Federal Court  Cour fédérale

Date: 20231006

Docket: IMM-1577-22

Citation: 2023 FC 1329

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 6, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

MAMADI KEMO CAMARA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Background

[1] Mr. Camara is a citizen of Guinea. In August 2021, he submitted his second application for a study permit, in which he named new guarantors. On September 26, 2021, the application was approved, subject to review under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Immigration Act] and its regulations.

[2] On December 8, 2021, Mr. Camara arrived in Canada and reported to the Canada Border Services Agency [CBSA] office at the airport to undergo a statutory examination and to request his study permit. Mr. Camara was referred for an interview with a CBSA officer, who determined that Mr. Camara did not have sufficient financial resources to pay for his tuition and to maintain himself while studying in Canada, as required by section 220 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Immigration Regulations].

[3] Being of the opinion that Mr. Camara was inadmissible under paragraph 20(1)(b) and section 41 of the Immigration Act because he did not hold the documents required to enter Canada, the CBSA officer prepared a report under subsection 44(1) of the Immigration Act. The Minister's Delegate then reviewed the report to assess whether it was well-founded pursuant to subsection 44(2) of the Immigration Act and, based on the evidence on file, explained to Mr. Camara the options available to him, namely: (1) a voluntary withdrawal of his application to enter Canada; (2) the issuance of an exclusion order; or (3) referral of the matter to the Immigration and Refugee Board of Canada.

[4] According to the file, Mr. Camara spoke at length and expressed his disagreement with the suggestion that he had failed to demonstrate that he had sufficient funds. After several hours at the airport, Mr. Camara signed an authorization to leave Canada, which he alleges before the Court he did not do voluntarily. He also signed form *BSF 536 Entry for Further Examination or Admissibility Hearing*, which provided for another examination to be held on the following day, December 9, 2021, at 4:00 p.m., in accordance with section 23 of the Immigration Act.

[5] However, Mr. Camara failed to appear as scheduled the following day, December 9, 2021, for further examination, and a warrant was issued for his arrest. On January 8, 2022,

Mr. Camara filed a refugee protection claim in Canada, which, according to Mr. Camara , was found ineligible because of problems with his status in Canada.

[6] On February 18, 2022, Mr. Camara filed an application for leave and judicial review of what he described as the [TRANSLATION] “refusal to issue a work permit by the border services officer upon his arrival in Canada”.

[7] Before the Court, Mr. Camara submitted two affidavits, including one dated March 10, 2022, which introduced into evidence five exhibits that he had not presented to the CBSA officer. Thus, and since no exception applies in this case, the Court will not consider these exhibits in this judicial review (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency* (*Access Copyright*), 2012 FCA 22 at para 20).

II. Parties’ positions

[8] On May 17, 2023, the Court heard the parties on Mr. Camara’s application for judicial review. At the conclusion of the hearing, the Court invited the parties to make additional written submissions to determine whether, given the circumstances of this case, a decision to refuse to issue a study permit has or has not been made against Mr. Camara such that it may be subject to judicial review under subsection 72(1) of the Immigration Act. The Court noted the discussion of informal decisions in *Khaniche v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 559 at paragraphs 49 to 64 [*Khaniche*] and asked the parties whether there were any other decisions that supported the conclusions in that case.

[9] Mr. Camara and the Minister of Public Safety and Emergency Preparedness [the Minister] made additional submissions.

[10] Mr. Camara argues that the Court's power to review the decision derives from subsection 72(1) of the Immigration Act, since (1) this subsection allows the Court to review "any matter — a decision, determination or order made, a measure taken or a question raised — under [the Immigration Act]"; (2) CBSA officers are responsible for enforcing the provisions of the Immigration Act, including determining, at an examination, whether a person seeking to enter Canada has a right to enter Canada or is or may become authorized to enter and remain in Canada (s 18(1) of the Immigration Act); and (3) any matter/question/decision that arises from a CBSA officer's carrying out an examination provided for in section 18(1) of the Immigration Act, as in this case, is subject to judicial review.

