Federal Court  Cour fédérale

Date: 20140902

Docket: T-1724-13

Citation: 2014 FC 836

Ottawa, Ontario, September 2, 2014

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JOSE LUIS FIGUEROA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks the issuance of a writ of *mandamus* requiring the Minister of Public Safety and Emergency Preparedness [respondent] to issue a certificate stating that he is not a "listed entity" under the *Criminal Code*, RSC 1985, c C-46 [Code]. Some background is necessary to understand the object of this proceeding which must be considered in light of other proceedings involving the applicant.

[2] The applicant is a citizen of El Salvador who has lived in Canada for 16 years and has three Canadian children. Being failed refugee claimants, in 2002, the applicant and his wife applied for permanent residency on humanitarian and compassionate [H&C] grounds. As a result of a July 6, 2009 interview with an officer from the Canadian Border Services Agency [CBSA], it was found that there were reasonable reasons to believe that the applicant was inadmissible to Canada on security grounds pursuant to paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. On May 5, 2010, the Immigration Division of the Immigration and Refugee Board issued a deportation order against the applicant on the grounds that he had engaged in terrorism or been a member of an organization that has engaged in terrorism, since he had been a member of the Martí para la Liberación Nacional [FMLN] from approximately 1986 to 1995. The applicant applied for leave to judicially review the Immigration Division's decision. On August 30, 2010, the Court dismissed the applicant's application for leave; accordingly, the removal order issued against the applicant became legally enforceable.

[3] In the meantime, on July 28, 2010, the applicant notably made an application to be exempted from his inadmissibility on H&C grounds. On March 28, 2013, the Delegate of the Minister of Citizenship and Immigration denied the application because the applicant's inadmissibility was of a "serious nature", observing that the FMLN is a "terrorist organization". However, the applicant's wife has been approved to remain in Canada on humanitarian grounds. The applicant made a request for judicial review. Meanwhile, on October 4, 2013, the applicant sought sanctuary in a church in Langley to avoid his removal from Canada. On October 29, 2013, the removal order against the applicant was stayed by the Court, pending final determination of the judicial review of the H&C application. On July 10, 2014, Justice Mosley

allowed the application for judicial review of the decision dismissing the H&C application because it is unreasonable and remitted the matter for reconsideration by a different officer: *Figueroa v Canada (Citizenship and Immigration)*, 2014 FC 673.

[4] It is worth noting that in his reasons for judgment, Justice Mosley found that the Delegate's decision was unreasonable as it failed to take into account the nature of the conflict in El Salvador – in particular, the political violence inflicted on the population by the military and security forces over many years – and the applicant's personal role as a non-combatant political advocate engaged in trying to motivate young people at the university to become involved in the movement to achieve political reform in the country (at paras 32 and 33).

[5] As far as to his admitted membership in the FMLN from 1986 to 1995 (the year he arrived in Canada), Justice Mosley also noted at paragraph 38 of his judgment:

> The Delegate unreasonably referred to the FMLN as a "terrorist organization". That term is not used in s 34 and is not a term of art employed by the statute. The IRPA refers to membership in an organization that has, is or will engage in acts of terrorism. The FMLN was never a group for which political terror was a primary tactic. It had broad popular support and has now formed the government elected through democratic means. The organization attracted 80-100,000 members in a country of 5 million population. It was a broad based legitimate resistance group. The armed elements of the FMLN were primarily military forces engaged in a civil war against an oppressive regime much like the African National Congress in South Africa's struggle against apartheid. The FMLN has not been proscribed as a "terrorist entity" on the list maintained by the Government of Canada. The Government of Canada carries on normal relations with the Government of El Salvador, now led by the FMLN. Some consideration should have been given to all of this before the Delegate concluded that the applicant's membership in the FMLN was of such a serious nature that it outweighed the positive humanitarian and compassionate factors in favour of granting the applicant an exemption.

[6] Parallel to the institution of the procedures discussed above seeking to set aside the Delegate's decision, on May 27, 2013, the applicant's counsel applied to the respondent under section 83.07 of the Code for a ministerial certificate stating that the applicant is not a "listed entity". The purpose why the applicant is seeking a ministerial certificate is clearly spelled out in the May 27, 2013 letter from his Counsel:

> [The applicant] is seeking a certificate that he is not a listed entity in order to clarify that, notwithstanding the finding against him – and against the FMLN – under the IRPA, Canadian officials know full well that he is not a terrorist and has not been involved in a terrorist organization. He wants to have this to ensure that he does not face further difficulties in his life because of the IRPA determination.

