Federal Court  Cour fédérale

**Date: 20231228**

**Docket: IMM-1349-21**

**Citation: 2023 FC 1762**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, December 28, 2023**

**PRESENT: Madam Justice St-Louis**

**BETWEEN:**

**SUGAR ÉRIC YUMBA**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] Sugar Éric Yumba is applying for judicial review of the decision by the delegate of the Minister of Public Safety and Emergency Preparedness [the Minister's Delegate] to make a deportation order against him under subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Immigration Act] and paragraph 228(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the Regulations].

[2] The Minister's Delegate said that he is satisfied that Mr. Yumba is a person described in paragraph 40(1)(c) of the Immigration Act because, on a balance of probabilities, he is a foreign national who is inadmissible for misrepresentation on a final determination to vacate a decision to allow his claim for refugee protection. Consequently, the Minister's Delegate did not refer the matter to the Immigration Division but opted for the removal order set out in the Regulations, that being deportation.

[1] In the memorandum of fact and law that he submitted to the Court, Mr. Yumba contends that the Minister's Delegate has the discretion not to make a deportation order on the basis of humanitarian and compassionate considerations, that the Minister's Delegate had the duty to exercise this discretion and that it is unreasonable for the Minister's Delegate not to exercise it in his case.

[2] During the hearing for this application, Mr. Yumba abandoned another argument that was raised in his memorandum, the one related to an alleged violation of the principles of procedural fairness. The Court will not deal with this argument because Mr. Yumba decided to abandon it.

[3] Also during the hearing, Mr. Yumba raised a new argument that does not appear in his memorandum. He argued that the circumstances surrounding the making of the deportation order (delay and number of proceedings) are an abuse of process and that the Court should consequently stay the inadmissibility process involving him. However, according to the applicable criteria, Mr. Yumba did not persuade me that it was appropriate for the Court to consider this new argument (*Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 at para 81; *Del Mundo v Canada (Citizenship and Immigration)*, 2017 FC 754 at paras 12–14; *Mishak v Canada (Minister of Citizenship and Immigration)* (1999), 1999 CanLII 8579 (FC),

173 FTR 144 at para 6; *Adewole v Canada (Attorney General)*, 2012 FC 41 at para 15). In addition and in any case, Mr. Yumba did not establish that the circumstances to which he refers are unacceptable to the point of being so oppressive as to taint the proceedings and that they constitute an abuse of process.

[4] For the following reasons detailed below, I will dismiss the application for judicial review. Mr. Yumba did not persuade me that the Minister's Delegate has the duty to consider humanitarian and compassionate considerations as part of the process described at section 228 of the Regulations given the circumstances of this case and the decisions of the Federal Court of Appeal by which I am bound. In addition, Mr. Yumba did not persuade me that the decision of the Minister's Delegate to make the deportation order is unreasonable.

## II. Background

[5] Mr. Yumba is a citizen of the Democratic Republic of the Congo [DRC]. On December 6, 2006, he arrived in Canada with his daughter, and on December 11, 2006, they claimed refugee protection. On March 18, 2009, Mr. Yumba and his daughter were granted refugee status within the meaning of the *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [the Convention]. Mr. Yumba is married to a Canadian citizen and has five children, but he is neither a citizen nor a permanent resident of Canada.

[6] On March 26, 2014, the Minister of Public Safety and Emergency Preparedness [the Minister] applied to the Refugee Protection Division [RPD] to vacate Mr. Yumba's refugee status under section 109 of the Immigration Act.

[7] The Minister's application relies in particular on the information uncovered by the Canada Border Services Agency [CBSA] showing a match between Mr. Yumba's fingerprints and those of a person born in France on November 11, 1978, named Chouga Yumba Luemba. According to this information, since at least June 3, 2004, this person was staying in France and had a criminal record in France. However, as part of his refugee protection claim, or after, Mr. Yumba never declared living anywhere other than the DRC before coming to Canada.

[8] During the hearing before the RPD, Mr. Yumba admitted to misrepresenting or withholding material facts relating to a relevant matter. Mr. Yumba does indeed admit to using a false identity in France, going to Belgium in 1993 and then to France, and not declaring this important information when claiming refugee protection in Canada. Before the RPD, however, Mr. Yumba denied committing a serious non-political crime in France.

[9] On May 6, 2016, the RPD vacated the initial decision to grant refugee status to Mr. Yumba and deemed Mr. Yumba's refugee protection claim to be rejected under subsection 109(3) of the Immigration Act. The RPD concluded that Mr. Yumba had obtained refugee status by misrepresenting or withholding material facts relating to a relevant matter. The RPD also concluded that Mr. Yumba's criminal charges and conviction in 2004 are covered by Article 1F(b) of the Convention and that, as a result, the initial panel would have rejected Mr. Yumba's refugee protection claim.

[10] On February 7, 2017, the Federal Court dismissed the application for leave that Mr. Yumba submitted against the RPD's decision, and on March 13, 2017, the Court dismissed the application to reconsider this decision.

[11] On January 17, 2018, an officer prepared an inadmissibility report under subsection 44(1) of the Immigration Act, and on February 16, 2018, a Minister's Delegate stated that he was satisfied that the report was well founded and made a deportation order under subsection 44(2) of the Immigration Act and subsection 228(1) of the Regulations. Mr. Yumba challenged the inadmissibility report and deportation order before the Court. The CBSA agreed to reconsider the case, without guaranteeing the result. Mr. Yumba abandoned his recourse and the case returned to the CBSA for redetermination.

[12] On January 9, 2020, a new inadmissibility report was prepared under subsection 44(1) of the Immigration Act by another officer. On January 22, 2021, the Minister's Delegate met with Mr. Yumba and his counsel. The Minister's Delegate then explained to Mr. Yumba that he was responsible for determining whether the allegations are erroneous, in which case Mr. Yumba should have the right to stay in Canada, or, if otherwise, whether the facts support the allegations, in which case a removal order should be made against him.

[13] According to the notes taken by the Minister's Delegate, Mr. Yumba argued that he had problems with the police in France but was not aware of any charges laid against him in France. Counsel for Mr. Yumba also stated that he had problems with his social status, had not returned to Congo in more than 10 years and would face a risk if he returned there. He stated that Mr. Yumba would face hardship and that he had not had access to a Pre-Removal Risk Assessment [PRRA]. Also according to the notes of the Minister's Delegate, Mr. Yumba argued that he was not a criminal and had not committed any crimes in Canada.

[14] The Minister's Delegate added in his notes that Mr. Yumba submitted the following humanitarian and compassionate considerations for consideration:

- Hardship if he returns to the DRC

- Best interests of his children and hardship if their father returns to the DRC

- Degree of establishment in Canada

[15] The Minister's Delegate added to his notes that the inadmissibility report under subsection 44(1) of the Immigration Act was well founded and that he would make a deportation order. The Minister's Delegate confirmed that Mr. Yumba is a person described in paragraph 40(1)(c), in that he is inadmissible for misrepresentation on a final determination to vacate a decision to allow his claim for refugee protection. The Minister's Delegate pointed out to Mr. Yumba that he could challenge the order through an application for judicial review within 15 days and that he was eligible for a PRRA application.

[16] Ultimately, on January 22, 2021, the Minister's Delegate made a deportation order against Mr. Yumba under paragraph 228(1)(b) of the Regulations. That decision is the one being challenged by this application for judicial review.

[17] Moreover, Mr. Yumba is also the subject of an inadmissibility report under subsection 44(1) of the Immigration Act for serious criminality under paragraph 36(1)(b) of the Immigration Act. The report was referred to the Immigration Division, which I will discuss in a different case (IMM-4988-22).

## III. Arguments raised by Mr. Yumba

[18] Mr. Yumba argues that the officer responsible for preparing the inadmissibility report in accordance with subsection 44(1) of the Immigration Act and the Minister's Delegate have

discretion as to whether to prepare said report under subsection 44(1) and whether to make the removal order, and that they had a duty to exercise that discretion and failed to do so in the case at hand.

## IV. Analysis

### A. *Relevant provisions*

[19] The following provisions of the Immigration Act are relevant:

| **Immigration and Refugee Protection Act, SC 2001, c 27** | **Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27** |
|---|---|
| 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 : |
| … | … |
| (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; |

[20] As is the following section of that same statute:

| **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. |
| **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 | (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 |

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.

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.

[21] The following provision of the Regulations is also relevant:

**Immigration and Refugee Protection Regulations, SOR/2002-227**

Subsection 44(2) of the Act — foreign nationals
228 (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

…

(b) if the foreign national is inadmissible under paragraph 40(1)(c) of the Act on grounds of misrepresentation, a deportation order;

**Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227**

Application du paragraphe 44(2) de la Loi : étrangers
228 (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :

…

b) en cas d'interdiction de territoire de l'étranger pour fausses déclarations au titre de l'alinéa 40(1)c) de la Loi, l'expulsion;

B. *Standard of review*

[22] The applicable standard of review is reasonableness. None of the situations that rebut this presumption apply in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27). It must therefore be determined whether the decision of the Minister's Delegate is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

C. *The decision is reasonable*

[23] Mr. Yumba argues that section 44 of the Immigration Act in itself shows that Parliament has clearly acknowledged that the CBSA officer has the discretion to prepare an inadmissibility report in accordance with section 44 of the Immigration Act or not, and that the Minister's Delegate has the discretion to make a removal order or not.

[24] Mr. Yumba cites a number of decisions in which, he contends, the scope of the discretion of the officer and the Minister's Delegate in connection with preparing an inadmissibility report (subsection 44(1)) and making a removal order (subsection 44(2)) under the Immigration Act are discussed (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at paras 21, 22 [*Cha*]; *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237 at para 12; *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at paras 18–22, 42). He further argues that in *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363 at paragraphs 33 and 36, the Court acknowledged that the officer's decision was unreasonable, since it did not in any way consider the fact that humanitarian and compassionate considerations could favour not referring the inadmissibility report to the Immigration Division, and adds a list of non-exhaustive factors found in Citizenship and Immigration Canada's *Operational Manual: Enforcement (ENF)* [the Manual] that the Minister's Delegate could consider.

[25] Mr. Yumba acknowledges that he is not a permanent resident in Canada but adds that despite this, the Federal Court of Appeal in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*], concluded in paragraph 23 that the limited discretion

recognized in *Cha* would appear to apply with equal force to both foreign nationals and permanent residents.

[26] Mr. Yumba adds that in their decisions, the officer and the Minister's Delegate did not consider the best interests of his five children and that they should have done so. He mentions chapter ENF 5 of the Manual and specifically section 8.3 of it. Mr. Yumba then adds a non-exhaustive list of factors found in section 9.1 of chapter ENF 5 of the Manual that the officer may consider in his decision whether to prepare an inadmissibility report under subsection 44(1) when criminality is not at issue for a foreign national. Mr. Yumba thus submits that the officer should have considered multiple humanitarian and compassionate considerations.

[27] Mr. Yumba also submits that the officer and the Minister's Delegate failed in their duty and that they had to at the very least discuss these considerations or indicate the reasons for their decision. He thus submits that the mere fact that humanitarian and compassionate considerations were not considered justifies allowing the application.

[28] The Minister first replies that Mr. Yumba does not have clean hands, since he failed to disclose his stays in Belgium and France, and his criminal past, and this reason alone justifies dismissing his application (*Mutanda v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1101 at para 10).

[29] The Minister adds that the Minister's Delegate has very limited discretion at the time of making the deportation order. The role of the Minister's Delegate is to determine whether the inadmissibility report is well founded, and if so, he must then make the removal order (*Obazughanmwen v Canada (Public Safety and Emergency Preparedness)* 2023 FCA 151

[*Obazughanmwen*]; *Sharma* at paras 22–23; *Cha* at paras 35, 37; *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 at para 3 [*McAlpin*]).

[30] The Minister points out that Mr. Yumba could have filed other applications, such as a permanent residence application for humanitarian and compassionate considerations under subsection 25(1) of the Immigration Act or a PRRA application (*Canada (Citizenship and Immigration) v Bermudez*, 2016 FCA 131 at para 38 [*Bermudez*]; *Sharma* at para 25).

[31] The case law of the Federal Court of Appeal supports the Minister's position, since it confirms the limited discretion given to officers and Minister's delegates under subsections 44(1) and (2) of the Immigration Act with regard to a foreign national and a permanent resident found inadmissible for serious criminality (*Obazughanmwen*; *Sharma* at paras 22–23; *Cha* at paras 35, 37). At paragraph 70 of *McAlpin*, the Chief Justice of the Federal Court reviews the case law in this regard.

[32] As the Minister points out, the Minister's Delegate does not have to examine the humanitarian and compassionate considerations or the reasons related to a PRRA, or to mention the humanitarian and compassionate considerations that a claimant may raise (*McLeish v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 705 at para 85; *McAlpin* at paras 70, 77, 82–83). The Minister's Delegate does not have discretion regarding humanitarian and compassionate considerations when dealing with an inadmissible foreign national (*Rosenberry v Canada (Citizenship and Immigration)*, 2010 FC 882 at paras 36–38).

[33] In addition, as the Federal Court of Appeal notes in 2016 in *Bermudez* at paragraph 38:

> [38] Section 25 of the IRPA includes specific delegations of the Minister's authority to a limited class of individuals to exercise H&C discretion under clearly and expressly defined circumstances. It follows that non-citizens, whether they be foreign nationals or permanent residents, do not have the right to have H&C considerations imported and read into every provision of the IRPA, the application of which could jeopardize their status (*Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007] 4 F.C.R. 3, at paragraph 13; *Medovarski v. Canada (Minister of Citizenship and Immigration)*; *Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, at paragraph 47). In other words, section 25 of the IRPA "was not intended to be an alternative immigration scheme" (*Kanthasamy*, at paragraphs 23 and 85).

[34] The case law therefore confirms that, in the case of a foreign national—and Mr. Yumba is a foreign national—both the officer responsible for the inadmissibility report under subsection 44(1) of the Immigration Act and the Minister's Delegate responsible for the report under subsection 44(2) of the same statute and for the resulting action, the removal order, have limited discretion and have no obligation to take humanitarian and compassionate considerations into account.

[35] Thus, the arguments raised by Mr. Yumba cannot succeed.

## V. Conclusion

[36] Mr. Yumba did not demonstrate that the decision of the Minister's Delegate is unreasonable; on the contrary, I am satisfied that the decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker. The application for judicial review will be dismissed.

**JUDGMENT in IMM-1349-21**

**THIS COURT'S JUDGMENT is as follows:**

1. The application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

"Martine St-Louis"
Judge

Certified true translation
Michael Palles

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-1349-21 |
| **STYLE OF CAUSE:** | SUGAR ERIC YUMBA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | EDMONTON, ALBERTA |
| **DATE OF HEARING:** | OCTOBER 11, 2023 |
| **JUDGMENT AND REASONS:** | ST-LOUIS J |
| **DATED:** | DECEMBER 28, 2023 |

**APPEARANCES:**

| | |
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| Sonia Bédard | FOR THE RESPONDENT |

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