Federal Court Cour fédérale

Date: 20220505

Docket: T-467-22

Citation: 2022 FC 660

Ottawa, Ontario, May 5, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

[redacted]

Appellant

and

HER MAJESTY THE QUEEN, THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, AND THE MINISTER OF PUBLIC SAFETY

Respondents

ORDER AND REASONS

[1] The Respondent brings this motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [the *Rules*] seeking to strike out the Appellant's Notice of Appeal filed pursuant to the *Secure Air Travel Act*, SC 2015, c 20, s 11 on February 28, 2022.

[2] In the alternative, the Respondent seeks an order that the parties have 30 days from the date of the determination of this motion to agree on the contents of the Appeal Book.

[3] For the reasons that follow, the Respondent's motion is granted. [redacted] Notice of Appeal is struck.

[4] In brief, section 16 of the *Secure Air Travel Act* [SATA] provides for an appeal to this Court of decisions made pursuant to section 15 of SATA. The decision of the Minister of Public Safety [the Minister] to place [redacted] on the list established pursuant to section 8 [the "no fly list" or the list] preceded the Direction issued to the air carrier pursuant to section 9 to prohibit [redacted] from boarding his planned flight on January 18, 2022. In accordance with the SATA, [redacted]'s first notice that he was on the list occurred when he received a copy of the Direction and Denial of Boarding Under the Passenger Protect Program. Section 15 of the SATA provides for administrative recourse by the affected person against a Direction issued pursuant to section 9 and [redacted] has pursued this administrative recourse seeking to have his name removed from the list. Once the administrative recourse has concluded and a decision is made by the Minister pursuant to section 15 whether to remove or retain [redacted]'s name on the list established pursuant to section 8, [redacted] could then appeal an unfavourable decision to this Court. An appeal at the current stage – before the administrative recourse has concluded – is not contemplated by the SATA and is premature. A contextual reading of the relevant provisions of the SATA supports this finding as does the jurisprudence (see *Brar v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 729 [*Brar*]).

[5] As explained by Justice Noël in *Brar*, the appeal provisions in the SATA set out that the Judge's role is to determine if the Minister's decision, made pursuant to section 15 is reasonable. While characterized as an appeal, there are some aspects that resemble judicial review, including the standard of review. However, as noted by Justice Noël, the appeal is more robust and if granted, would not result in remitting the decision to the Minister. Although an appeal is not limited to the record before the Minister, the record upon which the Minister's decision is based is, in my view, essential for the determination of an appeal.

[6] Contrary to [redacted]'s submissions, the Court has jurisdiction to strike a notice of appeal and the test for striking a notice of appeal is not significantly different from the test to strike out a notice of application for judicial review. The principle that any administrative recourse that will provide an effective remedy should be exhausted before resorting to the courts is not limited to applications for judicial review. There is no reason or exceptional circumstances to justify departing from this principle

[7] [redacted] pursued the administrative recourse in the SATA and should await the Minister's decision, which may provide the remedy he seeks.

[8] As noted by the Respondent, the proper respondent is the Minister of Public Safety and the style of cause will be amended accordingly.

I. **Background**

[9] On January 18, 2022, [redacted] was denied boarding for a flight to Afghanistan. He was given a copy of a Direction made pursuant to section 9 of the SATA, Denial of Boarding Under the Passenger Protect Program [Denial of Boarding]. The Direction noted that [redacted] could apply to have his name removed from the list established pursuant to section 8 of the SATA.

[10] On January 31, 2022, [redacted] made an Application for Recourse Under the Passenger Protect Program and provided submissions. The Minister has not yet decided whether to remove or retain [redacted]'s name on the list.

[11] On February 28, 2022, [redacted] filed a Notice of Appeal in this Court of the January 18, 2022 Direction and Denial of Boarding and of the Minister's decision to include [redacted]'s name on the list.

[12] The issue before the Court is whether to strike [redacted]s Notice of Appeal, not to address the merits of any appeal. However, [redacted]'s submissions provide a more detailed background, the highlights of which are noted for context. In brief, [redacted] argues that the Minister had no reasonable grounds to include his name on the list established pursuant to section 8 of the SATA. He explains that he previously assisted the Canadian Armed Forces and others in Afghanistan as an interpreter and that his current role with the [redacted] is to provide safe houses for people at risk in Afghanistan. He explains that he previously travelled to Afghanistan for this purpose and that his January 2022 travel on behalf of [redacted] was for the same

purpose. He disputes that any of his previous travel or meetings, including with Taliban representatives, were for any other purpose.

II. **The Notice of Appeal**

[13] [redacted] seeks to appeal the decision of the Minister that resulted in [redacted] being denied boarding as a result of the Direction issued pursuant to section 9 due to his inclusion on the list established pursuant to section 8.