[7] On September 11, 2013, the Director General of the National Security Operations Directorate acknowledged receipt of the application for the issuance of a ministerial certificate but noted that it does not indicate what confusion arises from a comparison of the applicant's name to those on the list of terrorist entities. Absent any evidence of confusion, there would appear to be no reason for contemplating the possible issuance of a certificate, and no certificate was issued by the respondent, leading to the institution of the present proceeding.

[8] The request for the issuance of a *mandamus* was heard in Vancouver on August 14, 2014. The applicant was not present but was represented by counsel. Special arrangements were also taken to permit the applicant to follow by telephone conference the proceedings. While not objecting to this matter of proceeding, counsel for the respondent advised the Court by letter dated August 11, 2014, that the applicant is not longer under threat of removal should he leave the Walnut Grove Lutheran Church. Indeed, on July 15, 2014, the CBSA agreed to defer the applicant's removal until a fresh decision is made on his application for an exemption from his

inadmissibility on the H&C compassionate grounds. In the meantime, he has been asked to report to CBSA and agree to the terms and conditions of release proposed in the letter dated July 15, 2014 from CBSA.

[9] The requirements for the issuance of an order of *mandamus* are set out in the seminal decision in *Apotex Inc v Canada (AG)*, [1994] 1 FC 742 (FCA), aff'd [1994] 3 SCR 1100 (SCC). The Federal Court of Appeal set out the following framework:

> 1. There must be a public legal duty to act […]
>
> 2. The duty must be owed to the applicant […]
>
> 3. There is a clear right to performance of that duty, in particular:
>
> > (a) the applicant has satisfied all conditions precedent giving rise to the duty […]
> >
> > (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay […]
>
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>
> > (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
> >
> > (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
> >
> > (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
> >
> > (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and

> (e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
>
> 5. No other adequate remedy is available to the applicant […]
>
> 6. The order sought will be of some practical value or effect […]
>
> 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought […]
>
> 8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

[10] The applicant submits that, first, the Minister has a clear legal duty owed to him under section 83.07 of the Code, to issue a certificate stating the applicant is not a listed entity. He submits that there was a prior demand for performance of that duty, a reasonable time to comply with it, and a subsequent refusal. He also submits that there is a clear right to performance of that duty: he is an entity claiming not to be a listed entity and has applied to the Minister for a certificate, thereby satisfying the requirements of subsection 83.07(1). Therefore, under subsection 83.07(2) it is incumbent on the Minister to issue the certificate if he is satisfied that the applicant is not a listed entity. The applicant says that *mandamus* is the only available remedy and that it will have a practical effect since persons will not be afraid to do business with him. Although the applicant's counsel says this application is not a collateral attack of the inadmissibility finding and the deportation order, a certificate under section 83.07 of the Code will "clarify… [that] Canadian officials know full well that he is not a terrorist and has not been involved in a terrorist organization." Finally, invoking the adverse consequences that can result with being labelled a terrorist (*Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 14), the applicant submits that there is no equitable bar to the relief and the balance of convenience lies with the applicant.

[11] The respondent, on the other hand, submits that there is no legal duty owed to the applicant in this case because 83.07 certificates are issued in situations of "mistaken identity" only. This interpretation is supported by an excerpt from the Proceedings of the Special Senate Committee on Bill C-36. It is apparent that the certificate was established for a situation where a person's name could be confused with a name on the list of entities. The respondent submits that it would lead to an absurd result if all the people whose names do not appear on the list could compel the Minister to issue a certificate within 15 days. In the case at bar, the applicant is not on the list of entities and he has not provided any reason why he might be mistaken for a person on the list of entities. Therefore, the Minister does not have a duty to issue a certificate to the applicant. The respondent further submits that the purpose of an application under section 83.07 of the Code is not to overcome the consequences of an inadmissibility finding made under paragraph 34(1)(f) of the IRPA. Moreover, the certificate would have no practical effect for the applicant. The applicant may rely on the publicly-available list of entities to demonstrate that he is not on the list. A certificate would not indicate a belief that he is not a member of a terrorist organization, nor will it state that he is not a terrorist. A certificate would do nothing more than state that he is not on the list of entities.

[12] The present application must fail because the Court is not satisfied that all the requirements for the issuance of a *mandamus* are met in this case. In particular, while I doubt very much that the Minister owes a legal duty to the applicant, it is apparent that the issuance of a *mandamus* would have no practical effect in this case.

