in addition to being purely moot and premature, this question does not seek to clarify an undecided legal point of general importance. The Court concurs with this suggestion.

JUDGMENT

THE COURT ORDERS that the application for judicial review is dismissed. No question is certified.

“Michel Beaudry”

Judge

Certified true translation
François Brunet, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1257-08

STYLE OF CAUSE: **MOUCTAR SOUARESY**
and
MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: October 30, 2008

REASONS FOR JUDGMENT
AND JUDGMENT BY: Mr. Justice Beaudry

DATED: November 20, 2008

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