[14] [redacted] seeks to have the decision quashed and his name removed from the list. He asserts several grounds, including that: the decision is unreasonable because there was no reason to suspect that he would engage in an act or omission that would threaten transport security, and there were no grounds to suspect that he would commit any offence pursuant to sections 83.18, 83.19 or 83.2 of the *Criminal Code* or other terrorism related offence; the decision was made contrary to the principles of procedural fairness and natural justice, including that he was not given any notice of the allegations that led to his inclusion on the list or any opportunity to be heard in response, nor any reasons for the decision to include his name on the list; the decision infringes his *Charter* rights pursuant to sections 6, 7, 10 (a) and (b); and, the SATA is unconstitutional, including because it infringes the *Charter*, is not in accordance with the principles of fundamental justice, and fails to provide an appeal process that allows a person to determine the grounds upon which the Minister made the decision, make full answer and defence or be heard within a reasonable time.

III. **The Respondent's Motion to Strike**

[15] The Respondent points to the provisions of the SATA, in particular sections 8, 9, 15 and 16. In particular, the Respondent notes that section 16 provides that the appeal is from a decision referred to in section 15 – the decision of the Minister on the application of the affected person for administrative recourse to have his or her name removed from the list – a decision which is generally required to be made by the Minister within 120 days.

[16] The Respondent submits that [redacted] was a listed person pursuant to section 8 of the Act before he was denied boarding and provided with a copy of the Denial of Boarding and Direction issued to the air carrier pursuant to section 9 of the SATA. The Respondent argues that [redacted]s recourse is to rely on section 15 to seek to have his name removed from the list.

[17] The Respondent submits that [redacted] has misconstrued the provisions of the SATA. Properly interpreted, it is only a decision of the Minister pursuant to section 15 that can be appealed.

[18] The Respondent explains that a person would not know that their name was on the list until they are provided with the Denial of Boarding. In accordance with section 20 of the SATA, the list is not disclosed; it is only when a Direction is issued pursuant to section 9 that the affected person becomes aware. It is at this point that the person can pursue recourse to seek to have their name removed. Once the Minister makes a decision pursuant to section 15 whether to

remove or maintain the name on the list, an appeal can be pursued. On appeal, the Court determines whether the decision made pursuant to section 15 is reasonable.

[19] The Respondent submits that given that [redacted] has availed himself of the administrative recourse pursuant to section 15, noting his January 31, 2022 application, any appeal is premature. Proceeding with both the administrative recourse and this appeal would be contrary to the intent of the SATA regime, inefficient and confusing.

[20] The Respondent notes that [redacted] has received a summary of the allegations and has acknowledged that he responded to each allegation. The Respondent adds that [redacted] will receive reasons for the Minister's decision.

[21] The Respondent submits that an appeal at this stage should not pre-empt the decision to be made by the Minister and would not permit a different remedy with respect to the possibility of removing [redacted]'s name from the list. The Respondent notes that [redacted] can obtain the same relief from the Minister that he seeks from the Court – to have his name removed from the list – through the administrative process, if meritorious.

[22] The Respondent further submits that the Court cannot determine the reasonableness of the Minister's initial decision to include [redacted]'s name on the list or any subsequent review of that inclusion without a record. The Respondent adds that if, as a result of the administrative recourse provided in section 15, the Minister removes [redacted]'s name, this appeal will be moot.

[23] However, the Respondent acknowledges that an appeal of a decision made by the Minister pursuant to section 15 of SATA differs from the administrative recourse in several respects, including that it is more robust.

[24] The Respondent points to the jurisprudence that establishes that administrative processes should run their course before seeking the intervention of the Court by way of appeal or judicial review (*Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 30–31 [*CB Powell*]). Whether described as the doctrine of exhaustion, adequate alternative remedies, objections against premature judicial reviews or otherwise, the Respondent submits that the basic principle that the courts should not interfere with administrative processes until these have been completed applies equally to notices of application for judicial review and notices of appeal.

[25] The Respondent also points to the jurisprudence guiding motions to strike applications for judicial review noting that the Court will only strike where the application is "bereft of any possibility of success" (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 47–48 [*JP Morgan*]). The Respondent submits that [redacted]'s application cannot succeed because it is premature.

[26] With respect to [redacted]'s arguments that his *Charter* rights have been infringed and, more generally, that the SATA is unconstitutional, the Respondent submits that it is well established that Courts should not consider such issues without a proper evidentiary record and factual foundation. If, in response to [redacted]'s application for administrative recourse, the

Minister decides to maintain [redacted]'s name on the list, the Minister's decision and the full evidentiary record would then permit the Court to address the constitutional arguments.

[27] The Respondent disputes [redacted]'s contention that special circumstances exist to justify permitting his appeal to proceed despite that administrative recourse remains to be determined. The Respondent notes that the jurisprudence establishes that very few circumstances will constitute exceptional circumstances to justify bypassing administrative recourse and seeking early recourse to the courts (*CB Powell* at para 33).

[28] The Respondent submits that the Applicant's submissions that a miscarriage of justice will result from being prohibited from travelling by air should first be addressed by the Minister, in the context of [redacted]'s application to have his name removed from the list.

