

Federal Court



Cour fédérale

Date: 20180611

Docket: T-1713-16

Citation: 2018 FC 598

Ottawa, Ontario, June 11, 2018

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

KARL WALTHER KELLER

Applicant

and

THE MINISTER OF FOREIGN AFFAIRS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Since the spring of 2015, Mr Karl Keller has been seeking a certificate stating that he is not listed under the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism*, SOR/2001-360. The Regulations provide that anyone claiming not to be a listed person can apply to the Minister of Foreign Affairs for a certificate confirming that he

or she is not, in fact, a listed person (s 10(1)). The Minister must issue a certificate 15 days after receiving an application if satisfied that the applicant is not a listed person (s 10(2)).

[2] It is clear that Mr Keller is not a listed person. However, the Minister denied him a certificate on the basis that he did not appear to be eligible to apply. The Minister found that the Regulations are meant to provide relief to those who have been, or could be, mistaken for a listed person, and who may have suffered adverse consequences as a result (*eg*, freezing of assets or bank accounts). As Mr Keller met none of these criteria, the Minister denied his application.

[3] Mr Keller asserts that the Minister's decision is unreasonable because the plain words of the Regulations provide that any person "claiming not to be a listed person" may apply for a certificate and that the Minister "shall, within 15 days after receiving the application, issue a certificate" if the applicant has established that he or she is not a listed person. Since he claimed not to be a listed person, and established that he is not, Mr Keller maintains that the Minister was obliged to issue him a certificate within 15 days of his request.

[4] While Mr Keller's interpretation of the Regulations is plausible, I find that the Minister's conclusion that Mr Keller was ineligible for a certificate was reasonable. Reading the Regulations as a whole, I conclude that the relief set out in s 10 was meant to apply to individuals who have experienced or, at least, risked some adverse consequence as a result of being confused with a listed person. Accordingly, I must dismiss Mr Keller's application for judicial review.

[5] The Minister raises two preliminary issues: (1) Mr Keller has not identified the proper respondent. It should be the Minister of Foreign Affairs, not the Minister of Foreign Affairs of Canada. (2) Mr Keller has included in his affidavit evidence that was not before the Minister when the decision under review was made. I will order that the style of cause be amended accordingly, and will consider only the evidence that was before the Minister at the relevant time.

[6] The sole remaining issue, therefore, is whether the Minister's decision was unreasonable.

II. Factual Background

[7] On April 12, 2015, Mr Keller filed his application stating that he is not a listed person. He did not receive a response within the 15-day period provided in the Regulations. However, on May 4, 2015, Mr Keith Morrill, Director of the United Nations, Human Rights and Economic Law Division of Foreign Affairs, wrote to Mr Keller and informed him that he did not appear to be eligible for the requested certificate. Mr Morrill asked Mr Keller to provide additional information. Mr Keller, believing that Mr Morrill was asking for information irrelevant to his request, did not respond. Instead, he sought judicial review on the basis that Mr Morrill had impliedly refused his request.

[8] In 2016, Justice Luc Martineau dismissed Mr Keller's application for judicial review on the basis that it was premature – no final decision had yet been rendered on Mr Keller's request for a certificate (2016 FC 903). In his decision, Justice Martineau offered some general comments on the scope of the Regulations. He disagreed with Mr Keller that the Regulations

allowed any individual who was not a listed person to request and receive a certificate; he also questioned the Minister's position that the Regulations applied only to cases of mistaken identity. In any case, Justice Martineau's comments were offered in the abstract.

[9] However, Justice Martineau's views in respect of a similar provision were clearly set out in *Figueroa v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 836. That case involved a request from a person who claimed not to be a listed entity under s 83.07 of the *Criminal Code*, RSC 1985, c C-46.

[10] Under the *Criminal Code*, the Governor in Council (*ie*, the Cabinet) can establish a list of terrorist entities (s 83.05), and a person claiming not to be a listed entity can request a certificate from the Minister of Public Safety and Emergency Preparedness. There, as here, the Minister concerned took the position that the applicant was not entitled to a certificate because there was no evidence that the applicant would be confused with an entity on the list. Justice Martineau concluded that the provision was meant to provide relief for cases of mistaken identity, and that it would have no practical value for the applicant. He dismissed the applicant's request for *mandamus*.

