

Federal Court



Cour fédérale

**Date: 20151203**

**Docket: T-146-15**

**Citation: 2015 FC 1341**

**Ottawa, Ontario, December 3, 2015**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**JOSE LUIS FIGUEROA**

**Applicant**

**and**

**MINISTER OF FOREIGN AFFAIRS TRADE  
DEVELOPMENT CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] On February 2, 2015, Jose Luis Figueroa filed an application for an order of *mandamus* to compel the Minister of Foreign Affairs, Trade and Development [the Minister] to make a decision regarding his request for a certificate under s 10 of the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360 [the Regulations]. Pursuant to s 2(1) of the Regulations, the Minister may recommend that a person's name be

listed in the schedule to the Regulations if there are reasonable grounds to believe that the person is involved in terrorist activity. Mr. Figueroa requested a certificate confirming that he is not a person listed in Schedule II of the Regulations.

[2] The Minister rendered a decision on July 17, 2015. By letter of the same date, William Crosbie, legal adviser to the Minister, notified Mr. Figueroa that his request for a certificate was refused because he had not demonstrated that he had been, or may have been mistaken for, a listed person. Nor had any of his bank accounts or other assets been frozen as a result of his being mistaken for a listed person.

[3] The Minister has now brought a motion in writing pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [the Rules] for an order dismissing Mr. Figueroa's application on the ground that it is moot. Although Mr. Figueroa opposes the motion, he has not objected to its disposition on the basis of written submissions.

[4] As a general rule, the Court will deal with a motion in writing unless it cannot be adequately addressed in this manner (see *Federal Courts Practice* (Toronto: Thomson Reuters, 2015) at 829). This motion does not raise questions of credibility, and the issues are relatively straightforward. I am therefore satisfied that it is apt for determination on the basis of written submissions.

[5] For the reasons that follow, I have concluded that Mr. Figueroa's application for an order of *mandamus* to compel the Minister to make a decision regarding his request for a certificate is moot. This is not a case where this Court should exercise its discretion to decide a moot question.

In addition, the record is insufficient to permit an analysis of the merits of the Minister's decision. The application is therefore dismissed.

## II. Background

[6] Mr. Figueroa is a citizen of El Salvador who arrived in Canada with his wife in 1997. They have three Canadian-born children. In May 1997, they made an unsuccessful claim for refugee status in Canada.

[7] In June 2002, Mr. Figueroa and his wife applied for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds. Their H&C application was provisionally accepted in July 2004, which resulted in a statutory stay of their removal from Canada.

[8] Following an interview with the Canada Border Services Agency in July 2009, Mr. Figueroa was found to be inadmissible to Canada pursuant to s 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Due to his past membership in the Marti para la Liberacion Nacional, which opposed the military led regime in El Salvador, Mr. Figueroa was found to have engaged in terrorism or to have been a member of an organization that had engaged in terrorism.

[9] A report was prepared pursuant to s 44 of the IRPA, and an admissibility hearing was scheduled for April 29 2010. In May 2010, Mr. Figueroa was found to be inadmissible and a

deportation order was issued against him. Leave to commence an application for judicial review of that decision was denied by this Court in August 2010.

[10] By letter dated July 28, 2010, Mr. Figueroa requested that he be exempted from the finding of inadmissibility on H&C grounds pursuant to ss 25 and 34(2) of the IRPA (repealed in 2013 by the *Faster Removal of Foreign Criminals Act* — Bill C-43, which received Royal Assent on June 19, 2013).

[11] On April 9, 2013, Mrs. Figueroa was granted permanent residence on H&C grounds. However, on April 22, 2013, Mr. Figueroa was informed that his application had been rejected. He brought an application for judicial review of this decision, which was allowed in July, 2014. Justice Mosley held that the decision was unreasonable because the Minister of Citizenship and Immigration had failed to consider the nature of the conflict in El Salvador and Mr. Figueroa's personal involvement as a non-combatant advocating for political reform (*Figueroa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 673).

[12] On February 2, 2015, Mr. Figueroa filed an application for leave and for judicial review of the Minister's failure to make a decision regarding his request for a certificate pursuant to s 10 of the Regulations. In his Notice of Application, Mr. Figueroa asked for two forms of relief: (i) a writ of *mandamus* requiring the Minister to issue a certificate pursuant to s 10 of the Regulations confirming that he is not a person listed in Schedule II of the Regulations; and (ii) with leave of the Court, a "writ or order of *certiorari* to review the legality of the [Minister's] refusal to issue a certificate under s 10 of the Regulations".

[13] On March 26, 2015, Mr. Figueroa requested material in the possession of the Minister pursuant to Rule 317. He identified seven documents that he alleged were relevant to his application for *mandamus* and for judicial review, including “a current list to the Schedule II of the Regulations”. On May 5, 2015, Mr. Figueroa sought an order granting him leave to conduct examinations for discovery of six employees of the Department of Foreign Affairs, Trade and Development [DFATD].