[29] With respect to [redacted]'s submissions that his rights to procedural fairness have been breached, the Respondent submits that [redacted] has availed himself of the administrative recourse, which provides such procedural rights. In addition, any adverse decision made by the Minister pursuant to section 15 could be appealed.

IV. **The Appellant's Submissions**

[30] As noted above, [redacted] seeks an order to have his name removed from the "no fly list" established pursuant to section 8 of SATA. He characterizes his appeal as from the initial decision of the Minister to place him on the list, from which the Denial of Boarding resulted.

[31] [redacted] argues that subsection 16(1) of the SATA states that the appeal provisions apply "in respect of any appeal of any direction made under section 9 and any decision made under section 8 or 15 by the Minister" [emphasis added]. He submits that his appeal is not premature because it is an appeal of the decision made by the Minister to place his name on the list pursuant to section 8, for which there is no administrative recourse. He acknowledges that he has sought administrative recourse, but submits that this administrative recourse relates only to the Direction and Denial of Boarding issued pursuant to section 9. He also argues that the administrative recourse provided in section 15 will not address his other challenges to the SATA regime.

[32] [redacted] argues that the jurisprudence regarding striking out a notice of application for judicial review applies only in the context of judicial review and not to an appeal. He further submits that the Court has no jurisdiction to strike a Notice of Appeal, but cites no authority for this broad proposition.

[33] [redacted] alternatively argues that if this jurisprudence applies, the Respondent has not met the very high threshold to strike out his Notice of Appeal. [redacted] disputes that his appeal has no prospect of success. He advances several arguments in support of his overall submission that the Minister had insufficient evidence to warrant placing his name on the list established pursuant to section 8. He also argues that the administrative recourse against the Denial of Boarding will not address his arguments regarding the *Charter* violations and constitutionality of the SATA regime.

[34] [redacted] also alternatively argues that exceptional circumstances justify permitting his appeal to proceed, including that the Minister's decision to include his name on the list breached his *Charter* rights (sections 6 and 7) without notice to him or an opportunity to respond and without any reasons and more generally breached the duty of procedural fairness. He also argues that the SATA regime is unconstitutional. [redacted] adds that there is no other recourse to address these issues. In addition, he submits that prohibiting his travel by air puts the lives of those he seeks to help in Afghanistan at stake, including the lives of Canadian interpreters, and prevents him from managing safe houses for those persons.

[35] [redacted] acknowledges that a factual foundation is essential to permit the Court to determine the *Charter* and constitutional issues he raises. He submits that he has provided such a foundation that could be supplemented by the Respondent's evidence, which together will provide a sufficient record.

[36] [redacted] also makes submissions regarding the merits of his appeal.

V. **The Respondent's Motion Is Granted**

A. *The interpretation of the SATA's appeal provisions*

[37] [redacted]'s arguments regarding his right to bring this appeal now, before he has exhausted the administrative recourse provided in SATA, stem from his interpretation of the relevant provisions. He focusses on subsection 16(1) without taking a more holistic view of how the regime operates.

[38] The relevant provisions of the SATA are set out at Annex 1.

[39] In my view, read as a whole, the SATA provides for the appeal of the Minister's decision pursuant to section 15.

[40] I agree that the wording of subsection 16(1), read in isolation, suggests that it is possible to appeal a "decision" made pursuant to section 8. (Subsection 16(1) states "this section applies in respect of any appeal of any direction made under section 9 and any decision made under section 8 or 15 by the Minister" [emphasis added].) More clarity of this wording to accord with the appeal provisions described in section 16 and more harmoniously with the related provisions would be helpful.

[41] However, the subsection should not be read in isolation or in an illogical manner. When subsection 16(1) is read in the context of section 16, which applies to appeals, and to the SATA as a whole, it is apparent that the appeal provisions apply to the Minister's decision pursuant to section 15 – the decision whether to retain or remove a name on the list established pursuant to section 8 based on the application by the affected person (i.e., the decision on the administrative recourse). Note that subsection 16(2) sets out the right of appeal for a listed person, stating, "A listed person who has been denied transportation as a result of a direction made under section 9 may appeal a decision referred to in section 15…" [emphasis added]. Section 16 does not set out a right of appeal for a listed person to appeal the initial decision by the Minister to include their name on the list.

[42] As noted by the Respondent, the Minister's decision to place a name on the list is made without notice to the person or to anyone else (with some specific exceptions) and the list is not disclosed. The Direction and Denial of Boarding gives the first notice to the person and triggers the administrative recourse.

[43] From a practical perspective, a listed person could not pursue an appeal without knowledge that their name is on the list. This knowledge arises only once the Direction is issued pursuant to section 9, which then triggers the administrative recourse option by which the affected person can seek to have their name removed from the list.

[44] In *Brar,* at paras 60–128, Justice Noël provided a comprehensive overview of the SATA and interpreted the relevant provisions, including the appeal process, based on the modern principles of statutory interpretation. Justice Noël explained the robust nature of the appeal provided, the role of the judge in determining whether the Minister's decision made pursuant to section 15 is reasonable and the need to balance the protection of national security with the right of the listed person to know and meet the case. The passages below highlight that SATA provides for an appeal of a decision made pursuant to section 15.