[11] Justice Martineau rendered his decision relating to Mr. Keller on August 5, 2016. The same day, Mr Keller wrote to counsel for the Minister setting out his reasons for seeking a certificate. He explained his concern that Internet searches of his name along with the word "terrorism" turns up information about Mr Keller's involvement with a person who was found inadmissible to Canada based on allegations that the person was a member of a terrorist group.

Mr Keller, a pastor of the Walnut Grove Lutheran Church in Langley, BC had granted this person (who was the applicant in *Figueroa*, above) temporary sanctuary in the Church. As Mr Keller put it, given that he has family in the United States, he wished to proactively reduce the risk of encountering difficulty at the border by obtaining a certificate from the Minister.

[12] Two weeks later, on August 29, 2016, Mr Keller wrote a letter to the Minister summarizing the proceedings to date, and expressing his concern that his August 5, 2016, letter had not been forwarded to the Minister. He attached that letter for the Minister's information and, once again, requested a certificate.

[13] On September 20, 2016, the Minister wrote to Mr Keller informing him that he did not qualify for a certificate. The Minister explained that the purpose of the Regulations is "to provide redress for situations where an individual has been or may be mistaken for a listed person." The Minister noted that Mr Keller was not in that situation, and further, he had not experienced any difficulties, such as the freezing of assets or bank accounts.

A. *Was the Minister's decision unreasonable?*

[14] Mr Keller raises a number of concerns about the Minister's decision. First, Mr Keller submits that the Minister's interpretation of the Regulations is unreasonable because it conflicts with their plain words and, as Justice Martineau stated, that interpretation is "restrictive." Second, Mr Keller notes that Minister failed to comply with the legal requirement to issue a certificate within 15 days of receiving an application and, further, ultimately rendered his decision after an unreasonable delay of over 17 months.

[15] I respectfully disagree with Mr Keller on both of these points.

[16] On the interpretation of the Regulations, Mr Keller rightly points out that, on its face, s 10 refers to “a person claiming not to be a listed person” and Mr Keller is just such a person. That is a good starting point for interpreting the Regulations, but the exercise does not end there. One must also look to the entire context and the intention of the enacting body, the Governor in Council (*ie*, the Cabinet).

[17] The Regulations serve to implement, in part, United Nations Resolutions on the Suppression of Terrorism. They do so by empowering the Cabinet to compose a list of persons who are believed on reasonable grounds to have been involved in terrorist activity, or to have been controlled or directed by such persons (s 2(1)). The Regulations provide several consequences of being listed. They forbid individuals from providing or collecting funds for the use of listed persons (s 3), entering into property transactions with listed persons (s 4), or assisting or promoting any activities of listed persons (s 6). In addition, the Regulations require individuals to disclose the existence of any property in their possession that is owned by a listed person, or any proposed transaction with a listed person (s 8).

[18] The Regulations include various forms of relief. A listed person can apply to have his or her name removed from the list (s 2.1) and seek judicial review if the request is dismissed (s 2.2). A person whose property has been affected may apply to the Minister for a certificate to exempt the property on grounds of necessity (s 10.1). Finally, and most relevant to this proceeding, a

person who claims not to be a listed person may request a certificate from the Minister stating that he or she is not a listed person (s 10).

[19] As I read them, the Regulations serve to limit the ability of persons believed to be involved in terrorist activities from pursuing their aims, by constraining their ability to finance those activities, acquire necessary goods, and obtain the assistance of others. The purpose of the certificate available under s 10 is to ensure that persons who are not on the list do not encounter those kinds of difficulties.

[20] In this context, the Minister's characterization of the purpose of s 10 is reasonable: The provision's purpose is "to provide redress for situations where an individual has been or may be mistaken for a listed person." Accordingly, it was not unreasonable for the Minister to expect to receive some evidence from Mr Keller indicating that he had been or could be mistaken for a listed person, or showing that he had had difficulties with respect to his property, his financial institution, or otherwise.

[21] As mentioned, Mr Keller was concerned that counsel for the Minister had not transmitted the contents of his August 5, 2016, letter to the Minister. In any case, however, the relevant information was conveyed to the Minister by way of Mr Keller's August 29, 2018, letter and was before the Minister when he made his decision denying the application. Therefore, nothing turns on whether that information should have been passed along sooner.

[22] In respect of the unreasonableness of the delay in receiving a definitive decision from the Minister, Mr Keller correctly points out that the Regulations require the Minister to issue a certificate to a person who has established that he or she is an unlisted person within 15 days. However, that provision does not require the Minister to determine the applicant's eligibility for a certificate within any particular time frame. Here, Mr Morrill requested Mr Keller to provide additional information in support of his application. Mr Keller, assuming his application had been denied, sought judicial review, which took more than a year to resolve. After informing the Minister that his request arose from concerns about crossing the border into the United States, the Minister rendered his decision promptly, although not within 15 days. However, as I read the Regulations, there is no set time period within which the Minister must render a negative decision.

[23] As explained, Mr Keller's desire for a certificate arises from concerns about travelling to visit his family in the United States. However, any potential difficulty at the border would not necessarily be resolved even if Mr Keller had been granted a certificate. As noted above, the Regulations address financial dealings, property transactions, and interactions with others. They say nothing about how a listed or an unlisted person should be treated by US authorities when crossing the border. The comfort Mr Keller seeks is not available under the Regulations.

[24] Accordingly, I find that the Minister's decision denying Mr Keller a certificate under the Regulations was not unreasonable.

III. Conclusion and Disposition

[25] The Minister's decision not to grant Mr Keller a certificate under s 10 of the Regulations was not unreasonable; it was made in a manner consistent with the purposes of the Regulations as a whole and s 10 in particular. I must, therefore, dismiss this application for judicial review. The Minister seeks costs at the higher end of the Court's tariff based on Mr Keller's conduct in these proceedings. I am prepared to grant the Minister costs, but not on an elevated scale given that Mr Keller raised a valid question of statutory interpretation.

JUDGMENT IN T-1713-16

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Minister of Foreign Affairs as respondent.
2. The application for judicial review is dismissed, with costs.

"James W. O'Reilly"

Judge

ANNEX

Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism, SOR/2001-360

Règlement d'application des résolutions des Nations Unies sur la lutte contre le terrorisme, DORS/2001-360

List

Liste

2 (1) A person whose name is listed in the schedule is a person who the Governor in Council, on the recommendation of the Minister, is satisfied that there are reasonable grounds to believe

2 (1) Figure sur la liste à l'annexe le nom de toute personne dont le gouverneur en conseil est convaincu, sur la recommandation du ministre, qu'il existe des motifs raisonnables de croire :

(a) has carried out, attempted to carry out, participated in or facilitated the carrying out of a terrorist activity;

a) qu'elle s'est livrée ou a tenté de se livrer à une activité terroriste, ou a participé à son exercice ou l'a facilitée;

(b) is controlled directly or indirectly by any person conducting any of the activities set out in paragraph (a); or

b) qu'elle est contrôlée directement ou non par une personne visée à l'alinéa a);

(c) is acting on behalf of, or at the direction of, or in association with any person conducting any of the activities set out in paragraph (a).

c) qu'elle agit au nom d'une personne visée à l'alinéa a), ou sous sa direction ou en collaboration avec elle

2.1 (1) Any listed person may apply in writing to the Minister to request to be removed from the schedule.

2.1 (1) Toute personne inscrite peut demander par écrit au ministre d'être radiée de la liste établie à l'annexe.

(2) On receipt of a written application, the Minister shall decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant be removed from the schedule.

(2) Sur réception de la demande, le ministre décide s'il a des motifs raisonnables de recommander ou non au gouverneur en conseil de radier le demandeur de la liste établie à l'annexe.

(3) If the Minister does not make a decision on the application within 60 days after receipt of the application, the Minister is deemed to have decided to recommend that the applicant remain a listed person.

(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.

(4) Il 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) A listed person may not make another application under subsection (1) unless there has been a material change in circumstances since the time the person made their last application.

(5) Aucun demandeur ne peut présenter de nouvelle demande de radiation à moins que sa situation n'ait évolué d'une manière importante depuis la présentation de sa dernière demande.

Judicial Review

Examen judiciaire

2.2 (1) Within 60 days after receipt of the notice referred to in subsection 2.1(4), the applicant may apply to a judge for judicial review of the decision.

2.2 (1) Dans les soixante jours suivant la réception de l'avis visé au paragraphe 2.1(4), le demandeur peut présenter au juge une demande de révision de la décision.

Providing or Collecting Funds

Financement

3 No person in Canada and no Canadian outside Canada shall knowingly provide or collect by any means, directly or indirectly, funds with the intention that the funds be used, or in the knowledge that the funds are to be used, by a listed person.

3 Il est interdit à toute personne au Canada et à tout Canadien à l'étranger de fournir ou de collecter sciemment, par quelque moyen que ce soit, directement ou indirectement, des fonds avec l'intention qu'ils soient utilisés par une personne inscrite ou dont il sait qu'ils seront utilisés par une personne inscrite.

Freezing Property

Blocage de biens

4 No person in Canada and no Canadian outside Canada shall knowingly

4 Il est interdit à toute personne au Canada et à tout Canadien à l'étranger :

(a) deal directly or indirectly in any property of a listed person, including funds derived or generated from property owned or controlled directly or indirectly by that person;

a) d'effectuer sciemment, directement ou indirectement, une opération portant sur les biens d'une personne inscrite, y compris les fonds provenant de biens appartenant à une telle personne ou qui sont contrôlés, directement ou indirectement, par elle;

(b) enter into or facilitate, directly or indirectly, any transaction related to

b) de conclure sciemment, directement ou indirectement, une opération

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| a dealing referred to in paragraph (a); | financière relativement à une opération visée à l'alinéa a) ou d'en faciliter sciemment, directement ou indirectement, la conclusion; |
| (c) provide any financial or other related service in respect of the property referred to in paragraph (a); or | c) de fournir sciemment des services financiers ou des services connexes liés à des biens visés à l'alinéa a); |
| (d) make any property or any financial or other related service available, directly or indirectly, for the benefit of a listed person. | d) de mettre sciemment des biens ou des services financiers ou services connexes à la disposition, directement ou indirectement, de toute personne inscrite |

Causing, Assisting or Promoting

6 No person in Canada and no Canadian outside Canada shall knowingly do anything that causes, assists or promotes, or is intended to cause, assist or promote, any activity prohibited by section 3 or 4, unless the person has a certificate issued by the Minister under section 11.

Aide à la perpétration d'un acte interdit

6 Il est interdit à toute personne au Canada et à tout Canadien à l'étranger d'accomplir sciemment tout acte qui occasionne, aide ou favorise, ou qui tend à occasionner, aider ou favoriser, la perpétration d'un acte interdit par les articles 3 ou 4, sauf si l'acte est autorisé par l'attestation ministérielle prévue à l'article 11.

Disclosure

8 (1) Every person in Canada and every Canadian outside Canada shall disclose forthwith to the Commissioner of the Royal Canadian Mounted Police and to the Director of the Canadian Security Intelligence Service

Communication

8 (1) Toute personne au Canada et tout Canadien à l'étranger est tenu de communiquer sans délai au commissaire de la Gendarmerie royale du Canada et au directeur du Service canadien du renseignement de sécurité :

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| (a) the existence of property in their possession or control that they have reason to believe is owned or controlled by or on behalf of a listed person; and | a) l'existence des biens qui sont en sa possession ou sous son contrôle et qu'il soupçonne d'appartenir à une personne inscrite ou d'être contrôlés par une telle personne ou en son nom; |
| (b) information about a transaction or proposed transaction in respect of property referred to in paragraph (a). | b) tout renseignement portant sur une opération financière, réelle ou projetée, mettant en cause des biens visés à l'alinéa a). |

(2) No person contravenes subsection (1) by disclosing information in good faith under that subsection.

(2) Nul ne contrevient au paragraphe (1) pour avoir fait un rapport de bonne foi au titre de ce paragraphe.

Offences and Punishment

Infractions et peines

10 (1) 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.

10 (1) Toute personne qui affirme ne pas être une personne inscrite peut demander au ministre de lui délivrer une attestation à cet effet.

(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

(2) S'il est établi que le demandeur n'est pas une personne inscrite, le ministre lui délivre l'attestation dans les quinze jours suivant la réception de la demande.

10.1 (1) A person whose property has been affected by section 4 may apply to the Minister for a certificate to exempt property from the application of that section if necessary for basic or extraordinary expenses.

10.1 (1) Toute personne dont les biens sont visés à l'article 4 peut demander au ministre de délivrer une attestation soustrayant à l'application de cet article certains biens qui sont nécessaires pour des dépenses de base ou extraordinaires.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1713-16

STYLE OF CAUSE: KARL WALTHER KELLER v THE MINISTER OF
FOREIGN AFFAIRS

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MAY 14, 2018

JUDGMENT AND REASONS: O'REILLY J.

DATED: JUNE 11, 2018

APPEARANCES:

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