[13] Part II.1 of the Code (sections 83.01 to 83.33) deals with terrorism, including terrorism-related offences; systems for the seizure and restraint or forfeiture of assets controlled by a terrorist group; rules of procedure for the prosecution in terrorism offences; a procedure for investigative hearings; rules for laying an information, arrest and bail; and an annual report. I agree with the interpretation of the law suggested by the respondent. The practical implications of placing an entity (which includes a person) to the list established under section 83.05 of the Code are to facilitate the prosecution of terrorism related offences. Placing an entity to the list allows the Crown to assert that an entity is a "terrorist group" when prosecuting a terrorism offence. But the list is not exhaustive. Terrorist groups are not necessarily "listed entities".

[14] Section 83.05 provides for a list of entities to be established by the Government in Council:

(1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Minister of Public Safety and Emergency Preparedness, the Governor in Council is satisfied that there are reasonable grounds to believe that	(1) Le gouverneur en conseil peut, par règlement, établir une liste sur laquelle il inscrit toute entité dont il est convaincu, sur la recommandation du ministre de la Sécurité publique et de la Protection civile, qu'il existe des motifs raisonnables de croire :
(a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or	a) que, sciemment, elle s'est livrée ou a tenté de se livrer à une activité terroriste, y a participé ou l'a facilitée;
(b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in	b) que, sciemment, elle agit au nom d'une entité visée à l'alinéa a), sous sa direction ou en collaboration avec elle.

paragraph (a).

(1.1) The Minister may make a recommendation referred to in subsection (1) only if he or she has reasonable grounds to believe that the entity to which the recommendation relates is an entity referred to in paragraph (1)(a) or (b).

(1.1) Le ministre ne fait la recommandation visée au paragraphe (1) que s'il a des motifs raisonnables de croire que l'entité en cause est visée aux alinéas (1)a) ou b).

(2) On application in writing by a listed entity, the Minister shall decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be a listed entity.

(2) Le ministre, saisi d'une demande écrite présentée par une entité inscrite, décide s'il a des motifs raisonnables de recommander ou non au gouverneur en conseil de radier celle-ci de la liste.

(3) If the Minister does not make a decision on the application referred to in subsection (2) within 60 days after receipt of the application, he or she is deemed to have decided to recommend that the applicant remain a listed entity.

(3) S'il ne rend pas sa décision dans les soixante jours suivant la réception de la demande, le ministre est réputé avoir décidé de ne pas recommander la radiation.

(4) The Minister shall give notice without delay to the applicant of any decision taken or deemed to have been taken respecting the application referred to in subsection (2).

(4) Le ministre donne sans délai au demandeur un avis de la décision qu'il a rendue ou qu'il est réputé avoir rendue relativement à la demande.

(5) Within 60 days after the receipt of the notice of the decision referred to in subsection (4), the applicant may apply to a judge for judicial review of the decision.

(5) Dans les soixante jours suivant la réception de l'avis, le demandeur peut présenter au juge une demande de révision de la décision.

(6) When an application is made under subsection (5), the judge shall, without delay

(6) Dès qu'il est saisi de la demande, le juge procède de la façon suivante :

(a) examine, in private, any security or criminal intelligence reports considered in listing the applicant and hear any other evidence or information that may be presented by or on behalf of the Minister and may, at his or her request, hear all or part of that evidence or information in the absence of the applicant and any counsel representing the applicant, if the judge is of the opinion that the disclosure of the information would injure national security or endanger the safety of any person;

a) il examine à huis clos les renseignements en matière de sécurité ou de criminalité qui ont été pris en considération pour l'inscription du demandeur sur la liste et recueille les autres éléments de preuve ou d'information présentés par le ministre ou en son nom; il peut, à la demande de celui-ci, recueillir tout ou partie de ces éléments en l'absence du demandeur ou de son avocat, s'il estime que leur divulgation porterait atteinte à la sécurité nationale ou à la sécurité d'autrui;

(b) provide the applicant with a statement summarizing the information available to the judge so as to enable the applicant to be reasonably informed of the reasons for the decision, without disclosing any information the disclosure of which would, in the judge's opinion, injure national security or endanger the safety of any person;

b) il fournit au demandeur un résumé de l'information dont il dispose — sauf celle dont la divulgation pourrait, à son avis, porter atteinte à la sécurité nationale ou à la sécurité d'autrui — afin de lui permettre d'être suffisamment informé des motifs de la décision;

(c) provide the applicant with a reasonable opportunity to be heard; and

c) il donne au demandeur la possibilité d'être entendu;

(d) determine whether the decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, order that the applicant no longer be a listed entity.

d) il décide si la décision est raisonnable compte tenu de l'information dont il dispose et, dans le cas où il décide que la décision n'est pas raisonnable, il ordonne la radiation.

(6.1) The judge may receive into evidence anything that, in

(6.1) Le juge peut recevoir et admettre en preuve tout

the opinion of the judge, is reliable and appropriate, even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence.

élément qu'il estime digne de foi et approprié — même si le droit canadien ne prévoit pas par ailleurs son admissibilité — et peut fonder sa décision sur cet élément.

(7) The Minister shall cause to be published, without delay, in the *Canada Gazette* notice of a final order of a court that the applicant no longer be a listed entity.

(7) Une fois la décision ordonnant la radiation passée en force de chose jugée, le ministre en fait publier avis sans délai dans la *Gazette du Canada*.

(8) A listed entity may not make another application under subsection (2), except if there has been a material change in its circumstances since the time when the entity made its last application or if the Minister has completed the review under subsection (9).

(8) L'entité inscrite ne peut présenter une nouvelle demande de radiation en vertu du paragraphe (2) que si sa situation a évolué d'une manière importante depuis la présentation de sa dernière demande ou que si le ministre a terminé l'examen mentionné au paragraphe (9).

(9) Two years after the establishment of the list referred to in subsection (1), and every two years after that, the Minister shall review the list to determine whether there are still reasonable grounds, as set out in subsection (1), for an entity to be a listed entity and make a recommendation to the Governor in Council as to whether the entity should remain a listed entity. The review does not affect the validity of the list.

(9) Deux ans après l'établissement de la liste et tous les deux ans par la suite, le ministre examine celle-ci pour savoir si les motifs visés au paragraphe (1) justifiant l'inscription d'une entité sur la liste existent toujours et recommande au gouverneur en conseil de radier ou non cette entité de la liste. L'examen est sans effet sur la validité de la liste.

(10) The Minister shall complete the review as soon as possible and in any event, no later than 120 days after its commencement. After

(10) Le ministre termine son examen dans les meilleurs délais mais au plus tard cent vingt jours après l'avoir commencé. Une fois l'examen

completing the review, he or she shall cause to be published, without delay, in the *Canada Gazette* notice that the review has been completed.	terminé, il fait publier sans délai un avis à cet effet dans la *Gazette du Canada*.
(11) In this section, "judge" means the Chief Justice of the Federal Court or a judge of that Court designated by the Chief Justice.	(11) Au présent article, « juge » s'entend du juge en chef de la Cour fédérale ou du juge de cette juridiction désigné par celui-ci.

[15] An entity may be added to the list if the Government in Council is satisfied that there are reasonable grounds to believe that the entity has knowingly carried out, attempted to carry out, participated in or facilitated terrorist activity; or if the entity is knowingly acting on behalf of such an entity. If an entity is added to the list under section 83.05, they become a "listed entity". As mentioned in subsection 83.01(1) a listed entity is a "terrorist group":

(1) The following definitions apply in this Part.	(1) Les définitions qui suivent s'appliquent à la présente partie.
"entity" means a person, group, trust, partnership or fund or an unincorporated association or organization.	« entité » Personne, groupe, fiducie, société de personnes ou fonds, ou organisation ou association non dotée de la personnalité morale.
"listed entity" means an entity on a list established by the Governor in Council under section 83.05.	« entité inscrite » Entité inscrite sur la liste établie par le gouverneur en conseil en vertu de l'article 83.05.
"terrorist group" means	« groupe terroriste »
(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or	a) Soit une entité dont l'un des objets ou l'une des activités est de se livrer à des activités terroristes ou de les faciliter;

(b) a listed entity,	b) soit une entité inscrite.
and includes an association of such entities.	Est assimilé à un groupe terroriste un groupe ou une association formé de groupes terroristes au sens de la présente définition.

[16] This brings us to section 83.07 of the Code which reads as follows:

(1) An entity claiming not to be a listed entity may apply to the Minister of Public Safety and Emergency Preparedness for a certificate stating that it is not a listed entity.	(1) L'entité qui prétend ne pas être une entité inscrite peut demander au ministre de la Sécurité publique et de la Protection civile de lui délivrer un certificat à cet effet.
(2) The Minister shall, within 15 days after receiving the application, issue a certificate if he or she is satisfied that the applicant is not a listed entity.	(2) S'il est convaincu que le demandeur n'est pas une entité inscrite, le ministre délivre le certificat dans les quinze jours suivant la réception de la demande.