[45] At paras 76–79, the Court noted how the process unfolds and the availability of administrative recourse:

> [76] Should a positive match arise [between the identity of the proposed traveller and the name on the list], subsection 9(1) of the *SATA* provides the Minister with the power to direct an air carrier to "take a specific, reasonable and necessary action to prevent a listed person from engaging in any act set out in subsection 8(1)" as well as the power to "make directions

respecting, in particular, (a) the denial of transportation to a person; or (b) the screening of a person before they enter a sterile area of an airport or board an aircraft." Should a denial of transportation under paragraph 9(1)(a) be directed, the listed person is provided with written notice to this effect. As seen earlier, this is the first time a person becomes aware that their name is included on the *SATA* list as, barring denial, a listed person is not advised that their name is on the *SATA* list.

[77] Subsection 15(1) of the *SATA* provides an individual who has been denied transportation pursuant to section 9 of the *SATA* an administrative recourse to have their name removed from the *SATA* list. The individual in question can apply in writing to the Minister within 60 days after the day on which they were denied transportation, although an extension may be granted pursuant to subsection 15(2). On receipt of the application, the Minister must decide whether there "are still reasonable grounds to maintain the applicant's name on the list" pursuant to subsection 15(4).

[78] In considering a listed person's application for administrative recourse, the nominating member of the Advisory Group will provide information to help the Minister determine whether reasonable grounds exist to maintain the person's name on the *SATA* list. The Minister will also provide the listed person with a "reasonable opportunity to make representations," which the Minister will consider in their decision (subsection 15(3)). However, section 15 of the *SATA* imposes no explicit obligation on the Minister to disclose any information to a listed person in order to assist them in making representations. That being said, each Appellant in these appeals was provided with a two-page "unclassified summary" of the information that was placed before the Minister along with a statement that the Minister would also consider "classified information" in his decision. (Affidavit of Lesley Soper, Document ii of Exhibit B).

[79] Finally, once the Minister makes a decision on the listed individual's application for administrative recourse pursuant to subsection 15(4), the Minister must give notice to the listed individual without delay (subsection 15(5)). However, pursuant to subsection 15(6), if the Minister does not make a decision within a period of 120 days after the day that the application is received, the Minister is deemed to have decided to remove the individual's name from the list. The Minister may nevertheless extend this period by an additional 120 days, upon notice, if there is a lack of sufficient information available to make a decision.

[46] Justice Noël elaborated on the appeal process in *Brar*, at paras 80–81, explaining and buttressing the point that the appeal is from a decision made pursuant to section 15,

> [80] Beyond the internal decision-making process and administrative recourse provisions in the *SATA*, the legislative scheme provides for an external appeal to the Chief Justice of the Federal Court, or a judge designated by the Chief Justice, pursuant to the appeal procedures set out in section 16 of the *SATA*. In particular, the *SATA* provides that a person listed pursuant to section 8, who has been denied transportation as a result of a direction made pursuant to section 9, may appeal a decision made under section 15 within 60 days of the notice of decision (see subsection 16(1) and 16(2)). Pursuant to paragraph 63(1)(e) of the *Federal Courts Rules*, SOR/98–106, the originating document to begin this process is a notice of appeal. In the present appeals, the parties submitted Notices of Appeal in accordance with the *Federal Court Rules*.
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> [81] Subsection 16(4) tasks the designated judge with determining "whether the decision [of the Minister pursuant to section 15] is reasonable on the basis of the information available to the judge" and that this determination must be done "without delay." Should the decision be deemed unreasonable, subsection 16(5) allows the judge to order that an appellant's name be removed from the list. These subsections are key in defining the nature of the appeal under the *SATA* as they: set the standard applicable for the designated judge's review, do not limit the evidence before the judge to the evidence that was before the Minister, and allocate powers to the judge to directly make a decision concerning the removal of an individual from the *SATA* list.
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> [Emphasis added.]

B. *The Administrative Recourse Should Be Exhausted*

[47] [redacted] argues that the jurisprudence that establishes that resort to the courts should await the outcome of effective administrative recourse does not apply. He has not articulated why, other than to note that *CB Powell* arose from a different set of facts – where the applicable statute provided for an appeal, but the applicant instead sought judicial review. Contrary to [redacted]

[redacted]'s view, the principle or rule described in *CB Powell* applies broadly, as the rationale for the principles does not differ whether the first recourse is an internal appeal or other review process. The point is that where a statute has provided for such recourse, that recourse should be pursued and exhausted before resorting to the courts. As noted at para 33 of *CB Powell*, "Courts across Canada have enforced this general principle of non-interference with ongoing administrative processes vigorously."

