Federal Court  Cour fédérale

Date: 20190717

Docket: T-643-16

Citation: 2019 FC 945

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, July 17, 2019

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

JEAN-PIERRE MARTIN SIBOMANA
JEANNETTE MUKASINE
CHANTAL UWIDUHAYE
RUTIGUNGA HERVÉ SIBOMANA
ITUZE LOIC SIBOMANA
ISHEMA TRACY SIBOMANA

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
FRANÇOIS JOBIDON
ÉMELIE AUDET
N. M. EGAN
RAOUL DELCORDE
HUBERT ROISIN
PATRICK STEVENS

Defendants

ORDER AND REASONS

I. Introduction

[1] This is a motion for summar y judgment brought by the defendants under rules 213 and 215 of the *Federal Courts Rules,* SOR/98-106 [the Rules].

[2] The defendants essentially argue that the plaintiffs' action is certain to fail, that the defendants have not committed any fault because the alleged acts are lawful, and that a part of the action is time-barred.

[3] Mr. Sibomana, the principal plaintiff, has not filed any affidavit in support of the responding motion record and essentially maintains that the motion for summary judgment is a disguised motion to strike, that the defendants are failing to comply with the Court's orders to stop making motions, and that there are numerous issues to decide at trial.

[4] For the reasons below, this Court finds that the defendants have met their burden of demonstrating that there is no genuine issue for trial with respect to the action, and the motion will be granted (*Canada (Citizenship and Immigration) v Houchaine,* 2014 FC 342 at para 26).

II. Context/evidence

[5] The plaintiffs are Belgian citizens and members of the same family. In 2008, Mr. Sibomana arrived in Canada and obtained a work permit valid until May 2011. In 2009, his family came to join him.

[6] On June 25, 2010, N. M. Egan, an immigration officer at Citizenship and Immigration Canada (CIC), refused Mr. Sibomana's initial application for permanent residence, filed under client ID 6199-9991.

[7] CIC's FOSS-ATIP records show that discussions took place between CIC and Mr. Sibomana regarding an incident described as theft in 2006 in Belgium, that Mr. Sibomana is inadmissible under paragraph 36(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] and that a refusal letter was sent to him on June 25, 2010, (defendants' motion record at p 131; affidavit of Natalie Desalliers, Exhibit A).

[8] Starting in May 2011, Mr. Sibomana took various steps to obtain a new work permit but did not succeed. In October 2011, the CIC-Vegreville processing centre refused the application that he had sent by mail. On October 29, 2011, Mr. Sibomana returned with his family to the Armstrong land border crossing to apply for a work permit in the information technology class and a related document for each member of his family. In support of his application for a new work permit, Mr. Sibomana submitted a letter of offer of employment from a company and a valid Quebec acceptance certificate (CAQ).

[9] François Jobidon, a Canada Border Services Agency (CBSA) officer, doubted the genuineness of Mr. Sibomana's letter of offer. His research showed that the company's offices were empty and that the building in which it was allegedly located was owned by Mr. Sibomana. On November 11, 2011, Mr. Jobidon met with Mr. Sibomana again, refused to issue a work permit and instead established a report under subsection 44(1) of the Act against each family member (defendants' motion record at pp 8–25; affidavit of Georges-Éric Hivon, Exhibit A).

Mr. Jobidon declared Mr. Sibomana and his family members inadmissible under section 41 of the Act for failing to comply with paragraph 20(1)(a) of the Act, finding that they were seeking to become permanent residents without holding the required visas. On the same day, a Minister's delegate issued an exclusion order against each family member under subsection 44(2) of the Act on the same grounds (defendants' motion record at pp 26–38; Mr. Hivon's affidavit, Exhibit A). Both reports show Mr. Sibomana's client ID as 6001-2088, while the application for permanent residence and the refusal letter dated June 25, 2010, are filed under a different client ID as stated above (defendant's motion record at pp 8, 26; affidavit of Georges-Éric Hivon, Exhibit A).

[10] On November 25, 2011, Mr. Sibomana and his family applied for judicial review of the decision and, on July 5, 2012, the Federal Court granted the plaintiffs' application for judicial review, set aside the exclusion orders and referred the case back to a different Minister's delegate (*Sibomana v Canada (Citizenship and Immigration)*, 2012 FC 853 [*Sibomana 1*]). The Court also found that there had not been any breach of procedure with respect to the decision-making that led to the exclusion order and noted that the plaintiffs had not "detailed the alleged breach and the parties [had] not described the conduct of the interview of November 11 with Mr. Sibomana" (*Sibomana* at para 22).