[11] Mr. Camara submits that, even if the Court were to accept the Minister's position that no final decision as to the refusal of the applicant's study permit was made by the CBSA officer or the Minister's Delegate since the examination was not completed, the Court would nevertheless retain a power of judicial review.

[12] Mr. Camara adds that the decision that he did not have the financial resources to pay his tuition fees was final in the CBSA officers' minds despite the fact that the examination for administrative purposes had not been completed.

[13] Furthermore, Mr. Camara insists that the officer's decision not to issue the study permit is subject to judicial review because (1) judicial review of any matter under the Immigration Act is expressly provided for in subsection 72(1) of the Immigration Act; (2) there is no review or appeal mechanism where the same issues can be raised (subsection 72(2) of the Immigration Act; section 18 of the *Federal Courts Act*, RSC 1985, c F-7; *Somodi v Canada (Minister of*

Citizenship and Immigration), 2009 FCA 288); and (3) the decision was not interlocutory (*Zündel v Canada (Human Rights Commission) (CA)*, [2000] 4 FC 255 at para 10).

[14] Finally, Mr. Camara draws the Court's attention to *Reyes Garcia v Canada (Citizenship and Immigration)*, 2020 FC 66 [*Reyes Garcia*], in which the Court found that it had jurisdiction to review the CBSA officer's decision to cancel an electronic travel authorization when no formal decision as to the applicant's removal had been made in that case because he had voluntarily signed an "allowed to leave" form.

[15] The Minister submits that judicial review is premature, since the examination never ended, as provided for in section 37 of the Immigration Regulations. The Minister points out that the normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted, and Mr. Camara has not put forward any exceptional circumstances to justify his failure to respect this principle (*CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at paras 31–32 [*CB Powell*]; *Budlakoti v MCI*, 2015 FCA 139 at paras 57–58, 61).

[16] In reply, Mr. Camara states that, contrary to the Minister's position, there is no mention in the court record that the Minister's Delegate was going to give him the opportunity to perfect his evidence on December 9, 2021, and that, on the contrary, the Global Case Management System [GCMS] notes state that the steps for his departure were underway and ready to be executed. Mr. Camara also replies that he applied to the Federal Court because he had no other appropriate and effective means of obtaining the relief he was seeking.

III. Analysis

A. *Relevant legislative provisions*

[17] Subsection 18(1) of the Immigration Act states that every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada.

[18] Subsection 37(1) of the Immigration Regulations sets out when a statutory examination ends (subject to certain exemptions that are not at issue in this case).

[19] Section 23 of the Immigration Act also provides that an officer may authorize a foreign national to enter Canada for the purpose of further examination, particularly when the examination could not be completed on the same day. This allows the person to leave the port of entry when the officer has no reasonable grounds to believe that the person will not appear for an examination, admissibility hearing or removal or a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2) of the Immigration Act. This entry authorization is, however, subject to the conditions imposed by the Immigration Regulations, which stipulate, among other things, that the foreign national must report in person at the time and place specified for further examination (subsection 43(1) of the Immigration Regulations).

[20] Paragraph 20(1)(b) of the Immigration Act stipulates that foreign nationals seeking to enter or remain in Canada must establish, to become temporary residents, that they hold the visas or other documents required under the regulations and will leave Canada by the end of the period authorized for their stay.

[21] Foreign nationals must undergo an examination on arrival; failure to prove that they hold the necessary visas and documents may constitute a breach of the law and render the foreign nationals inadmissible under section 41 of the Immigration Act.

[22] Subsection 44(1) of the Immigration Act provides that an officer who is of the opinion that a permanent resident or a foreign national is inadmissible may prepare a report. This report is transmitted to the Minister's Delegate, who must decide whether the report is well-founded.

[23] The guide "ENF 6 - Review of reports under subsection A44(2)" outlines the options available to the Minister's Delegate, which include referring the case to an admissibility hearing, issuing a removal order, allowing the person to leave Canada, issuing a temporary resident permit and issuing a warning letter (permanent residents/protected persons) (ENF 6, Exhibit A of François Leduc's affidavit, p 21).

[24] Moreover, a report that identifies a failure to comply with the requirement set out in section 20 of the Immigration Act is one of the circumstances in which a case is not referred to the Immigration Division under subsection 228(1) of the Immigration Regulations.

[25] An officer who examines a foreign national shall allow the foreign national to withdraw his or her application to enter Canada and leave Canada (subsection 42(1) of the Immigration Regulations). However, if a report has been prepared under subsection 44(1) of the Immigration Act in respect of a foreign national who indicates that he or she wants to withdraw the application to enter Canada, "the officer shall not allow the foreign national to withdraw their application or leave Canada unless the Minister decides . . . not to make a removal order. . ." (subsection 42(2) of the Immigration Regulations).

[26] Finally, as the applicant points out, subsection 72(1) of the Immigration Act allows for judicial review of “any matter — a decision, determination or order made, a measure taken or a question raised — under this Act” and section 18 of the *Federal Courts Act* provides for the Court’s jurisdiction.

B. *Decision*

[27] First, Mr. Camara has not proven, on a balance of probabilities, that his signatures on the various forms were not voluntary although he clearly discussed and expressed his disagreement with the CBSA officers’ concerns about proving his financial capacity.

[28] Second, in his amended application for judicial review, Mr. Camara is still seeking review of the [TRANSLATION] “[r]efusal to issue a study permit by the border services officer upon his arrival in Canada Canada Border Services Agency” on December 8, 2021.

[29] The Court agrees with the parties that a refusal to issue a study permit is indeed a decision reviewable by the Court under section 18.1 of the *Federal Courts Act* and section 72 of the Immigration Act. However, in this case, and according to the evidence in the record, no such refusal has yet been issued by the Canadian authorities since Mr. Camara’s statutory examination has not yet ended.

[30] Accordingly, I agree with the Minister’s position and conclude that this judicial review cannot be brought before the Court because either (1) there is no longer an application to enter Canada, which was the application for a study permit, because Mr. Camara has indeed signed an application to be allowed to leave Canada; or (2) there is no refusal of a study permit because the statutory examination has not yet ended; the application for judicial review is premature.

[31] In Mr. Camara's case, although the officer was dissatisfied with his admissibility as a student, the *BSF 536 Entry for Further Examination or Admissibility Hearing* form that Mr. Camara signed clearly provides for further examination to be held on the following day, December 9, 2021, at 4:00 p.m., in accordance with section 23 of the Immigration Act. Furthermore, since none of the circumstances set out in subsection 37(1) of the Immigration Regulations have been met, it must be concluded that the statutory examination has not ended.

[32] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. Thus, absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course (*CB Powell Limited v Canada (Border Services Agency)*, 2010 FCA 61 at para 31). The threshold for recognizing circumstances as exceptional is very high (*CB Powell* at paras 31–33; *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35–36; *Black v Canada (Attorney General)*, 2013 FCA 201 at paras 7–10; *Dugré v Canada (Attorney General)*, 2021 FCA 8 at paras 37–38).

[33] The general rule against early, immediate access to the reviewing court applies in this case. There is no reason to relax this general rule here (*Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139 at para 60).

[34] The process followed by CBSA officers was not clear-cut, but it is clear that an application for judicial review of the refusal to issue a study permit is premature, since no refusal has yet been issued.

[35] The Court will not certify any questions since the proposed questions do not transcend the interests of the parties to the litigation.

JUDGMENT in IMM-1577-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No questions are certified.

3. No costs are awarded.

"Martine St-Louis"
Judge

Certified true translation
Janna Balkwill

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Annabel Busbridge	FOR THE APPLICANT
Sherry Rafai Far	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kilongozi Law Office Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT