Federal Court		Cour fédérale

Date: 20101104

Docket: IMM-1743-10

Citation: 2010 FC 1086

Ottawa, Ontario, November 4, 2010

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

PIERRE CHARLES DOUZE
MARGARETTE LUC DOUZE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal from an order of Prothonotary Tabib, dated October 20, 2010, whereby the respondent Minister of Public Safety and Emergency Preparedness (MPS) was ordered to produce additional documents pursuant to Rule 17 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 (*IRP Rules*). This appeal arises in the context of an application for judicial review of the respondent Minister's failure to render a decision with respect to a ministerial

relief request under subsection 35(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*).

BACKGROUND

[2] Pierre Charles Douze (the "principal applicant") is a citizen of Haiti. In February of 2005, he applied for permanent residence in Canada. That application was rejected on November 9, 2007, when the respondent Minister of Citizenship and Immigration determined that the principal applicant was inadmissible under paragraph 35(1)(*b*) of the *IRPA* for having served as part of the Haitian judiciary under a designated regime. On January 29, 2008, the principal applicant requested ministerial relief from the respondent MPS under subsection 35(2) of the *IRPA*. A decision with respect to this request has not yet been rendered.

[3] On March 29, 2010, the applicants filed an application for leave and judicial review seeking, in part, an order in the nature of *mandamus* requiring the respondent MPS to render a final decision with respect to the relief request.

[4] On September 13, 2010, Michelle Barrette, a Senior Program Officer with the Canada Border Services Agency (CBSA) Ministerial Relief Unit submitted an affidavit with regards to these proceedings. Ms. Barrette indicated that the assessment of a relief request can take, on average, 5 to 10 years. Ms. Barrette further indicated that a recommendation had already been drafted with respect to the principal applicant's relief request. She pointed to the following steps that were still outstanding: provision of the draft recommendation to the principal applicant for

feedback, review of the feedback by the CBSA, incorporation of the feedback into the draft recommendation, approval of the draft recommendation by the President of the CBSA, and, finally, rendering of the ultimate decision by the MPS.

[5] Ms. Barrette was cross-examined on September 22, 2010. She indicated that the draft recommendation was completed on February 5, 2010 and although she could not provide a firm time frame, she indicated that, as a "general estimate," it might be presented to the MPS some time between February 2011 and February 2013. When asked why the draft recommendation had not been disclosed as part of the Certified Tribunal Record (CTR) under Rule 17, Ms. Barrette indicated that the document was "still a draft recommendation and [had] not yet been approved by the president of the CBSA for disclosure". She also indicated that only documents and case notes that were assessed in writing the draft recommendation were disclosed as part of the CTR.

[6] On October 1, 2010, the applicants filed a motion for an order compelling the respondent MPS to produce a complete CTR pursuant to Rule 17 of the *IRP Rules*. They argued that the draft recommendation, as well as any other excluded documents or notes relevant to the application for *mandamus*, should have been disclosed as part of the CTR. On October 20, 2010, Prothonotary Tabib granted the applicants' motion and ordered the MPS to complete the CTR no later than October 25, 2010 by providing: a) the draft recommendation, b) any additional case notes obtained or created by the MPS in processing the principal applicant's request, and c) any internal notes or correspondence as to the progress of processing the relief request.

[7] On October 20, 2010, the respondents filed a motion with this Court to appeal the production order. They also filed a motion requesting a stay of the production order pending a decision on the appeal. On October 25, 2010, a stay was granted in part. The Court indicated that the MPS was not required to produce the draft recommendation until a final determination had been made on the appeal. The MPS was still required, however, to comply with the remainder of the production order by providing the applicants with the rest of the specified materials no later than October 29, 2010.

[8] On October 28, 2010, the respondent MPS disclosed additional correspondence and notes relating to the processing of the relief request.

ANALYSIS

[9] The applicants submit that the appropriate standard of review to be applied to Prothonotary Tabib's decision is the standard set out in *Merck & Co v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 at para. 19. There, the Court of Appeal indicated that a discretionary order of a prothonotary is not to be disturbed on appeal unless: a) the questions raised in the motion are vital to the final issue of the case, in which case the matter is considered *de novo*, or b) the order is clearly wrong, in the sense that the exercise of discretion by the prothonotary was based on a wrong principle or a misapprehension of the facts. The applicants argue that the production or non-production of additional documents is not "vital" to the issue to be tried and, as such, the production order should be assessed using the "clearly wrong" branch of the *Merck* test.

[10] I disagree. The production order at issue in this case is not discretionary in nature. The Prothonotary was not called upon to exercise her discretion, instead she was called upon to interpret and apply Rule 17 of the *IRP Rules* in the context of a *mandamus* application (i.e. where a tribunal decision had not yet been made). As such, the normal appellate standards of review apply (*Scott Steel Ltd. v. Alarissa (The Ship)* (1997), 125 F.T.R. 284 at para. 34, 69 A.C.W.S. (3d) 7 (T.D.); *Giroux v. Canada*, 2001 FCT 531, 210 F.T.R. 63 at para. 32). Questions of law are to be reviewed against a correctness standard (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8).

[11] Rule 17 of the *IRP Rules*, in relevant part, reads as follows:

17. Upon receipt of an order under Rule 15 [an order granting an application for leave], a tribunal shall, without delay, prepare a record containing the following, on consecutively numbered pages and in the following order: …	17. Dès réception de l'ordonnance visée à la règle 15 [l'ordonnance faisant droit à la demande d'autorisation], le tribunal administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement : …
(b) all papers relevant to the matter that are in the possession or control of the tribunal, …	b) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif, …

[12] As a preliminary argument, the respondents submit that Prothonotary Tabib acted *ultra petita* by ordering disclosure of more than what was requested. There is simply no basis for this argument. The applicants expressly sought an order for all relevant documents under Rule 17. Prothonotary Tabib proceeded appropriately by identifying which additional documents were required in order to satisfy the rule.

[13] The respondents also argue that, in general, Rule 17 only requires the disclosure of documents that were before the decision-maker at the time of rendering the decision. They submit that disclosure should only be expanded beyond this when certain narrow exceptions are shown to apply; such as when procedural fairness is at issue, or when apprehension of bias is at issue. In this case, they argue, no such exceptions have been shown to apply. Instead, the respondents submit that Prothonotary Tabib should have adopted the approach of Prothonotary Lafrenière in *Western Canada Wilderness Committee v. Canada (Minister of the Environment)*, 2006 FC 786, 149 A.C.W.S. (3d) 597 (*Western Canada*) where the Court refused to order the production of documents.

[14] There are a number of problems with the respondents' argument in this regard. Since this is an application for relief in the nature of *mandamus*, no decision has yet been made. As such, no documents can be said to meet the respondents' test of having been before the decision-maker at the time of rendering the decision. The logical result of the respondents' argument, then, is that no documents would ever be required to be produced under Rule 17 in the context of a *mandamus* application. This is simply not supported by the wording of Rule 17 which requires a tribunal, on receipt of an order granting leave with respect to a judicial review, to prepare a record containing "all papers relevant to the matter that are in the possession or control of the tribunal." There is no indication that this rule should not apply when the judicial review is related to a non-decision. The respondents' interpretation is also not supported by the practice of this Court, which is to order the production of a CTR under Rule 17 in the case of *mandamus* applications (see, for example, *John*

Doe v. Canada (Minister of Citizenship and Immigration), 2006 FC 535, 148 A.C.W.S. (3d) 308).

[15] It is true that Prothonotary Lafrenière in *Western Canada* found that Rule 317 of the *Federal Courts Rules*, SOR/98-106 (*FCR*) was not applicable in the context of a *mandamus* application; i.e. where no actual order or decision had been made. Justice Snider in *Gaudes v. Canada (Attorney General)*, 2005 FC 351, 137 A.C.W.S. (3d) 1082 (*Gaudes*) at para. 16, similarly indicated that, "before invoking Rule 317 to obtain documents, there must be a decision of a tribunal." However, in this latter decision, the determination was not made in the context of a *mandamus* application.

[16] The applicants rightly point out, however, that the question of whether Rule 317 applies in the context of a *mandamus* application has not been definitively resolved. Most recently, Justice Mosley, in *Victoria v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 857, 297 F.T.R. 85 at para. 15, indicated that, "Where the object of the underlying application is to compel the performance of a statutory duty, as here, it is not entirely clear that these rules [Rules 317 and 318 of the *FCR*] are applicable."

[17] In any event, as Prothonotary Tabib correctly indicated in her reasons, the case-law on Rule 317 of the *FCR* has little bearing on the application of Rule 17 of the *IRP Rules*. The two rules are different in that Rule 317 explicitly requires an "order [to be] the subject of the application" (emphasis added), whereas Rule 17 has no such requirement. Justice Snider in *Gaudes*, above, pointed to this added requirement as being the reason why a tribunal decision must be rendered before Rule 317 can be invoked. In comparing Rule 317 to its predecessor, Justice Snider said:

> …Rule 317 differs from its predecessor in a significant way. Rule 1612 referred to "material that is in the possession of the federal board, commission or other tribunal and not in the party's possession" and required that the material "must be relevant to the application for judicial review". Rule 317 adds another element to the demand for documents. That is, a party may only request material "that is in the possession of the tribunal whose order is the subject of the application". Thus, before invoking Rule 317 to obtain documents, there must be a decision of a tribunal. (emphasis added)

Like Rule 317's predecessor, Rule 17 is broader and does not require a tribunal order to have been made. As such, one can not take the Rule 317 jurisprudence and apply it directly to the interpretation of Rule 17.

[18] Another important distinction between the two rules is that leave must have been granted by this Court before Rule 17 can be invoked. As a result, much of the prejudice referred to by Prothonotary Lafrenière in *Western Canada* is avoided. Since leave is required, there is no risk that government respondents will "routinely be asked to produce" (*Western Canada* at para. 12) documents under the guise of a *mandamus* application. We need not be concerned with the promotion of "frivolous applications based on minimal delay for the purpose of obtaining government records" (*Western Canada* at para. 13), since this Court will not grant leave in such cases.

[19] Prothonotary Tabib was correct in determining that relevance is the primary consideration for the purposes of deciding what documents must be included in a CTR. In *Canada (Human Rights Commission) v. Pathak*, [1995] 2 F.C. 455, 54 A.C.W.S. (3d) 1344 (C.A.) (*Pathak*), the

Court of Appeal provided useful instruction as to when a document is relevant for the purposes of Rule 317:

> A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent. (at para. 10)

This is equally applicable to determining relevance in the context of Rule 17.

[20] In the current case, the primary issue to be determined on review is whether or not there has been an unreasonable delay in processing the principal applicant's relief request. As such, I can find no error with Prothonotary Tabib's order that the respondent MPS disclosed case notes obtained or created for the purposes of processing the relief request, as well as any internal notes or correspondence as to the progress of said processing. These documents are directly relevant to the question of unreasonable delay. They provide insight into the level of activity surrounding the processing of the principal applicant's request, as well as the complexity involved. As such, their disclosure is required under Rule 17.

[21] I find, however, that the production order went too far in requiring the disclosure of the preliminary draft recommendation. A *mandamus* application is not to be used as a means of obtaining an early indication as to what the ultimate decision will be. The substance of the ultimate decision is not at issue. Instead, the application must be focussed on whether the statutory duty under review is being carried out diligently. To this end, case notes, internal notes and

correspondence are relevant. The applicants suggest that, in this case, the preliminary draft recommendation is also relevant. They argue that having the preliminary draft recommendation might enable them to demonstrate that the delay at issue has not been due to complexity, as has been suggested by the respondent MPS.

[22] While I recognize that the preliminary draft recommendation may be of some relevance in this regard, when this limited relevance is balanced against the potential for prejudice, I must ultimately conclude that the preliminary draft recommendation is not captured by Rule 17. Requiring the disclosure of a preliminary draft recommendation would have the potential to create, in the applicant, an expectation for a certain result. Given the multiple levels of approval and revision that are still required before this preliminary draft recommendation becomes finalized, it is easy to envisage a scenario whereby the recommendation undergoes a number of significant changes. Exposing this process by requiring production of draft recommendations has the potential to shift the focus on subsequent applications such that the MPS is required to justify each incremental substantive change. This could occasion even more delay in terms of arriving at the final determination.

[23] The principal applicant, in this case, will have the opportunity to see a finalized version of the draft recommendation and to comment on it as the CBSA moves forward with processing the relief request. To order disclosure of the draft recommendation prior to this has the potential to undermine this aspect of the CBSA's process.

[24] For these reasons, I grant the appeal in part. The respondent MPS is not required to disclose the draft recommendation. I note that all other documents ordered to be disclosed under the production order have been disclosed already, and will remain on the record for the purposes of the application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is granted in part. The respondent MPS is not required to disclose the draft recommendation. All other documents ordered to be disclosed under the production order have been disclosed already, and will remain on the record for the purposes of the application for judicial review.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1743-10

STYLE OF CAUSE:

PIERRE CHARLES DOUZE
MARGARETTE LUC DOUZE

Applicants

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THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: November 2, 2010

REASONS FOR : TREMBLAY-LAMER J.

DATED: November 4, 2010

APPEARANCES:

Jared Will	FOR THE APPLICANTS
Michèle Joubert	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Jared Will Montreal, Quebec	FOR THE APPLICANTS
Deputy Minister of Justice and Deputy Attorney General Montreal, Quebec	FOR THE RESPONDENTS