Federal Court  Cour fédérale

Date: 20160805

Docket: T-990-15

Citation: 2016 FC 903

Vancouver, British Columbia, August 5, 2016

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

KARL WALTHER KELLER

Applicant

and

THE MINISTER OF FOREIGN AFFAIRS

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr. Karl Walther Keller, is a Canadian citizen and a pastor at Walnut Grove Lutheran Church in Langley, British Columbia, who is publicly known to have helped Mr. Jose Luis Figueroa to avoid deportation in El Salvador. Mr. Figueroa was a student member of the FMLN (Farabundo Martí National Liberation Front) which was a guerrilla group active in El Salvador during the civil war in the 1980s. The FMLN has now become one of the major political parties in El Salvador. That being said, the FMLN may have been labelled in the past by

Canadian government officials as a "terrorist organization". See *Figueroa v. Canada (Minister of Public Safety and Emergency Preparedness*, 2014 FC 836, at paras 2 to 6 [*Figueroa*].

[2] Section 10(1) of the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360, as amended [Regulations] provides that a person claiming not to be a listed person may apply to the Minister for a certificate stating that the person is not a listed person. Section 1 defines a "listed person" to mean a person whose name is listed in the Schedule in accordance with section 2 of the Regulations. Pursuant to subsection 10(2), the Minister shall, within 15 days after receiving the application, issue a certificate if it is established that the applicant is not a listed person.

[3] Today, the applicant seeks the judicial review of the so-called "implied refusal" of the Minister of Foreign Affairs [Minister] to issue a certificate under section 10 of the Regulations. The applicant made his application for the issuance of a certificate on April 12, 2015. The impugned decision was purportedly made on behalf of the Minister by Mr. Keith Morrill, Director, United Nations Human Rights and Economic Law Division, Department of Foreign Affairs [Minister's representative], by way of a letter dated May 4, 2015 [the May 4th Letter], which was received by the applicant on May 16, 2015.

[4] The applicant submits that the requisites for the issuance of a certificate under section 10 of the Regulations are met here. He also notes that the impugned decision, though it is dated May 4, 2015, has nevertheless been made outside the statutory time limit to issue a certificate, which expired on May 4, 2015. Be that as it may, he challenges the legality or reasonableness of

the ministerial refusal which, he submits, is motivated by his failure to provide to the Minister's delegate further information on the following, if applicable:

- An indication of the listed person for when the applicant claims to have been mistaken or for whom he is at risk of being mistaken; and
- A copy of the confirmation from the applicant's financial institution of the reason(s) for which it has frozen his accounts, if his bank assets or other assets have been frozen.

[5] The respondent takes the position that the present application for judicial review is premature, and, subsidiarily, that the request made by the Minister's representative to obtain the further information mentioned in the May 4th letter was reasonable in any event. Accordingly, the respondent submits that this Court should refuse to issue a writ of *certiorari* and/or a writ of *mandamus*, and forthwith dismiss the present application, with costs fixed in the amount of $1500.

[6] The present application must fail. The preliminary ground of dismissal raised by the respondent is well founded. No final decision was taken on behalf of the Minister by the Minister's representative on May 4, 2015. The present application is accordingly premature. Considering that this finding is determinative, it is not necessary that I comment on the merits of the application made to the Minister. However, since the parties have divergent views with respect to the correct or reasonable interpretation of section 10 of the Regulations, I offer these general observations.

[7] Firstly, the burden is on an applicant to convince the Minister or his representative that all of the conditions mentioned in section 10 of the Regulations are met. Where an applicant

challenges the legality or reasonableness of a final decision refusing to issue such a certificate, there should be a proper evidentiary record before the Court, including any part of the material in possession of the Minister which is not in possession of the applicant. This is lacking in the present case. Moreover, even if it had decided to consider the May 4th letter as a final decision, this Court could not have considered the particular elements of personal prejudice raised by the applicant at the outset of the hearing. He stated that his name appears on the internet and that he and his family are encountering difficulties with the authorities, notably the American ones, because asylum was granted in his church to Mr. Figueroa. This is the reason why he wishes to obtain a certificate so that he and his family do not encounter problems during travel. However, such concerns were never explicitly mentioned by the applicant in his application for the issuance of a certificate made on April 12, 2015. Even if evidence supporting this claim would have been included in the applicant's affidavit of July 5, 2015, any such relevant evidence would not be admissible in this proceeding because it must first be provided by the applicant to the decision-maker.

[8] Secondly, I doubt very much today that, as suggested by the applicant, a certificate should automatically be delivered by the Minister to any applicant who is not a listed person, simply because an applicant's name is not listed in the Schedule. The words of section 10 of the Regulations are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme, object and purposes of the Regulations (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21). In particular, the Regulations were enacted in 2001 under the *United Nations Act*, R.S.C., 1985, c. U-2, to implement in Canadian domestic law the binding elements of *United Nations, Security Council Resolution 1373 (2001)* and that its purpose is to

prevent terrorist individuals and entities listed in the Regulations, from using global financial systems to further terrorist activity. In this respect, despite any apparent similarities with *Figueroa*, the decision rendered by the Court in the latter case must be read with caution since the application for a certificate of Mr. Figueroa was made under section 83.07 of the *Criminal Code*, RSC 1985, c C-46, which is not applicable in this proceeding.

[9] Thirdly, while section 10 of the Regulations does not expressly refer to "mistaken identity", I agree with the respondent that, in the case of "mistaken identity", an applicant certainly qualifies and has interest in making to the Minister an application for the issuance of a certificate. However, I am not ready at this time to endorse the restrictive interpretation of section 10 of the Regulations proposed by the respondent that only "mistaken identity" cases qualify under this regulatory provision. Perhaps, there can be other types of situations which may also justify the delivery of a certificate. However, it is not the role of the Court to define these. I prefer to leave it to the Minister to address this possibly contentious issue, notably if the applicant decides to pursue his application and provides other relevant information in support of his request for a certificate. That being said, I doubt that, in advance, the Minister can have a closed mind on the merit of an application and refuse to process it, without considering any other possible relevant information, simply because the application is not presented by a person or entity having the same or a similar name as one of the persons or entities listed in the Schedule of the Regulations. Any refusal on the merit should be motivated by clear and articulate reasons.

[10] Finally, considering the particular circumstances of the case, the fact that the applicant is self-represented and is acting in good faith, and that the preliminary objection made by the

respondent is determinative and could have well been raised earlier by a motion to strike the proceeding, there shall be no costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the present judicial review application is dismissed without costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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