[11] On June 13, 2013, Mr. Sibomana arrived in Canada via the Québec City airport and requested admission. On the CBSA form that he signed, Mr. Sibomana confirmed that his home address was in Belgium and that he was planning to stay in Canada for 16 days (defendants' motion record at p 227; affidavit of Émélie Audet, Exhibit A). Ms. Audet, a CBSA officer, met with Mr. Sibomana and noted that he appeared to be living in Québec City, even though he had no status in Canada, and that he had allegedly committed a theft in Belgium in 2006 (defendants'

motion record at pp 229–36; affidavit of Ms. Audet, Exhibit B). She therefore established a report under subsection 44(1) of the Act stating that Mr. Sibomana was inadmissible under paragraph 36(2)(c) of the Act for offences in Belgium (defendants' motion record at pp 240–41; affidavit of Ms. Audet, Exhibit D) and she issued a notice of arrest under section 55 of the Act (defendants' motion record at p 238; affidavit of Ms. Audet, Exhibit C). A Minister's delegate referred the report to an admissibility hearing under subsection 44(2) of the Act to determine whether Mr. Sibomana is a person described in paragraph 36(2)(c) of the Act (defendants' motion record at p 98; affidavit of Mr. Hivon, Exhibit E). The reports show the client ID as 6001-2088 (defendants' motion record at pp 98, 240; affidavit of Mr. Hivon, Exhibit E; affidavit of Ms. Audet, Exhibit D). Mr. Sibomana was detained and, on June 17, 2013, a member of the Immigration Division reviewed his detention and ordered his release, instructing him not to work in Canada without a work permit (defendants' motion record at p 103; affidavit of Mr. Hivon, Exhibit F). On July 25, 2013, the Immigration Division determined that the Minister had not proven *mens rea*, that is, the guilty intent to commit theft, with respect to Mr. Sibomana's case, an essential element of the offence of theft under section 322 of the *Criminal Code*, RSC 1985, c C-46, and that Mr. Sibomana was therefore not a person described in paragraph 36(2)(c) of the Act as alleged in the subsection 44(2) report (defendants' motion record at pp 105–11; affidavit of Mr. Hivon, Exhibit G).

[12] As part of these procedures, Mr. Jobidon contacted the Belgian authorities at the Embassy of Belgium for information on Mr. Sibomana's Belgian criminal record (defendants' motion record at pp 113–15; affidavit of Mr. Hivon, Exhibit H).

[13] In April 2016, Mr. Sibomana brought this action against the defendants and sought a series of remedies with respect to the processing of his immigration case by CIC and CBSA officials.

[14] In late June 2016, defendants Her Majesty the Queen in Right of Canada, federal ministers John McCallum and Ralph Goodale and federal public servants François Jobidon and Émélie Audet, represented by the Attorney General of Canada, brought a motion to strike Mr. Sibomana's action, on the ground that it disclosed no reasonable cause of action. Legal immunity was claimed for defendants Raoul Delcore, Hubert Roisin and Patrick Stevens, since they were Belgian nationals on duty in Canada on behalf of their government.

[15] On August 18, 2016, Justice Roy dismissed the defendants' motion to strike. Taking the facts pleaded by Mr. Sibomana as true, Justice Roy found that it was not plain and obvious that Mr. Sibomana's action was certain to fail (*Sibomana v Canada*, 2016 FC 943 [*Sibomana 2*]). However, Justice Roy struck ministers McCallum and Goodale as defendants and ordered that references to remedies sought in favour of any person other than Mr. Sibomana, in this case the members of his family, be struck because Mr. Sibomana was not authorized to act on behalf of another.

[16] On August 30, 2016, the plaintiffs filed a re-amended statement of claim and, on September 30, 2016, the defendants filed their defence.

[17] On November 24, 2016, Justice Shore stayed the proceedings until a decision could be rendered on a possible application for leave and for judicial review of CIC's decision dated

June 25, 2010, which refused Mr. Sibomana permanent residence. On February 6, 2017, Mr. Sibomana filed an application for leave and for judicial review of this decision (defendants' motion record at pp 143–53; affidavit of Ms. Desalliers, Exhibit D), and this Court refused it on April 20, 2017. On June 28, 2017, the stay of proceedings was lifted.

[18] On January 17, 2018, Justice LeBlanc dismissed three motions brought by Mr. Sibomana (1) for default judgment; (2) for summary judgment; and (3) to allow an amendment to the statement of claim and to force the defendants to disclose documents deemed relevant. Regarding the Belgian defendants, Justice Leblanc stated that "the Court therefore has no authority over them" (*Sibomana v Canada*, 2018 FC 43 at para 13 [*Sibomana 3*]).

[19] On March 12, 2018, Mr. Sibomana and his family members were granted permanent resident status in Canada (defendants' motion record at p 221; affidavit of Ms. Desalliers, Exhibit G).

III. The action

[20] On August 30, 2016, Mr. Sibomana, his spouse and their four children filed a re-amended statement of claim in which they essentially sought the following remedies: (1) allow the action and the motion for default judgment; (2) by default judgment, order various groups of defendants to pay amounts of $36.5 million, $25 million and $5 million for civil wrongdoing, for violation of their rights under sections 7, 8, 12, 13, 15 and 24 of the Charter, and for unlawful criminal proceedings; (2) order the Minister of Citizenship and Immigration to issue permanent resident visas and grant them a waiver enabling them to obtain Canadian citizenship cards immediately;

(3) order and prohibit a series of measures; (4) if the default judgment is not allowed, order the defendants to pay [TRANSLATION] "1/1,000 or 1/1,500 of the total amount claimed in this dispute, namely $66,500,000.00 in damages incurred by the plaintiffs as a result of the defendants' failure to file a defence"; and (5) order a series of measures.

[21] Essentially, as noted by Justice Leblanc in *Sibomana 3*, Mr. Sibomana's central allegations can be grouped as follows:

1. On June 25, 2010, CIC refused Mr. Sibomana's permanent residence application because of inadmissibility on account of a theft that he allegedly committed in Belgium and reportedly failed to declare to the Canadian authorities; in addition to denying the commission of this crime, Mr. Sibomana says that he was never advised of the CIC's decision dated June 25, 2010, deeming him inadmissible for permanent resident status, which deprives him of his right to have it judicially reviewed and makes his status in Canada precarious, considering all the resulting inconveniences for him and his family. He blames CIC for having intentionally hidden this decision and even created a "ghost file" of inadmissibility that will haunt his subsequent reports with CIC for the sole purpose of causing him harm. In addition, Mr. Sibomana alleges that CIC failed to conduct an equivalency exercise between Belgian and Canadian criminal law and that his application for permanent residence was improperly and unlawfully refused;

2. On November 11, 2011, at the Armstrong land border crossing, Mr. Jobidon issued an exclusion order against Mr. Sibomana on account of his inadmissibility, which was subsequently set aside by a decision of this Court (*Sibomana 1*). Mr. Sibomana alleges that, on that day, Mr. Jobidon was aggressive and contemptuous, shouted racist insults and deliberately lied in his report when he stated that the plaintiffs had never applied for permanent residence. In addition, Mr. Sibomana claims that he should have been informed at that time that he had been eligible for permanent residence since 2011 (statement of claim at para 110);

3. On June 13, 2013, as he was returning from Europe via the Québec City airport, Mr. Sibomana was arrested and placed in detention for a few days by Ms. Audet because he was inadmissible and there was a risk that he would avoid an examination and potential removal. He alleges that the arrest was made without a warrant and on the basis of false accusations. He further alleges that Ms. Audet withheld his certificate of a clean criminal record from Belgium;

4. Mr. Sibomana alleges that the communications between Officer Jobidon and Patrick Stevens, a Belgian police officer and liaison officer in Canada, were

> unlawful, since they were subject to the *Treaty Between the Government of Canada and the Government of the Kingdom of Belgium on Mutual Legal Assistance in Criminal Matters* [Treaty], and contrary to the *Privacy Act*, RSC 1985, c P-21. In addition, he alleges that Mr. Jobidon and Mr. Stevens conspired to make up false accusations against him.

IV. The defence

[22] On September 30, 2016, the defendants filed their defence.

[23] Regarding the refusal dated June 25, 2010, the defendants respond that (1) Ms. Egan conducted an equivalency exercise between Belgian and Canadian law; (2) the refusal letter dated June 25, 2010, was sent to Mr. Sibomana, according to the Field Operations Support System [FOSS] notes; (3) CIC cannot reproduce a copy of the letter because it was disposed of in accordance with CIC's records retention policy; and (4) Mr. Sibomana did not [TRANSLATION] "lose" the opportunity to apply for judicial review of the decision because the time limit was calculated from the time he became aware of the decision.

[24] Regarding the events on November 11, 2011, the defendants respond that (1) Mr. Jobidon states in his report that the plaintiffs never applied for permanent residence because the initial application for permanent residence had a different client ID of which Mr. Jobidon was unaware; (2) this part of the action is time-barred under section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 [Crown Liability Act] and article 2925 of the *Civil Code of Québec*; (3) the Federal Court's reasons do not criticize Mr. Jobidon's conduct; and (4) the Court found that Mr. Jobidon's concerns were valid because, although CBSA decisions may cause harm to foreign nationals in Canada, the decisions cannot, in themselves, be a source of wrongdoing or harm (*Sibomana 2* at para 19).

[25] Regarding the arrest on June 13, 2013, the defendants respond that (1) no charges were laid in criminal court; (2) at the hearing before the Immigration Division, Mr. Sibomana admitted that he had been convicted of theft in 2006; (3) Mr. Sibomana told Ms. Egan that criminal record entries are deleted after five years and, moreover, he himself submitted his criminal record to the Immigration Division; and (4) the arrest without warrant and the detention were in accordance with subsections 55(2) and 57(1) of the Act.

[26] Regarding the communications between Mr. Jobidon and Mr. Stevens, the defendants respond that (1) the Treaty does not apply because there is no criminal or penal aspect; (2) Mr. Jobidon was acting within the scope of the duties assigned in subsection 5(1) of the *Canada Border Services Agency Act*, SC 2005, c 38 [CBSA Act] and paragraph 4(2)(a) of the Act; and (3) the communications do not contravene section 7 of the *Privacy Act*.

V. Motion for summary judgment

[27] Under rules 214 and 215 of the Rules, it is possible in some circumstances to obtain a summary judgment, that is, to obtain a judgment without holding a trial. The purpose of this proceeding is to allow the Court to summarily dispense "with actions that ought not to proceed to trial because they do not raise a genuine issue to be tried" (*Canada (Citizenship and Immigration) v Houchaine*, 2014 FC 342 at para 26 [*Houchaine*]). In other words, it allows the Court to summarily dispense "with cases which ought not proceed to trial because there is no genuine issue to be tried in respect of the claim" (*Timm v Canada*, 2015 FC 1391 at para 48 [*Timm*]).

[28] Thus, upon a motion for summary judgment, the Court's role is to determine whether the success of the position put forward by the party against whom the motion is brought "is so doubtful that [the position] does not deserve consideration by the trier of fact at a future trial" (*Houchaine* at para 27; *Granville Shipping Co v Pegasus Lines Ltd SA*, [1996] FCJ No 481 (Fed TD)). The burden is on the party seeking the summary judgment (*Timm* at para 49), in this case, the defendants.

[29] It is established case law that, for a motion for summary judgment, the parties must administer their evidence by affidavit and cross-examination out of court (*Yodjeu Ntemde v Canada*, 2018 FC 410 at paras 53–55). Rule 214 of the Rules specifically states that a response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings and that it must set out specific facts and adduce the evidence showing that there is a genuine issue for trial. Allegations alone are not enough; the parties must put their best foot forward and not merely state that more and better evidence will (or may) be available at trial (*Rude Native Inc v Tyrone T Resto Lounge*, 2010 FC 1278 at para 16 [*Rude Native*]).

[30] In this case, however, it should be noted that Mr. Sibomana did not file any affidavit in support of the response to the defendants' motion.

A. Defendants' position

(1) Evidence

[31] In support of their motion for summary judgment, the defendants filed the affidavits of (1) Georges-Éric Hivon, Regional Program Officer, Canada Border Services Agency (CBSA),

sworn on June 27, 2018; (2) Natalie Desalliers, Litigation Analyst, Case Management Branch, National Headquarters, Immigration, Refugees and Citizenship Canada, sworn on July 5, 2018; and (3) Émélie Audet, Border Services Officer, CBSA, sworn on June 30, 2018.

[32] Mr. Hivon filed the following documents: (1) in a bundle, the reports established under subsection 44(1) of the Act, the observations recorded by CBSA officer Jobidon regarding the plaintiffs, and the exclusion orders against the plaintiffs, all dated November 11, 2011; (2) Justice Noël's decision in *Sibomana 1*; (3) an email message dated October 30, 2011, from officer Jobidon to Philippe Anctil of the Quebec Ministère de l'Immigration et des Communautés culturelles regarding Mr. Sibomana and the reply from Mr. Anctil, dated November 2, 2011; (4) in a bundle, the results of Internet research into Mr. Sibomana's employer conducted by officer Jobidon in October 2011; (5) in a bundle, the decision of the Minister's delegate, dated June 17, 2013, to refer to an admissibility hearing the report established by CBSA officer Audet under subsection 44(2) of the Act on June 13, 2013, and a copy of the report; (6) the order for Mr. Sibomana's release, dated June 17, 2013, issued by a member of the Immigration Division; (7) the Immigration Division's decision, dated July 25, 2013; (8) email messages between officer Jobidon and liaison officer Stevens in October 2012 regarding Mr. Sibomana; and (9) in a bundle, email messages sent and received by officer Jobidon in October 2012 in an attempt to obtain a copy of the Belgian judgment concerning Mr. Sibomana.

[33] Ms. Desalliers filed the following documents: (1) FOSS notes regarding Mr. Sibomana's application for permanent residence that was refused on June 25, 2010; (2) an excerpt from the CIC manual *OP 1—Procedures*, dated March 15, 2016, on records retention and disposal procedures; (3) page 19 of 27 of the detailed records retention and disposal plan of Immigration,

Refugees and Citizenship Canada (IRCC), dated November 3, 2016; (4) the application for leave and for judicial review filed on February 6, 2017, by the plaintiffs against the CIC's decision dated June 25, 2010, file no. IMM-526-17; (5) in a bundle, the plaintiffs' memorandum of fact and law, the defendant's memorandum and the plaintiffs' reply memorandum filed in file no. IMM-526-17; (6) Justice Martineau's order dated April 20, 2017, dismissing the plaintiffs application for leave and for judicial review in file no. IMM-526-17, certified on April 26, 2017; (7) in a bundle, a letter dated March 29, 2018, from the IRCC to Mr. Sibomana's spouse, approving their application for permanent residence, and a more legible document confirming the permanent residence granted; and (8) the FOSS entry regarding CIC's file on Mr. Sibomana under client ID 6001-2088.

[34] Officer Audet filed the following documents: (1) the declaration card completed by Mr. Sibomana upon his arrival in Canada on June 13, 2013; (2) the observations recorded in FOSS by officer Audet on June 13, 2013, with respect to the questioning of Mr. Sibomana; (3) the notice of arrest completed in accordance with section 55 of the Act, dated June 13, 2013; and (4) a report established under subsection 44(1) of the Act, dated June 13, 2013.

(2) Arguments

[35] The defendants essentially argue that the plaintiffs' first allegation does not raise any issue for trial because (1) the FOSS summary shows that the refusal letter dated June 25, 2010, was sent on the same day to Mr. Sibomana at his email address (defendants' motion record at p 131; affidavit of Ms. Desalliers, Exhibit A), so that the risk of non-delivery rests with Mr. Sibomana (*Zhang v Canada (Citizenship and Immigration)*, 2010 FC 75 at para 14; *Wu v*

Canada (Citizenship and Immigration), 2018 FC 554 at para 7 [*Wu*]); (2) the defendants failed to file the refusal letter not because of some conspiracy but because of CIC's policy of disposing of certain documents after a given period of time; (3) the plaintiffs admit that they became aware of the refusal decision on June 17, 2013, and nevertheless did not apply for leave and judicial review in June 2013; (4) Mr. Sibomana applied for leave and judicial review of the refusal decision on February 6, 2017, in file no. IMM-526-17, and the application for leave was dismissed on April 20, 2017; and (5) the plaintiffs became permanent residents of Canada on March 31, 2018.

[36] The defendants argue that the plaintiffs' second allegation is based on statements allegedly made by officer Jobidon on November 11, 2011, and that this part of the action was therefore already time-barred when the statement of claim was filed (section 32 of the Crown Liability Act; article 2925 of the *Civil Code of Québec)*. They note that a time-barred action may be dismissed by means of a motion for summary judgment (*Byer v Canada*, 2003 FCT 67, aff'd *Byer v Canada*, 2004 FCA 65; *Riva Stahl GmbH v Combined Atlantic Carriers GmbH et al* (1999), 243 NR 76 (FCA) at para 11; *Paszkowski v Canada (Attorney General)*, 2006 FC 198 at paras 45–71; *Archer v Pollydore*, 2001 FCT 871 at para 21).

[37] Regarding the plaintiffs' third allegation, the defendants argue that Mr. Sibomana was arrested on June 13, 2013, and released on June 17, 2013, in accordance with subsections 55(2) and 57(1) of the Act because there were reasonable grounds to believe that he would evade an examination. In addition, the defendants point out that the plaintiffs refer to a number of criminal law concepts in their statement of claim, while proceedings before the Immigration Division are administrative in nature, as confirmed by Justice Roy in his 2016 decision (*Sibomana 2* at

para 23). The defendants further state that, at the hearing, officer Audet did not attempt to withhold the evidence of his Belgian criminal record, since Mr. Sibomana had told officer Audet that his offence would already have been expunged and since, at the hearing June 17, 2013, Mr. Sibomana himself filed that evidence and admitted the conviction.

[38] Lastly, regarding the plaintiffs' fourth allegation, the defendants argue that the communications between the CBSA and Belgian authorities did not contravene section 7 and 8 of the *Privacy Act*, since the information was disclosed for the purpose for which it was obtained (paragraph 8(2)(a) of the *Privacy Act*; *Igbinosun v Canada (Minister of Citizenship and Immigration)* (1994), 87 FTR 131 (FC) at para 6; *Moin v Canada (Citizenship and Immigration)*, 2007 FC 473 at paras 35–38). The communications also did not contravene articles 14 to 17 of the Treaty, since the Treaty does not apply to matters that do not have a criminal or penal aspect.

B. Plaintiffs' response

(1) Evidence

[39] The plaintiffs have not filed an affidavit in response to the motion for summary judgment. Their responding motion record instead contains a [TRANSLATION] "list of documents and materials from the defendants' affidavits of documents", a page that contains only the words [TRANSLATION] "LISTEN to the Excerpt from the Federal Court recording of the hearing on June 28, 2017, in Montréal, by the Honourable Justice Luc Martineau, jfc.: Lifting the stay of the plaintiffs' action T-643-16", and four appendices, namely (1) the reasons for the assessment of costs granted by the Court following Justice Leblanc's dismissal of Mr. Sibomana's three motions, as well as a letter dated September 25, 2018, from the defendants to Mr. Sibomana;

(2) the email messages between Mr. Jobidon and Mr. Stevens, already included in the defendants' motion record (at pp 113–14); (3) the request, in accordance with rule 9, from the Court Registry to CIC, and the latter's response, sent as part of Mr. Sibomana's application for leave and for judicial review, as well as the FOSS-ATIP notes already included in the defendants' motion record (at pp 130–31); and (4) documents regarding the steps that Mr. Sibomana took to obtain the refusal letter dated June 25, 2010.

[40] Rule 363 of the *Federal Courts Rules* states that a party to a motion shall set out in an affidavit any facts to be relied on by that party in the motion that do not appear on the Court file. Moreover, rule 214 of the Rules specifically states that a response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings, and it must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

[41] In *Canada (Attorney General) v Lameman*, 2008 SCC 14 [*Lameman*], the Supreme Court of Canada confirmed that, for a motion for summary judgment, each party must put its best foot forward, providing proof and not relying on mere allegations or the pleadings (*Lameman* at para 11). A motion for summary judgment cannot be judged "on suppositions about what might be pleaded or proved in the future" (*Lameman* at para 19). The Federal Court of Appeal also recognized that a party wishing to contradict the facts in the court record must do so by affidavit (*Pfeiffer & Pfeiffer Inc v Canada (Deputy Superintendent)*, 2003 FCA 391 at para 6).

[42] In this case, the documents attached to the plaintiffs' memorandum are not attached to any affidavit. Consequently, the documents that are not part of the plaintiffs' evidence already on the record cannot be filed, and the Court cannot take them into account.

(2) Arguments

[43] Mr. Sibomana responds that the defendants' motion for summary judgment is in fact a disguised motion to strike, which was already dismissed by Justice Roy on August 18, 2016 (Mr. Sibomana's written submissions at para 10). He relies on the order dated January 17, 2018, by Justice LeBlanc, who dismissed the plaintiffs' motion for summary judgment and maintained that the defendants should stop clogging up the file and unfairly delaying their action (Mr. Sibomana's written submissions at paras 11–18).

[44] Mr. Sibomana further states that the defendants' motion is on its face improper and inadmissible, without providing details, and claims damages of $16,000 (Mr. Sibomana's written submissions at paras 19, 27). He argues that the orders of justices Roy, Martineau and LeBlanc show that their action warrants a trial on the merits (Mr. Sibomana's written submissions at para 26) and suggests that, if the defendants had valid arguments, they would proceed immediately to trial on the merits (Mr. Sibomana's written submission at para 29).

[45] Mr. Sibomana claims that he never received the decision dated June 25, 2010, and that, despite his written requests, the CBSA refused to inform him of its decisions (Mr. Sibomana's written submissions at para 32). In addition, he deplores the fact that he never received the

inadmissibility report dated June 25, 2010, and that CIC is withholding the grounds for inadmissibility (Mr. Sibomana's written submissions at paras 34–35).

[46] Mr. Sibomana argues that [TRANSLATION] "all the allegations written in the defendants' memorandum are untrue and invalid", and he maintains his position that the decision dated June 25, 2010, does not exist (Mr. Sibomana's written submissions at paras 37–38). Mr. Sibomana alleges that the defendants are lying and conspiring (Mr. Sibomana's written submissions at paras 39–49).

[47] To demonstrate that a trial is required, Mr. Sibomana then lists 24 questions, some repeated, that the Court would have to decide at trial on the merits (Mr. Sibomana's written submissions at paras 50–74).

[48] At the hearing, Ms. Mukasine, Mr. Sibomana's spouse, also made submissions for herself. She argued that the case should proceed on the merits so that she could speak, because she [TRANSLATION] "still had questions", and so that the questions could be discussed [TRANSLATION] "at length and in detail" (hearing transcript at p 130). She wanted to know why Ms. Egan had withheld her 2010 decision from them, why Mr. Jobidon was continuing to pursue their case and why Mr. Sibomana was not prevented from travelling despite being inadmissible (hearing transcript at p 132). She wanted to be heard and she wanted to free herself by speaking.

VI. Discussion

A. The allegations

(1) Allegation 1

[49] The FOSS notes show that CIC sent the permanent residence refusal letter on June 25, 2010 (defendants' motion record at p 131; affidavit of Ms. Desalliers, Exhibit A). The notes also show that Ms. Egan conducted an equivalency exercise between Belgian and Canadian law (defendants' motion record at p 131; affidavit of Ms. Desalliers, Exhibit A).

[50] Where the defendant has established on a balance of probabilities that the correspondence has been sent, the plaintiff is presumed to have received it and must rebut the presumption with credible evidence (*Wu* at para 7). In this case, Mr. Sibomana has not filed an affidavit to contradict the FOSS notes.

[51] Moreover, Mr. Sibomana admits being aware of the reasons that he was refused permanent residence on June 17, 2013, through the FOSS notes of the CBSA, but so far he has not initiated a challenge by way of judicial review (amended statement of claim at paras 101–2).

[52] CIC's policy is to dispose of permanent residence refusal letters after two years, which explains the fact that the copy of the letter sent to Mr. Sibomana is no longer available (defendants' motion record at p 142; affidavit of Ms. Desalliers, Exhibit C).

[53] On February 6, 2017, Mr. Sibomana filed an application for leave and for judicial review against the decision dated June 25, 2010, which was dismissed by Justice Martineau (defendants' motion record at pp 144–53, 216; affidavit of Ms. Desalliers, exhibits D, F).

[54] Lastly, on March 12, 2018, Mr. Sibomana and his family members obtained permanent resident status in Canada (defendants' motion record at p 221; affidavit of Ms. Desalliers, Exhibit G).

(2) Allegation 2

[55] On November 11, 2011, at the Armstrong border crossing, officer Jobidon established an inadmissibility report under subsection 44(1) of the Act against Mr. Sibomana (defendants' motion record at pp 8–9; affidavit of Mr. Hivon, Exhibit A).

[56] On the same day, a Minister's delegate issued an exclusion order against Mr. Sibomana (defendants' motion record at pp 26–27; affidavit of Mr. Hivon, Exhibit A).

[57] Mr. Sibomana alleges that Mr. Jobidon was aggressive during the meeting. However, he did not provide any affidavit in support of this allegation, while Justice Noël, as part of the judicial review of this decision, notes that "the parties have not described the conduct of the interview of November 11 with Mr. Sibomana" (*Sibomana 1* at para 22).

[58] Mr. Sibomana also alleges that Mr. Jobidon [TRANSLATION] "deliberately lied" when he stated that he was unaware of his application for permanent residence. However, the application for permanent residence was filed under a different client ID, namely 6199-9991 (defendants'

motion record at p 127; affidavit of Ms. Desalliers, Exhibit A). In the inadmissibility report by Mr. Jobidon, Mr. Sibomana's client ID is 6001-2088 (defendants' motion record at p 8; affidavit of Mr. Hivon, Exhibit A).

[59] Moreover, this part of the action is time-barred. Article 2925 of the *Civil Code of Québec* states, "An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise determined". When the statement of claim was filed, on April 21, 2016, more than three years had passed since November 11, 2011.

(3) Allegation 3

[60] Upon his arrival at the Québec City airport on June 13, 2013, Mr. Sibomana was questioned by Ms. Audet. According to officer Audet's notes, Mr. Sibomana stated that he was on a visit to attend a marriage but did not appear to know the names of the couple (defendants' motion record at p 231; affidavit of Ms. Audet, Exhibit B). As well, he initially stated that he was staying in a motel or at someone's home but later stated that he owned a duplex in Québec City (defendants' motion record at pp 232–33; affidavit of Ms. Audet, Exhibit B). In addition, he stated that he was working in Brussels and was on leave for three and a half weeks but then admitted that he was in Québec City from October 17, 2012, to June 9, 2013 (defendants' motion record at pp 232–34; affidavit of Ms. Audet, Exhibit B).

[61] There is nothing to suggest that Ms. Audet arrested him without a warrant and placed him in detention in a manner contrary to the Act (paragraph 55(2)(a) of the Act). Moreover, Ms. Audet established a report under subsection 44(1) of the Act, finding Mr. Sibomana

inadmissible under paragraph 36(2)(c) of the Act (defendants' motion record at pp 240–41; affidavit of Ms. Audet, Exhibit D). A Minister's delegate then referred the report to an admissibility hearing under subsection 44(2) of the Act (defendants' motion record at p 98; affidavit of Mr. Hivon, Exhibit E).

[62] A few days later, a member of the Immigration Division reviewed Mr. Sibomana's detention and released him with conditions (defendants' motion record at p 103; affidavit of Mr. Hivon, Exhibit F).

[63] Contrary to Mr. Sibomana's allegation, there is nothing to suggest that Ms. Audet [TRANSLATION] "withheld" his criminal record before the Immigration Division. The evidence shows that Mr. Sibomana himself admitted his conviction for theft and filed his criminal record. On July 25, 2013, the Immigration Division determined that Mr. Sibomana was not a person described in paragraph 36(2)(c) of the Act as alleged (defendants' motion record at p 111; affidavit of Mr. Hivon, Exhibit G). In its decision, the Immigration Division noted that [TRANSLATION] "the Minister's evidence regarding the allegation of theft consists . . . of Mr. Sibomana's admission to having been convicted of theft in absentia in Belgium in 2006" and that [TRANSLATION] "the computer entry in the database . . . also refers to a conviction for theft. This information is taken from documents produced by [Mr. Sibomana] as part of his application for permanent residence" (defendants' motion record at pp 106–7; affidavit of Mr. Hivon, Exhibit G).

(4) Allegation 4

[64] On October 3, 2012, Mr. Jobidon wrote to Mr. Stevens for information to help him establish his inadmissibility report (defendants' motion record at 113–14; affidavit of Mr. Hivon, Exhibit H). Mr. Jobidon's efforts revealed no wrongdoing.

[65] Paragraph 5(1)(a) of the CBSA Act sets out the mission of the CBSA: "The Agency is responsible for providing integrated border services that support national security and public safety priorities and facilitate the free flow of persons and goods, including animals and plants, that meet all requirements under the program legislation, by supporting the administration or enforcement, or both, as the case may be, of the program legislation".

[66] Paragraph 4(2)(a) of the Act states that the Minister of Public Safety and Emergency Preparedness is responsible for examinations at ports of entry.

[67] There is no reason to think that Mr. Jobidon's communications were not made in accordance with paragraph 8(2)(a) of the *Privacy Act*, which reads, "Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed (a) for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose".

B. Conclusion

[68] The burden is on the party seeking the summary judgment, in this case the defendants (*Timm* at para 49). As stated above, upon a motion for summary judgment, the Court's role is to

determine whether the position put forward by the party against which the motion is brought "is so doubtful that [the position] does not deserve consideration by the trier of fact at a future trial" (*Houchaine* at para 27).

[69] In this case, the party against which the motion is brought has chosen not to file any evidence but rather to make allegations only, which is insufficient (*Lameman*; *Trevor Nicholas Construction Co Limited v Canada*, 2011 FC 70 at para 44; *Rude Native* at paras 15–18). This Court is satisfied that the plaintiffs' position does not merit consideration in a future trial and agrees with the defendants' position that the plaintiffs' statement of claim does not raise any genuine issue to be tried. The part of the claim relating to the events of October 2011 is time-barred, while the acts alleged by the plaintiffs are in compliance with the Act, as argued by the defendants. The Court therefore grants defendants' motion and dismisses the plaintiffs' action in its entirety.

ORDER

THIS COURT ORDERS that

1. The motion for summary judgment is granted.

2. The plaintiffs' action is dismissed.

3. With costs against the plaintiffs.

"Martine St-Louis"
Judge

Certified true translation
This 12th day of August, 2019.

Michael Palles, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-643-16
STYLE OF CAUSE:	**JEAN-PIERRE MARTIN SIBOMANA, JEANNETTE MUKASINE, CHANTAL UWIDUHAYE, RUTIGUNGA HERVÉ SIBOMANA, ITUZE LOIC SIBOMANA, ISHEMA TRACY SIBOMANA and HER MAJESTY THE QUEEN IN RIGHT OF CANADA, FRANÇOIS JOBIDON, ÉMÉLIE AUDET, N. M. EGAN, RAOUL DELCORDE, HUBERT ROISIN, PATRICK STEVENS**
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	March 28, 2019
ORDER AND REASONS:	ST-LOUIS J.
DATED:	July 17, 2019

APPEARANCES:

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Daniel Latulippe	FOR THE DEFENDANTS

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