[14] In a decision dated May 22 2015, Prothonotary Lafrenière dismissed Mr. Figueroa’s request for production of a certified tribunal record pursuant to Rule 317. Prothonotary Lafrenière observed that “it is plainly inconsistent to both seek *mandamus* alleging that a decision has not been made and *certiorari* to quash a decision that has been made”. He therefore concluded that the legality of the Minister’s decision was not in issue, but only his alleged failure to make a decision (Order of Prothonotary Lafrenière dated May 22, 2015, citing *Alberta Wilderness Association v Canada (Attorney General)*, 2013 FCA 190 at paras 38-40). Prothonotary Lafrenière also held that the production of documents could not be compelled in an application for *mandamus*, and that Mr. Figueroa had no right to conduct examinations for discovery of the six DFATD employees he had identified.

[15] Mr. Figueroa appealed the Order of Prothonotary Lafrenière. In a decision dated July 6, 2015, Justice Gagné agreed with Prothonotary Lafrenière that Mr. Figueroa’s application was limited to *mandamus*, and that Rule 317 is not intended to compel the production of documents where no decision has been made. She also agreed with Prothonotary Lafrenière that Mr. Figueroa was not permitted to conduct examinations for discovery in an application for judicial review.

[16] On July 20, 2015, counsel for the Minister wrote to Mr. Figueroa requesting that he discontinue his application for judicial review because the matter had been rendered moot by the Minister's decision of July 17, 2015. Counsel for the Minister informed Mr. Figueroa that this would not prejudice his right to file a further application for judicial review of the Minister's decision.

[17] Receiving no response to this letter, on July 27, 2015, the Minister filed the present motion to dismiss Mr. Figueroa's application for *mandamus* on the ground that it is moot.

### III. Issues

[18] The Minister's motion raises two issues:

- A. Should Mr. Figueroa's application for *mandamus* be dismissed on the ground that it is moot?
  
- B. Should this Court determine the legality of the Minister's decision dated July 17, 2015?

IV. Analysis

A. *Should Mr. Figueroa's application for mandamus be dismissed on the ground that it is moot?*

[19] There can be no doubt that Mr. Figueroa's application for an order of *mandamus* has been rendered moot by the Minister's decision of July 17, 2015.

[20] The test for mootness was explained by the Supreme Court of Canada in *Borowski v Canada*, [1989] 1 SCR 342, [1989] SCJ No 14 at para 16 [*Borowski*] and by this Court in *Bago v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1299 at para 11. The two-part test requires the Court to decide: (i) whether the concrete dispute between the parties has disappeared such that the issues have become academic; and (ii) if the response to the first question is affirmative, whether the Court should exercise its discretion to hear the case.

[21] In *Borowski*, Justice Sopinka noted at para 353 that the doctrine of mootness is an aspect of general policy or practice that allows a court to decline to answer questions that have become hypothetical or abstract, and where the decision of the court would have no practical effect on the parties. The essential question that must be asked is whether there exists some "live controversy" which affects or may affect the rights of the parties.

[22] Mr. Figueroa's application for *mandamus* is clearly moot because the Minister has now rendered a decision. Mr. Figueroa alleges that the Minister failed to meet the statutory obligation to respond to his request within 15 days. Even if there were merit in Mr. Figueroa's complaint, no remedy is required because a decision has now been made. A ruling of the Court on the

question of the Minister's delay would have no practical effect on the parties' rights, and accordingly it would not be appropriate for the Court to decide the matter.

B. *Should this Court determine the legality of the Minister's decision dated July 17, 2015?*

[23] Mr. Figueroa disagrees with the Minister's decision of July 17, 2015. However, there is no record before this Court that would permit an analysis of whether the Minister committed a reviewable error in refusing Mr. Figueroa's request for a certificate pursuant to s 10 of the Regulations.

[24] The evidentiary record in this application has been assembled on the understanding that Mr. Figueroa is seeking an order of *mandamus*. Prothonotary Lafrenière and Justice Gagné have explicitly ruled that Mr. Figueroa's application is limited to *mandamus*. No certified tribunal record has been produced pursuant to Rule 317, nor has the Minister filed a memorandum of fact and law to address the merits of the decision.

[25] If Mr. Figueroa wishes to formally dispute the Minister's decision of July 17, 2015, he may bring an application for judicial review of that decision, accompanied by an application for an extension of time in which to commence the proceeding.



V. Conclusion

[26] The application for an order of *mandamus* is dismissed. The Minister seeks costs. If the parties are unable to agree upon costs, they may make written submissions to the Court, not exceeding seven pages, within 10 business days of the date of this decision.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for an order of *mandamus* is dismissed on the ground that it is moot. The hearing date previously scheduled for December 7, 2015 commencing at 9:30 a.m. in Vancouver is vacated.

"Simon Fothergill"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-146-15

**STYLE OF CAUSE:** JOSE LUIS FIGUEROA v MINISTER OF FOREIGN  
AFFAIRS TRADE DEVELOPMENT CANADA

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO  
RULE 369 OF THE *FEDERAL COURTS RULES***

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATE:** DECEMBER 3, 2015

**WRITTEN REPRESENTATIONS BY:**

Jose Luis Figueroa

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Cheryl D. Mitchell

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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