[48] In *CB Powell*, the Court of Appeal clearly and forcefully explained the "normal rule" at paras 30–31:

> [30] 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. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561; *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3; *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929; *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706 at paragraphs 38-43; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 at paragraphs 31 and 34; *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 at paragraph 14-15, 58 and 74; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14; *Vaughan v. Canada*, [2005] 1 S.C.R. 146, 2005 SCC 11 at paragraphs 1-2; *Okwuobi v. Lester B. Pearson School Board*, [2005] 1 S.C.R. 257, 2005 SCC 16 at paragraphs 38-55; *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, 2005 SCC 30 at paragraph 96.
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> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This

> means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
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> [Emphasis added.]

[49] The Court of Appeal explained the rationale for the rule at para 32, including that it prevents fragmentation of the administrative process, avoids unnecessary costs and delays, and reflects judicial respect for administrative decision-makers.

[50] There is no basis in the present case to depart from the principle that the administrative recourse should run its course. I do not find that [redacted] has established exceptional circumstances that warrant departing from this principle. As noted at para 33 of *CB Powell*, "very few circumstances qualify as 'exceptional' and the threshold for exceptionality is high" and concerns about procedural fairness or constitutional issues would not generally permit bypassing the administrative process. [redacted] should await the outcome of his request to the Minister to remove his name from the list.

C. *The Court Has Jurisdiction to Strike a Notice of Appeal*

[51] [redacted] has not cited any authority for his argument that the principles that guide whether to strike out a notice of application do not apply to striking out a Notice of Appeal. Nor has [redacted]

[redacted] cited any authority for his submission that the Court has no jurisdiction at all to strike out a Notice of Appeal.

[52] A review of the jurisprudence in both scenarios demonstrates that the same general principles underlie the tests for striking out a notice of application, a notice of appeal or other pleading. Although the tests have been articulated in various ways by the courts, they are similar, for example, "plain and obvious that the appeal cannot succeed," "no reasonable chance of succeeding" or "bereft of any possibility of success." The jurisprudence also confirms that the Court has the jurisdiction to strike a notice of appeal.

[53] In *Lessard-Gauvin v Canada (Attorney General)*, 2019 FCA 233, the Federal Court of Appeal considered a motion to strike out a notice of appeal and agreed that the Court had such inherent authority. The Court of Appeal noted at para 16 that the parties did not diverge significantly on the applicable test. At paras 8–10, the positions of the parties is described:

> [8] In the written submissions filed in support of the motion, the Respondent argues that the Court has the inherent authority to strike a notice of appeal when it is plain and obvious that the appeal cannot succeed (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Canada (Citizenship and Immigration) v. Arif*, 2010 FCA 157 at paragraph 9). The Appellant does not challenge that argument.
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> [9] The Respondent submits that the test for striking out the notice of appeal is met in this case. The Respondent argues that, for each error alleged in the notice of appeal, the Appellant's position is unfounded and/or vague, and it is plain and obvious that the appeal cannot succeed.
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> [10] In reply, the Appellant insists that the threshold for striking out the notice of appeal is very high.

[54] In *Tuccaro v Canada*, 2014 FCA 184, the Federal Court of Appeal considered the appeal of an Order of the Tax Court that struck parts of the notice of appeal. The Court of Appeal applied the jurisprudence governing motions to strike pleadings, citing, at para 5, *Odhavji Estate v Woodhouse*, 2003 SCC 69, which in turn cited *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980, 1990 CanLII 90: “assuming that the facts as stated in the statement of claim can be proved, is it ‘plain and obvious’ that the plaintiff's statement of claim discloses no reasonable cause of action?” and noting, “the question that must then be determined is whether there it is "plain and obvious" that the action must fail.”

[55] Similarly in *Ereiser v Canada*, 2013 FCA 20, also an appeal of a decision of the Tax Court striking parts of a Notice of Appeal, the Court of Appeal cited the jurisprudence regarding the test for striking pleadings (at para 17) including *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco*], which also cited the tests set out in *Odhavji Estate v Woodhouse* and *Hunt v Carey Canada Inc.*

[56] In *Imperial Tobacco*, the Supreme Court of Canada noted that a motion to strike should be used with caution. The Court also provided additional guidance, at para 25, noting that “[t]he question is whether, considered in the context of the law and the litigation process, the claim has no reasonable chance of succeeding” [emphasis in original].

[57] In *JP Morgan* the Court of Appeal set out the test for striking out a notice of application for judicial review at para 47:

> [47] The Court will strike a notice of application for judicial review only where it is “so clearly improper as to be bereft of any

> possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v. Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v. Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *cf.*. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[58] The Respondent notes that in *JP Morgan* the Court of Appeal confirmed that the Court's jurisdiction to strike a notice of application is founded on the Court's plenary jurisdiction to restrain misuse or abuse of the judicial process. As noted by the Respondent, a premature application for judicial review can be struck on the same test; that it is bereft of any possibility of success (*Forner v Professional Institute of the Public Service of Canada*, 2016 FCA 35 at paras 11–14 [*Forner*]). In *Forner*, at para 11, the Court of Appeal found the premature application for judicial review was a "show stopper" and that the application for judicial review could not be entertained.

[59] [redacted] argues that the principle in *JP Morgan* does not apply because that case dealt with a motion to strike out a notice of application for judicial review on the basis that an appeal to the Tax Court was available. (Section 18.5 of the *Federal Courts Act* precludes judicial review in such circumstances.) [redacted] argues more generally that the jurisprudence with respect to applications for judicial review does not apply because he is pursuing a statutory appeal.

[60] [redacted]'s submissions focus more on whether the principle requiring the exhaustion of administrative recourse (as described in *CB Powell*) applies and whether his appeal is premature and, as a result, has no reasonable prospect of success. Whether the test for striking out a notice

of appeal differs from the test that applies to strike out a notice of application for judicial review is not the real issue. The issue is whether a premature appeal can meet the threshold to strike out the Notice of Appeal. In my view, there is no principled reason for finding that it cannot and in the circumstances of this case, it meets the threshold.

[61] As noted above, the Court has jurisdiction to strike a notice of appeal when it is plain and obvious that the appeal cannot succeed. As noted in *Imperial Tobacco* at para 25, the "context of the law and litigation" must be considered. The SATA provides for administrative recourse and the right of appeal follows the determination of the administrative recourse. A premature appeal in this context has no reasonable prospect of success.

D. *Practicality*

[62] Apart from the application of the established principles to the present case, it would be impractical to permit [redacted]'s appeal to proceed now. [redacted] sought administrative recourse on January 31, 2022. In accordance with subsection 15(6) of the SATA, the Minister has 120 days (with the possibility of an extension of time) to determine if [redacted]'s name should remain or be removed from the list. A decision may be issued by the end of May, which is now a matter of a few weeks. In the event that the Minister's decision is to remove [redacted]'s name, the primary remedy he now seeks by way of appeal would be moot. If the Minister's decision is that [redacted]'s name remain on the list, [redacted] could appeal that decision and the Court would determine without delay, as required by subsection 16(4) of the SATA, whether the decision is reasonable with the benefit of the record before the Minister and other information. As described by Justice Noël in *Brar*, the appeal is "robust."

[63] I acknowledge that [redacted]'s *Charter* and constitutional arguments deserve consideration and note that similar issues have been raised before this Court in other proceedings. However, I do not agree with [redacted] that this Court would have a sufficient record at this time to determine the issues he raises.

[64] In conclusion, the Respondent's motion is granted. The Notice of Appeal is struck in its entirety. There is no need to address the alternative relief sought regarding the contents of the Appeal Book at this time. In the event that the Minister's decision in response to [redacted]'s application for administrative recourse results in [redacted]'s name remaining on the list established pursuant to section 8 of the SATA, [redacted] may pursue his right to appeal at that time and the Court will endeavour to expedite any appeal to the extent possible. The Court declines to award costs in the present circumstances.

ORDER in file T-467-22

THIS COURT ORDERS that

1. The Respondent's Motion is granted.

2. The Appellant's Notice of Appeal is struck in its entirety.

3. No Costs are ordered.

"Catherine M. Kane"
Judge

ANNEX 1 – relevant provisions / excerpts from SATA

Secure Air Travel Act	**Loi sur la sûreté des déplacements aériens**
List	**Liste**
8 (1) The Minister may establish a list on which is placed the surname, first name and middle names, any alias, the date of birth and the gender of any person, and any other information that is prescribed by regulation that serves to identify the person, if the Minister has reasonable grounds to suspect that the person will (a) engage or attempt to engage in an act that would threaten transportation security; or (b) travel by air for the purpose of committing an act or omission that (i) is an offence under section 83.18, 83.19 or 83.2 of the Criminal Code or an offence referred to in paragraph (c) of the definition terrorism offence in section 2 of that Act, or (ii) if it were committed in Canada, would constitute an offence referred to in subparagraph (i).	**8 (1)** Le ministre peut établir une liste sur laquelle il inscrit les nom et prénoms, tout nom d'emprunt, la date de naissance et le genre de toute personne — ainsi que tout autre renseignement prévu par règlement permettant de l'identifier, à l'égard de laquelle il a des motifs raisonnables de soupçonner qu'elle : **a)** soit participera ou tentera de participer à un acte qui menacerait la sûreté des transports; **b)** soit se déplacera en aéronef dans le but de commettre un fait — acte ou omission — qui : **(i)** constitue une infraction visée aux articles 83.18, 83.19 ou 83.2 du *Code criminel* ou à l'alinéa c) de la définition de ***infraction de terrorisme*** à l'article 2 de cette loi, **(ii)** s'il était commis au Canada, constituerait une des infractions mentionnées au sous-alinéa (i).
Review of List (2) The Minister must review the list every 90 days to determine whether the grounds for which each person's name was added to the list under subsection (1) still exist and whether the person's name should remain on the list. The review does not affect the validity of the list.	**Examen périodique de la liste** 2) Tous les quatre-vingt-dix jours, le ministre examine la liste afin de déterminer si les motifs sur lesquels il s'est basé pour inscrire le nom de chaque personne en vertu du paragraphe (1) existent encore et si le nom de la personne devrait demeurer sur la liste. L'examen est sans effet sur la validité de la liste.

Amendment to List

(3) The Minister may at any time amend the list

(a) by deleting the name of a person and all information relating to them if the grounds for which their name was added to the list no longer exist; or

(b) by changing the information relating to a listed person.

Exemption from *Statutory Instruments Act*

(4) The list is exempt from the application of the Statutory Instruments Act

Directions

Directions

9 (1) The Minister may direct an air carrier to take a specific, reasonable and necessary action to prevent a listed person from engaging in any act set out in subsection 8(1) and may make directions respecting, in particular,

(a) the denial of transportation to a person; or

(b) the screening of a person before they enter a sterile area of an airport or board an aircraft.

Exemption from *Statutory Instruments Act*

(2) A direction made under subsection (1) is exempt from the application of the Statutory Instruments Act.

[ ]

Administrative Recourse

Application to Minister

Modifications apportées à la liste

(3) Le ministre peut en tout temps modifier la liste pour :

a) soit enlever le nom d'une personne de la liste ainsi que tout renseignement la visant, si les motifs pour lesquels le nom a été inscrit sur la liste n'existent plus;

b) soit modifier les renseignements visant une personne inscrite.

Loi sur les textes réglementaires

(4) La liste est soustraite à l'application de la *Loi sur les textes réglementaires*.

Directives

Directives

9 (1) Le ministre peut enjoindre à un transporteur aérien de prendre la mesure raisonnable et nécessaire qu'il précise en vue d'éviter qu'une personne inscrite commette les actes visés au paragraphe 8(1). Il peut en outre lui donner des directives relatives, notamment :

a) au refus de transporter une personne;

b) au contrôle dont une personne fait l'objet avant d'entrer dans une zone stérile de l'aéroport ou de monter à bord d'un aéronef.

Loi sur les textes réglementaires

2) Est soustraite à l'application de la *Loi sur les textes réglementaires* toute directive donnée en vertu du paragraphe (1).

[..]

Recours administratif

Demande de radiation

15 (1) A listed person who has been denied transportation as a result of a direction made under section 9 may, within 60 days after the day on which they are denied transportation, apply in writing to the Minister to have their name removed from the list.

15 (1) La personne inscrite ayant fait l'objet d'un refus de transport à la suite d'une directive donnée en vertu de l'article 9 peut, dans les soixante jours suivant le refus, demander par écrit au ministre que son nom soit radié de la liste.

Exceptional circumstance
(2) If the Minister is satisfied that there are exceptional circumstances that warrant it, the Minister may extend the time limit set out in subsection (1).

Prolongation
(2) Le ministre, s'il est convaincu qu'il existe des circonstances exceptionnelles le justifiant, peut prolonger le délai visé au paragraphe (1).

Representations
(3) The Minister must afford the applicant a reasonable opportunity to make representations.

Observations
(3) Le ministre accorde au demandeur la possibilité de faire des observations.

Application to Minister
(4) On receipt of the application, the Minister must decide whether there are still reasonable grounds to maintain the applicant's name on the list.

Décision du ministre
(4) À la réception de la demande, le ministre décide s'il existe encore des motifs raisonnables qui justifient l'inscription du nom du demandeur sur la liste.

Notice of decision to applicant
(5) The Minister must give notice without delay to the applicant of any decision made in respect of the application.

Avis de la décision au demandeur
(5) Le ministre donne sans délai au demandeur un avis de la décision qu'il a rendue relativement à la demande.

Deemed decision
(6) If the Minister does not make a decision in respect of the application within a period of 120 days after the day on which the application is received — or within a further period of 120 days, if the Minister does not have sufficient information to make a decision and he or she notifies the applicant of the

Présomption
(6) S'il ne rend pas sa décision dans les cent vingt jours suivant la réception de la demande ou dans les cent vingt jours suivant cette période s'il n'a pas suffisamment de renseignements pour rendre sa décision et qu'il en avise le demandeur durant la première période de cent vingt jours, le ministre est réputé avoir décidé de

extension within the first 120-day period — the Minister is deemed to have decided to remove the applicant's name from the list.

Appeals

Decisions under this Act

16 (1) This section applies in respect of any appeal of any direction made under section 9 and any decision made under section 8 or 15 by the Minister.

Application

(2) A listed person who has been denied transportation as a result of a direction made under section 9 may appeal a decision referred to in section 15 to a judge within 60 days after the day on which the notice of the decision referred to in subsection 15(5) is received.

Extension

(3) Despite subsection (2), a person may appeal within any further time that a judge may, before or after the end of those 60 days, fix or allow.

Determination

(4) If an appeal is made, the judge must, without delay, determine whether the decision is reasonable on the basis of the information available to the judge.

Removal from list

Removal from list

(5) If the judge finds that a decision made under section 15 is unreasonable, the judge may order that the appellant's

radier de la liste le nom du demandeur.

Appels

Décisions au titre de la présente loi

16 (1) Le présent article s'applique à toute demande d'appel d'une directive donnée en vertu de l'article 9 et d'une décision du ministre prise au titre des articles 8 ou 15.

Demande

2) La personne inscrite ayant fait l'objet d'un refus de transport à la suite d'une directive donnée en vertu de l'article 9 peut présenter à un juge une demande d'appel de la décision visée à l'article 15 dans les soixante jours suivant la réception de l'avis visé au paragraphe 15(5).

Délai supplémentaire

(3) Malgré le paragraphe (2), une personne peut présenter une demande d'appel dans le délai supplémentaire qu'un juge peut, avant ou après l'expiration de ces soixante jours, fixer ou accorder.

Décision

(4) Dès qu'il est saisi de la demande, le juge décide si la décision est raisonnable compte tenu de l'information dont il dispose.

Radiation de la liste

(5) S'il conclut que la décision visée à l'article 15 n'est pas raisonnable, le juge peut ordonner la radiation du nom de l'appelant de la liste.

name be removed from the list.

Procedure

(6) The following provisions apply to appeals under this section:

(a) at any time during a proceeding, the judge must, on the request of the Minister, hear information or other evidence in the absence of the public and of the appellant and their counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person;

(b) the judge must ensure the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person;

(c) throughout the proceeding, the judge must ensure that the appellant is provided with a summary of information and other evidence that enables them to be reasonably informed of the Minister's case but that does not include anything that, in the judge's opinion, would be injurious to national security or endanger the safety of any person if disclosed;

(d) the judge must provide the appellant and the Minister with an opportunity to be heard;

Procédure

(6) Les règles ci-après s'appliquent aux appels visés au présent article :

a) à tout moment pendant l'instance et à la demande du ministre, le juge doit tenir une audience à huis clos et en l'absence de l'appelant et de son conseil dans le cas où la divulgation des renseignements ou autres éléments de preuve en cause pourrait porter atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

b) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que lui fournit le ministre et dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui;

c) il veille tout au long de l'instance à ce que soit fourni à l'appelant un résumé de la preuve qui ne comporte aucun élément dont la divulgation porterait atteinte, selon lui, à la sécurité nationale ou à la sécurité d'autrui et qui permet à l'appelant d'être suffisamment informé de la thèse du ministre à l'égard de l'instance en cause;

d) il donne à l'appelant et au ministre la possibilité d'être entendus;

e) il peut recevoir et admettre en preuve tout élément — même inadmissible en justice — qu'il estime digne de foi et utile et peut fonder sa décision sur celui-ci;

(e) the judge may receive into evidence anything that, in the judge's opinion, is reliable and appropriate, even if it is inadmissible in a court of law, and may base a decision on that evidence;
(f) the judge may base a decision on information or other evidence even if a summary of that information or other evidence has not been provided to the appellant;
(g) if the judge determines that information or other evidence provided by the Minister is not relevant or if the Minister withdraws the information or evidence, the judge must not base a decision on that information or other evidence and must return it to the Minister; and
(h) the judge must ensure the confidentiality of all information or other evidence that the Minister withdraws.

f) il peut fonder sa décision sur des renseignements et autres éléments de preuve même si un résumé de ces derniers n'est pas fourni à l'appelant;
g) s'il décide que les renseignements et autres éléments de preuve que lui fournit le ministre ne sont pas pertinents ou si le ministre les retire, il ne peut fonder sa décision sur ces renseignements ou ces éléments de preuve et il est tenu de les remettre au ministre;
h) il lui incombe de garantir la confidentialité des renseignements et autres éléments de preuve que le ministre retire de l'instance.

Definition of *judge*
(7) In this section, judge means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.

Définition de *juge*
(7) Au présent article, ***juge*** s'entend du juge en chef de la Cour fédérale ou du juge de cette juridiction désigné par celui-ci.

Protection of information on appeal
17 Section 16 applies to any appeal of a decision made under that section and to any further appeal, with any necessary modifications.

Protection des renseignements à l'appel
17 L'article 16 s'applique, avec les adaptations nécessaires, à l'appel de la décision rendue au titre de cet article et à tout appel subséquent.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-467-22
STYLE OF CAUSE:	[redacted] v HER MAJESTY THE QUEEN, THE, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS,, AND THE MINISTER OF PUBLIC SAFETY
PLACE OF HEARING:	MOTION DETERMINED IN WRITING
DATE OF HEARING:	MOTION DETERMINED IN WRITING
REASONS FOR ORDER AND ORDER:	KANE J.
DATED:	MAY 5, 2022

APPEARANCES:

B. Rory B. Morahan	FOR THE APPELLANT
Hilla Aharon	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Morahan and Company Barristers and Solicitors Victoria, British Columbia	FOR THE APPELLANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENTS