

Federal Court



Cour fédérale

Date: 20100928

Docket: IMM-5612-08

Citation: 2010 FC 965

[UNREVISED CERTIFIED TRANSLATION]

Ottawa, Ontario, September 28, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

MAMADOU DIALLO

Applicant

and

**MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The only issue raised in the motion of the applicant, Mamadou Diallo, a citizen of Mali (the applicant), is whether he has demonstrated that there are special reasons to award him \$5,650 in costs payable by the respondent, the Minister of Public Safety and Emergency Preparedness, under section 22 of the *Federal Courts Immigration and Refugee Protection Rules* (the Rules), which

reads as follows:

Costs

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

Dépens

22. Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

[2] The applicant submits that he is entitled to certain costs because on January 11, 2009, a Sunday, the Minister unnecessarily opposed his motion to stay the enforcement of his removal from Canada to Mali. The removal had been scheduled for the following day, Monday, January 12, 2009, at 7:00 p.m. from the Pierre Elliot Trudeau airport notwithstanding that the Minister's department had not obtained a travel document from the Embassy of Mali in Ottawa (the Embassy) that was required for him to enter Mali.

[3] He maintains that this Court's urgent hearing on Sunday, January 11, 2009, on his motion for a stay was a waste of time and judicial resources because the next day the Minister had to cancel his removal since the applicant did not have a travel document authorizing him to enter Mali; this also required the Court to convene the parties in Montréal to clarify the circumstances surrounding the cancellation of the removal.

[4] The Minister submits that the applicant's motion for costs should be dismissed on the following grounds:

- The applicant did not file a detailed affidavit setting out the facts that could ground a costs order. Simply stated, there are no facts before the Court that would allow it to grant the motion for costs.
- The Minister has always acted in good faith in this matter and carried out his duty diligently; there was no bad faith. The affidavit of Mr. Kabongo-Katalay, supervisor of removals at the Canada Border Services Agency (CBSA), shows that the applicant's removal could not be carried out as planned essentially for two reasons: on the one hand, the applicant did not co-operate with the authorities, refusing to sign the notice to appear and the application for a travel document and, on the other hand, the Embassy changed its procedure for obtaining a travel document at the end of December or early January.
- Neither the applicant nor his counsel ever asked the CBSA to defer the removal; instead they filed a stay motion in this Court.
- The relief claimed is inappropriate for a number of reasons: (1) his motion does not specify how he arrived at such a high amount of costs; (2) he has already commenced an action in damages against the Minister in which he states that he was held illegally in the context of his removal, a legal proceeding that is still pending; (3) awarding costs would bring the administration of justice into disrepute and encourage similar conduct.

II. Facts

[5] The applicant arrived in Canada on August 3, 1999, via the United States from Mali; two weeks later, he claimed refugee status, which was denied on January 21, 2000. His application for leave and judicial review met the same fate.

[6] Subsequently, the applicant filed a first application for exemption based on humanitarian and compassionate considerations and a first application for a pre-removal risk assessment (PRRA); both were rejected on January 4, 2005. On November 2, 2006, he filed a second application for exemption based on humanitarian and compassionate considerations, which was supported by the sponsorship of his new common-law spouse, now his wife. That application was rejected on October 23, 2008. The second PRRA application was rejected on December 22, 2008. The parties recognize that the second PRRA application did not trigger an administrative stay as is the case for a first PRRA application.

[7] On December 17, 2008, Mr. Diallo and his counsel met with Removals Officer Eric Charlebois, who wanted to establish the terms and conditions of his departure. The officer served him with a notice to appear requiring him to attend in person at the P.E. Trudeau International Airport on January 12, 2009, at 7:00 p.m. for his departure from Canada. He refused to acknowledge receiving the notice.

[8] The same day, on December 17, 2008, the CBSA asked the Embassy to issue a travel document for Mr. Diallo; the request complied with the Embassy's requirements at the time. According to Mr. Kabongo-Katalay, the Embassy should have issued this travel document within three days at most.

[9] Since she was not in possession of a travel document for Mr. Diallo, CBSA officer Koen reached the Embassy by telephone on January 5, 2009, and was informed by an officer that the Embassy had not received an application for a travel document for the applicant. The next day, on January 6, 2009, Ms. Koen provided the Embassy with proof that the application had been sent in December 2008 and that the Embassy had received it. The Embassy found the lost application but told the officer that, as the result of a new policy, a new requirement had been implemented: concerned persons must sign a statement that they are aware that a removal order has been made against them.

[10] The same day, January 6, 2009, the CBSA required Mr. Diallo to attend its office the following day, January 7. Mr. Diallo complied, but the meeting did not take place because of severe weather. He was again summoned for the following day, Thursday January 8. He appeared before Mr. Charlebois with his counsel but refused to sign the required statement. He was arrested on the spot by Officer Charlebois, who stated that he had reasonable grounds to believe that the applicant was a flight risk and would not attend for his removal on January 12, 2009.

[11] The applicant's motion for a stay of removal, filed on January 7, 2009, was heard by the Court on Sunday, January 11, 2009 at 11:00 a.m. During the hearing, the Court expressed its concern a number of times as to whether the Embassy had issued a travel document for Mr. Diallo, and, if not, whether the stay motion was moot and unnecessary because the Minister could not carry out the removal without the travel document. Counsel for the Minister advised the Court that, as far as she knew, the Minister had the necessary travel document. She even tried unsuccessfully at the hearing to verify with the CBSA that this was accurate.

[12] Accordingly, the Court heard the parties on the merits. It dismissed the stay motion and was of the view that Mr. Diallo had not demonstrated a serious question or irreparable harm and that the balance of convenience favoured the Minister. Reflecting its apparent concern, the Court also ordered the following: [TRANSLATION] "If a travel document was not issued in a timely manner, the parties will inform the Montréal Registry on Monday morning and, in that case, I will issue directions" (Emphasis added.). By coincidence, I was sitting in Montréal the week of January 11, 2009.

[13] On January 11, 2009, in the afternoon, the Court received a letter from counsel for the applicant informing it that his client's removal had been cancelled for lack of a travel document. He asked the Court to summon the parties. The letter described the CBSA's attempt on the morning of January 11, 2009, to persuade Mr. Diallo to sign the statement, which Mr. Diallo again refused to do.

[14] Despite an explanatory letter from counsel for the Minister dated January 12, 2009, stating that a hearing before the Court was unnecessary in the circumstances, the Court summoned the parties for January 14, 2009. After hearing the parties, the following day, January 15, 2009, the Court set aside its decision of January 11, 2009, refusing the stay on the ground that a new fact had arisen—the absence of the travel document. The issue of costs was put over for a subsequent decision following the receipt of written representations.

[15] I end this overview by reproducing paragraphs 22 to 28 of Mr. Kabango-Katalay's affidavit:

[TRANSLATION]

22. When the applicant was arrested, his lawyer stated that there was still hope that the applicant would sign the statement after his detention review scheduled for the morning of January 12, 2009, which would permit his removal in accordance with the terms and conditions already established.

23. In fact, it was possible to go to Ottawa to file the statement at the Embassy and obtain a special travel document issued on the spot, thus ensuring that the applicant would be removed on the evening of January 12, 2009, as originally scheduled.

24. The applicant's plane ticket was not cancelled at any time because removal was still possible.

25. On January 12, 2009, at 10 a.m., I contacted the representative of the Embassy of Mali to update him on the situation. To my great surprise, he told me that no travel document could be issued the same day and that the application would be processed within ten days.

26. The same day, the applicant was released on condition that he co-operate with the CBSA and sign any document required for his removal.

27. On January 13, 2009, the applicant again refused to sign the statement that his Embassy required to issue his travel document.

Given that the applicant deliberately breached his release conditions, he was detained again.

28. On January 15, 2009, the applicant finally agreed to sign the statement required by his Embassy. He was therefore released. [Emphasis added.]

III. Analysis - Principles

[16] The threshold for “special reasons” in section 22 of the Rules “is high . . . each decision must turn upon the particular circumstances before the Court” (see *Ibrahim v. Canada (MCI)*, 2007 FC 1342, at paragraph 8, where Madam Justice Dawson, then of this Court, cited her decision in *Uppal v. Canada (MCI)*, 2005 FC 1133, at paragraph 6: “[e]ach request for costs will turn upon the particular circumstances of the case”).

[17] According to this Court’s consistent jurisprudence, special reasons include “situations where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith. But special reasons can also include conduct that unnecessarily or unreasonably prolongs the proceedings” (see *Manivannan v. Canada (MCI)* at paragraph 51).

[18] Specifically, an award of costs under section 22 of the Rules is justified to compensate for wasted costs on a stay motion that was adjourned (see *Jackson v. Canada (MPSEP)*, 2007 FC 56 at paragraphs 2 and 14 and the Federal Court of Appeal decision in *Geza v. Canada (MCI)*, [2001] F.C.J. No. 9) in which Madam Justice Sharlow, at paragraph 16, awarded costs against the Minister of Citizenship and Immigration where “the appellants [were] compelled to waste time and effort in commencing and defending these appeals”(Emphasis added). In that case, the Minister had taken inconsistent positions.

[19] An award of costs requires the Court to consider and weigh all the relevant factors. One of these factors (which could cause the Court to refuse costs) is inappropriate behaviour on the part of the applicant (see *Ibrahim* at paragraph 9 and *Uppal* at paragraph 7) provided that there is a causal link between the inappropriate behaviour (here, the applicant's refusal to sign the statement) and the costs requested (here, the costs resulting from the stay motion and its repercussions after the CBSA cancelled Mr. Diallo's removal) (see *Ibrahim*, paragraphs 9 and 12).

[20] Costs ordered under section 22 of the Rules are calculated in accordance with section 400(4) of the *Federal Courts Rules* (see *Jackson* at paragraph 18 and *Federal Court Practice* by Saunders et al. at page 1167). This section refers to Tariff B.

IV. Conclusion

[21] For the following reasons, I believe that an award of costs in favour of the applicant is justified based on the particular circumstances of this case but not in the amount requested.

[22] First, I do not agree with the Minister's submission that without an affidavit from the applicant the Court did not have any facts before it that could ground the applicant's motion for costs. The Court knew all the relevant facts: it was at the heart of the proceedings in question including the stay motion records; the oral submissions made on January 11 and 14, 2009; and the Minister's representations of January 9 and 12, 2009. More important in this case, this Court's direction on costs simply required written representations by the parties.

[23] Second, the stay motion was not necessary. The applicant was not removed to Mali on January 12, 2009, for the simple reason that the Embassy of Mali had not issued a travel document for him. I repeat: at the hearing on the stay, the Court repeatedly expressed its concern about this.

[24] Third, I gave careful consideration to the Minister's argument that Mr. Diallo, through his inappropriate behaviour, was the reason why the travel document had not been issued in time. In my view, Mr. Diallo's refusal to sign the statement required to issue his travel document for his removal is unacceptable behaviour that, under normal circumstances, would disqualify him from being awarded costs under section 22 of the Rules. However, the specific circumstances of this case are unusual and justify an award of costs. To summarize, the evidence before me is not sufficient for me to find that Mr. Diallo contributed to the fact that a travel document was not issued in time.

[25] Prior to the hearing on January 11, 2009, the Minister was well aware that the Embassy had not issued the requisite travel document to enforce his removal the following day. I am satisfied that counsel for the Minister who argued before me on Sunday, January 11, 2009, had not been informed by her client that there was no travel document.

[26] Is Mr. Diallo responsible for the fact that a travel document was not issued in time? I think not.

[27] It is true that Mr. Diallo refused to acknowledge the notice to appear on December 17, 2008. However, that did not prevent the CBSA from asking the Embassy for a travel document during the day on December 17, 2008. This request complied with the Embassy's requirements at the time. According to Exhibit R-2 to Mr. Kabongo-Katalay's affidavit, the Embassy needed [TRANSLATION] "three days to proceed".

[28] After realizing that the Embassy had not yet issued a travel document for Mr. Diallo, the CBSA contacted the Embassy on January 5, 2009, and was told that the Embassy did not have an application file for Mr. Diallo, which was found later. It was the following day, on January 6, 2009, that the CBSA was informed of the new requirement for a statement by the concerned party.

[29] On January 8, 2009, a Thursday, the applicant refused to sign such a statement for the first time. His departure had been scheduled for the following Monday. The day before, the applicant filed his motion for a stay with a request for an urgent hearing. Counsel for the Minister filed her written representations on Friday, January 9, 2009.

[30] Based on the evidence, the second time the applicant refused to sign the statement required for his travel document to be issued was the morning of the day he was to be removed. The Minister argued that if Mr. Diallo had signed the statement the Embassy could have issued the travel document, but Mr. Kabongo-Katalay told us in his affidavit that he contacted the Embassy on January 12, 2009, at 10 a.m. to inform them of the situation but [TRANSLATION] "to my great surprise . . . he told me that no travel document could be issued the same day . . ."

[31] In my view, the evidence before me establishes that the fundamental reason why a travel document was not issued in time stems from the Embassy of Mali's new requirement and that the refusal to sign the statement on January 8, 2009, was not a sufficient contributing factor to deny him the costs incurred for an unnecessary proceeding (the hearing of the stay motion), which could have been avoided if the Court had been advised that the CBSA did not have in its possession a document that was necessary for the removal.

[32] The Minister's concern that awarding costs in this case would constitute a precedent that is prejudicial to the proper administration of justice is without merit. The circumstances of this case are unusual. The applicant's inappropriate behaviour was not a factor that contributed to his non-removal. If it had been, this Court's decision would have been different.

[33] However, the amount of \$5,650 requested for costs is not acceptable for the following reasons:

- A. Some of the costs have no connection to the Court. That is the case for the administrative attendances of December 17, 2008, and January 7 and 8, 2009.
- B. The fees for the preparation of the motion record and the hearings on January 11 and 15, 2009, are not in accordance with Tariff B, items 5 and 6.
- C. If he is seeking solicitor-client costs (which is possible according to the jurisprudence), I have no evidence before me to justify the amounts indicated.

[34] Section 400(4) authorizes this Court to award a lump sum in lieu of, or in addition to, any assessed costs. Taking into consideration the items in Tariff B, the number of units in Column III for assessable services, the appearance on January 14, 2009, as well as the submissions on costs, I award costs to the applicant under section 22 of the Rules, which I fix at \$1,500 payable forthwith.

ORDER

THE COURT ORDERS that the applicant is entitled to costs under section 22 of the Federal Court's immigration rules, which I fix at \$1,500 payable forthwith by the respondent.

"François Lemieux"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5612-08

STYLE OF CAUSE: MAMADOU DIALLO v.
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

**MOTION HEARD BY TELECONFERENCE ON JUNE 10, 2010, BETWEEN
OTTAWA, ONTARIO, AND MONTRÉAL, QUEBEC**

**REASONS FOR ORDER
AND ORDER:** LEMIEUX J.

DATED: September 28, 2010

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