[17] Section 83.07 states that "an entity claiming not to be a listed entity" may apply to the respondent for a certificate stating that it is not a listed entity. If satisfied that an applicant is not a listed entity, the respondent must issue a certificate within fifteen days. The expression "an entity claiming not to be a listed entity" has a narrower meaning than "anyone who is not a listed entity." If Parliament had meant to convey that anyone could apply for a certificate it would have said so clearly. The issuance of a certificate under section 83.07 depends on the existence of a claim not to be a listed entity. The list is publicly available, which means that people are obliged to check whether or not they are on the list. If a "listed entity" believes that its name should not be on the list, it can either attack the legality of the decision and regulation placing the entity on

the list, or it can make an application to the respondent pursuant to subsection 83.05(2) of the Code to have its name removed from the list.

[18] In *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [*Rizzo*], the Supreme Court of Canada, citing Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983), affirmed the modern principle of statutory interpretation as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[19] If the text of subsection 83.07(1) is to be read literally, this is absurd. Why would a person or entity not on the list, which is a public document, want to obtain another document stating that they are not a listed entity?

[20] The interpretation of mistaken identity advanced by the respondent is a logical answer and coincides with the ministerial position taken before the Proceedings of the Special Senate Committee on Bill C-36, on December 4, 2011. It may be appropriate for the Court to refer to extrinsic evidence, as it can play a limited role in the interpretation of legislation: *Rizzo*, above at paras 31 and 35. Lawrence MacAulay, the Solicitor General of Canada, stated:

> In the unlikely event of a mistaken identity, an individual or an organization can apply to the Solicitor General for a certificate confirming that they are not the one on the list. This certificate will be issued if I am satisfied that the case of mistaken identity has been proven.

[21] In passing, the marginal note for section 83.07 reads "mistaken identity." While marginal notes are inserted for convenience of reference only (*Interpretation Act*, RSC 1985, c I-21, section 14), in *Imperial Oil Ltd v Canada*, 2006 SCC 46, at paragraph 57, Lebel J made the following comments on the utility of marginal notes in statutes:

> Although marginal notes are not entirely devoid of usefulness, their value is limited for a court that must address a serious problem of statutory interpretation. I would be loath to rely on one for that purpose and will return to the text of the statute itself, after considering some additional interpretive arguments raised by the litigants.

[22] I find that an order for *mandamus* would have no practical value or effect in this case. A ministerial certificate will only attest that the applicant is not a "listed entity". It will not say that the FMLN is not a "terrorist organization" or himself a "terrorist". There is no evidence of possible confusion. Moreover, there are other adequate remedies "to ensure that [the applicant] does not face further difficulties in his life because of the IRPA determination", and they have in fact been exercised by the applicant. With respect to the inadmissibility finding on security grounds made pursuant to paragraph 34(1)(f) of the IRPA, by letter dated July 28, 2010, the applicant requested consideration under subsection 34(2) (repealed in 2013 by the *Faster Removal of Foreign Criminals Act* – Bill C-43, which received Royal Assent June 19, 2013) and section 25 of the IRPA. Following the judgment rendered on July 10, 2014, his H&C application has been remitted for reconsideration by another officer, while his request for ministerial relief under subsection 34(2) of the IRPA, as of the date of the latter judgment, had yet to be decided (2014 FC 673 at paras 2 and 11).

[23] For all these reasons, in the exercise of its discretion, the Court is not ready to issue a writ of *mandamus*. Again, the applicant is not on the list of listed entities, nor is he claiming to be a member of a listed entity, and the FMLN is not a listed entity, nor was it ever placed on the list established by the Governor in Council under section 83.05 of the Code. This application shall be dismissed and no costs shall be awarded to either party in light of the particular circumstances of this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for an order of *mandamus* is dismissed and no costs are awarded to either party.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1724-13
STYLE OF CAUSE:	JOSE LUIS FIGUEROA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	AUGUST 14, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	MARTINEAU J.
DATED:	SEPTEMBER 2, 2014

APPEARANCES:

Peter Edelmann	FOR THE APPLICANT
Caroline Christiaens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Edelmann & Co. Law Offices Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT