Federal Court  Cour fédérale

Date: 20161220

Docket: IMM-5463-15

Citation: 2016 FC 1396

Ottawa, Ontario, December 20, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JOSE LUIS FIGUEROA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Jose Luis Figueroa makes another trip to the Federal Court. This time, he wishes to challenge a report made by an officer, according to subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Subsections 44(1) and (2), which are germane to this case, read:

44(1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is	**44 (1)** S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de

inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	**(2)** S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[2] Mr. Figueroa, the Applicant, challenges a report prepared on July 7, 2009, through an application for leave and judicial review perfected on December 3, 2015, but made initially on October 1. The application is made pursuant to Section 72 of IRPA.

[3] On its face, the application is late, very late. Paragraph 72(2)(b) requires that the notice of application be served and filed within 15 days "after the day on which the Applicant is notified of or otherwise becomes aware of the matter." Time may be extended for special reasons. In this application, the Applicant states that the decision of July 7, 2009 "was never communicated to the Applicant by the decision-maker. The Applicant became aware of the failure to communicate the decision by Officer Ward Hindson on September 29, 2015." If that were accurate, the Applicant would not have to seek an extension and satisfy the legal requirements in such

circumstances because he sought to seek judicial review on October 1, 2015, well within the prescribed 15 days. However, that cannot be accurate. The report was communicated to the Applicant at the latest in December 2009, as the report was referred to the Immigration Division where it was at the heart of the admissibility hearing that was conducted and that resulted in a decision to declare the Applicant inadmissible to Canada.

[4] Mr. Figueroa challenged the decision of the Immigration Division before this Court and his application for leave and judicial review was dismissed at the leave stage by Justice Sean Harrington (August 30, 2010). In view of the fact that a leave application will be granted on the relatively low threshold that there is a fairly arguable case (*Bains v MEI*, (1990) N R 239 (FCA)), the Respondent argues that this constitutes a decisive disposition; the matter has been heard and ought to be closed.

[5] However, the Applicant still seeks some remedy from the Court.

[6] That remedy is not available. There are four issues that should be examined in reaching that conclusion:

a) The application for judicial review is irremediably late as it does not satisfy the test for an extension;

b) The matter has been heard and decided culminating with the dismissal of the application for leave and judicial review of the finding by the Immigration Division on admissibility;

c) In view of the very limited discretion of an officer who prepares a subsection 44(1) report, and given the uncontroverted facts in this case, the report was reasonable;

d) The process followed to produce the impugned report did not violate the Applicant's participatory rights.

[7] I shall examine briefly each of the four issues.

I. Preliminary issue

[8] In his further memorandum of fact and law, the Applicant seeks as a remedy not only that the judicial review be granted, but also that his reputation be "cleared from the allegation that he is or was a member of a terrorist organization." (Memorandum of fact and law, para 33)

[9] This case is limited to a judicial review of a report made in 2009 expressing the opinion that this Applicant is inadmissible on security grounds. The provision in play is section 34 of IRPA. It is paragraph 34 (1)(f) that applies in the particular circumstances:

34(1) A permanent resident or a foreign national is inadmissible on security grounds for	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants :
...	(…)
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	**f)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

It follows that if the Applicant was a member of an organization and that there are reasonable grounds to believe that the organization has engaged in acts referred to in paragraph (c), the

conditions for a report under section 44 are met. The acts referred to in this case are at paragraph (c), which reads simply:

34(1) A permanent resident or a foreign national is inadmissible on security grounds for	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants :
(c) engaging in terrorism;	**c)** se livrer au terrorisme;

[10] As a matter of law, it is not necessary for a member to engage himself in an act of terrorism. It suffices that he be a member of the organization. Furthermore, the notion of "terrorist organization" is not present in the scheme. The law simply requires that the organization has been engaging in terrorism. Arguably, a "terrorist organization" will be engaging in terrorism, as terrorism is its "raison d'être", but acts of terrorism in which an organization has engaged may not turn every organization into a "terrorist organization".

[11] It seems that the motivation bringing Mr. Figueroa once again before this Court is what he considers to be the branding that he is a terrorist. Instead, he claims that his activities were of a political nature. As I have tried to explain, as long as Mr. Figueroa is a member of an organization that has been engaging in terrorism, a report could be made under section 44 of IRPA. The Court has to limit itself to the strict confines of a judicial review application. This Court must only examine if the decision made by an officer was reasonable when it was made. In administering the law, the Court is also bound by it.

II. Facts

[12] The Applicant is a citizen of El Salvador. However, he left his country of origin a long time ago, in January 1996. On April 25, 1997, 16 months later, the Applicant presented himself at a Canadian port of entry, arriving from the United States. He indicated his intention to claim refugee status in this country and an examination was scheduled for May 6, 1997.

[13] On that date, a certificate issued by the United Nations Observer Mission in El Salvador, referring to the Applicant as "Former FMLN fighter Jose Luis Figueroa", who would have officially abandoned his position in order to be integrated back into the life of his country, was seized by the immigration officer. It appears that the basis for the refugee claim was directly related to his role in the FMLN, as he said he would have been at risk in El Salvador for having volunteered to be an active member of the FMLN from late 1985 to January of 1996.

[14] FMLN is the acronym for Farabundo Marti National Liberation Front. Mr. Figueroa never denied having been a member of the FMLN. In his personal information form of May 28, 1997, he wrote in support of his refugee claim:

> …I joined the FMLN at the end of 1985. In the beginning, I started developing political work at the University of El Salvador. This work included raising the consciousness of the students about the reality of our country and to get them to understand it. I tried to convince them to join the FMLN. My links with the FMLN at that time were clandestine. I channeled my work through student organizations…
>
> From 1986 to 1991, I was attending university and doing this political work. From the time of the Peace Accords in January 1992 to December 1992, I was concentrated in a camp and after the demobilization date I was involved in programs to train for technical programs for returning to civilian life. My duties while I was in the camp were that I was in charge of a group of FMLN combatants who were being trained to be in the PNC…

[15] Not only did the Applicant write his personal information form, but he confirmed the truth and accuracy of his statements during the hearing before the Convention Refugee Determination Division, as it was then called, in October 1999. He did not deny either his active involvement in the FMLN. In essence, Mr. Figueroa was claiming that, as a member of the FMLN, he feared that he would be targeted if he were to be returned to El Salvador because of his involvement with the FMLN.

[16] The Applicant's refugee claim was dismissed on May 12, 2000. The Convention Refugee Determination Division accepted his membership in the FMLN but declined to find him to be a refugee.

[17] Following his refusal as a refugee, the Applicant, who was represented by counsel, did not seek to challenge that decision on judicial review. Instead, an application for consideration under the "post determination refugee claimant in Canada class" was made. While that application was still pending, the Applicant made an application for an exemption from the requirement to apply from abroad in order to get a visa to come to Canada (the so-called "humanitarian and compassionate application" or H&C application, made pursuant to section 25 of IRPA). This time, the application made on June 14, 2002, raised not only the allegation of risk in El Salvador, but also family reasons for wanting to remain in Canada. An H&C application allows for an exemption from the applicable criteria or obligation under IRPA if, in the Minister's view, such an exemption is justified by humanitarian and compassionate considerations, taking into account the best interests of a child directly affected. At the time, Mr. Figueroa was already a father. Mr. Figueroa is now the father of 3 children, all born in Canada.

[18] While the application before the post-claim determination office and that with respect to the obtaining of a visa from Canada based on humanitarian and compassionate grounds were pending, a deportation order was issued (June 29, 2002).

[19] On June 5, 2003, the Canadian Security Intelligence Service set up an interview with the Applicant, which took place on June 13, 2003. Two months later, a report was sent to the Security Review Division of Citizenship and Immigration; one can read at paragraph 2:

> 2. The information the service possesses with respect to Mr. FIGUEROA leads us to believe he was a member of an inadmissible class of persons pursuant to Section 34(1) f) of the Immigration and Refugee Protection Act. Mr. FIGUEROA was a member of the FARABUNDO MARTI NATIONAL LIBERATION FRONT (FMLN) (see annex), an organization that was engaged in terrorism.
>
> (Certified tribunal record, page 230)

[20] The description of the FMLN, in an annex to the report of August 2003, read in part:

> The FMLN is an alliance of guerilla groups which first agreed to unite in December 1979 during a meeting in Havana; the document forming the alliance was signed in Managua in 1980…The FMLN's declared objective was to wage a protracted guerrilla war against the government of El Salvador. The FMLN operates in all areas of El Salvador, both urban and rural, and to a limited extent in the Honduras.
>
> The planned "general offensive for a final onslaught" was started in January 1981, with heavy fighting in many parts of the country. The FMLN took over a radio station and issued a call to arms, whereupon the government declared martial law and imposed a curfew…
>
> Major offensives were launched in September 1983, May 1984 and October 1985, and were all followed by large-scale army sweep operations, establishing the pattern of repeated advance and retreat by both sides.

> A renewed intensification of FMLN activity was reported in the early months of 1987, this typically involving small units. The campaign included the kidnapping of small town mayors, the laying of "people's mines" designed to maim, interruption of traffic, and sabotage of electricity lines and utilities.
>
> …
>
> The FMLN abandoned military/terrorist activities in the late 1980's and joined with the government of El Salvador to participate in the democratic process. Former senior members of the FMLN now form part of the new government.

[21] The Security Review Division of the Canada Border Services Agency passed on the brief prepared by the Canadian Security Intelligence Service in January 2004. The brief of August 2003 had made it clear that it was to be used by officials to make their own determination. The same point is made in the memorandum of January 25, 2004 in the following terms:

> As the decision-maker, the interviewing officer is responsible to review all of the evidence and to make the determination with respect to admissibility. To assist in making a well informed decision, we are providing you with a copy of the CSIS brief.
>
> (Certified tribunal record, page 229)

There is little doubt that the CSIS brief carried significant weight. Similarly, there is little doubt that the decision was not in the hands of CSIS and that the information disclosed was to be used by the decision-maker to make their own assessment.

[22] The record shows that an attempt was made by the immigration authorities to interview the Applicant in March 2004. The officer seeking to interview the Applicant noted that if a report with respect to section 34 of the IRPA were to be made, the Applicant would be a good candidate for ministerial relief. At the time, subsection 34(2) of IRPA provided:

34(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.	**34(2)** Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

At any rate, the officer decided to take no further action until a pre-removal risk assessment (PRRA) was completed.

[23] It is only in July 2004 that the consideration under the post determination refugee claimant in Canada class was completed in the form of a PRRA. The officer concluded that the Applicant would not be at risk if he returned to El Salvador. That officer checked the box to indicate that the Applicant was not inadmissible. The Applicant has tried to suggest that a determination was made, at that stage, that he was not inadmissible and that the government changed its tune five years later. That is not accurate. An examination of the PRRA decision confirmed that the officer was merely confirming the status of the Applicant which was, at that point in time, that he was not inadmissible. Indeed, the PRRA officer had no power to make that determination as the jurisdiction to do so was under the Minister of Public Safety and Emergency Preparedness, and not the Minister of Citizenship and Immigration.

[24] Three days later, the same officer granted the Applicant the exemption, on humanitarian and compassionate grounds, to be exempted from seeking a visa to come to Canada from outside the country (section 11 of IRPA requires that, before entering to Canada, a foreign national must apply for a visa). It appears that some special needs for one of the Applicant's Canadian born

children were an important consideration. That decision launched a process for landing the Applicant and gave him a statutory stay of removal until a decision would be made on possible grounds for inadmissibility (for instance security or health grounds).

[25] It seems that there was very little progress, although there was certain activity on the file, until July 2009.

[26] On July 3, 2009, Officer Hindson communicated by telephone with the Applicant and invited him to an interview. The Applicant and the Officer agreed on July 6. At the interview, which lasted close to two hours, the Officer advised the Applicant that the purpose of the interview was to discuss the Applicant's possible "inadmissibilities" to Canada. I have reviewed the transcript of the interview. The following two paragraphs constitute, in my view, an adequate summary of the interview that took place. They are taken from the Respondent's Further Memorandum of Argument:

> 45. Officer Hindson received further information regarding Mr. Figueroa's involvement with the FMLN in El Salvador at that interview. The Applicant explained he had been active with the FMLN and was known by other FMLN members through the nickname "Ivan". He stated he joined the FMLN in 1989 and that the FMLN stood for an armed struggle against the government. He stated that through his messaging to the university students he was giving vocal support to the activities of the FMLN. He acknowledged being given the United Nations Certificate indicating that he was a demobilized member of the FMLN. He explained to Officer Hindson that he considered it an honor to have been asked by other FMLN members to teach at a camp after demobilization. He explained to Officer Hindson that he was aware during the war of the FMLN assassinating government officials and placing bombs to blow up soldiers, police and telephone poles. He stated he encouraged students to join the FMLN, and that he believed in the FMLN cause. He stated that the only time he

> carried a weapon was when he had his photo taken at the demobilization camp.
>
> 46. The interview concluded with Officer Hindson informing the Applicant that he would be making a decision as to whether the Applicant would be sent to a hearing where he could be ordered deported from Canada or whether the Applicant would be returned to Admissions for a final determination on his application for landing.

It is noteworthy that when the Applicant was seeking to be recognized as a refugee in this country, he situated the beginning of his involvement as being at the end of 1985. He stated in his personal information form, in 1997, that "(t) he reasons I am asking for refugee status in Canada are the following. I joined the FMLN at the end of 1985." This does not constitute a typographical error as the Applicant continued in the next paragraph by stating "(f)rom 1986 to 1991, I was attending university and doing this political work." Clearly, the Applicant was active within the FMLN during a period where violent activities were conducted by the organization.

[27] Officer Hindson completed his report in accordance with subsection 44(1) of IRPA on July 7, 2009. He was of the opinion that the Applicant is inadmissible pursuant to paragraph 34(1) (f). One can read in the report the following:

> This report is based on the following information: That Jose Luis Figueroa
>
> - Is not a Canadian citizen or permanent resident in Canada
>
> - Who by his own admission was a member of the Farabundo Marti National Liberation Front (also known as the FMLN) from 1985-1992
>
> - The FMLN is an organization that there are reasonable grounds to believe is/or was engaged in terrorism and/or subversion

[28] On July 13, 2009, the Officer produced his "Subsection 44(1) and 55 highlights" which confirms the information on which the opinion was formed that the Applicant is inadmissible. One can read:

> The subject made a convention refugee claim at the Douglas Port of Entry with his wife 3420-1110. The subject admitted that he was an active member of the FMLN from 1985-1996 and said his role was to talk to and recruit students at the university (See highlights).The subject was in possession of his UN issued ID card that stated that he was a combatant. The subject submitted his PIF with the assistance of counsel and again stated that he was a member of the FMLN from 1985 until after the Peace Accords in 1992…
>
> On October 26, 1999 the subject's refugee hearing was held. The subject testified that he was a member of the FMLN since 1985 and worked on a political level (See Transcript). On May 12, 2000 the subject and his spouse were found NOT to be Convention Refugees. On 13 June 2000 the subject applied for PDRCC and on 21 June 2002 they applied for an H+C… In his H+C application he stated that he was a member of the Communist Party of El Salvador (PCS), part of the FMLN from 1986-1995. On August 27, 2003 the subject was interviewed by CSIS as part of his AFL and again stated that he was a member of the FMLN from 1986-1995.
>
> On July 4, 2004 the subject was found not at risk by PRRA but was granted a positive H+C due to the best interest of his children. This application is still at stage one due to the security issue. The subject does currently have a stay of his removal order under A25 x R233 until a decision is made on landing. On July 6, 2009 I interviewed the subject the Pacific Region Enforcement Center… The subject stated that he did not become active in the FMLN until 1989 and could not explain why for the last 12 years all of his documents and his own testimony was that he joined the FMLN in 1985. The subject was questioned on why his UN document would state that he was a combatant, if he was not but he could not provide a reasonable explanation. Further the subject confirmed that he was aware of the violent activities of the FMLN.

[29] As already indicated, the opinion report under subsection 44(1) was transmitted to the Minister who referred it to the Immigration Division for an admissibility hearing (subsection

44(2)). In a decision noteworthy for its lucidity, the Immigration Division reviewed the evidence carefully, including of course the report made under subsection 44(1), and found:

> Now, the matter of the attacks on mayors was, in fact, researched to a very specific degree. And in that regard, I then direct your attention to the report of the Truth Commission, found at tab 6 of Exhibit C-2. There starting at page 101, in my view, is good, credible and trustworthy evidence of the nature of attacks and intimidation of mayors and that was perpetrated by the FMLN in the context of the civil dispute. So the Commission went through a number of specific attacks on mayors in a number of different cities and towns. In each case there is, in my view, suitable specificity as to the facts, namely the "the who, what, where, when, what circumstances", et cetera. It's clear that the Commission carefully reviewed all the evidence respecting those particular attacks. In my mind, there is no doubt that the FMLN did conduct a campaign of intimidation of mayors that were perceived to be not working in the best interests of what the objectives of the group were at that particular time.
>
> (Page 6 of the Decision)

[30] Later in the decision, one can read:

> Now, the evidence is clear that in the context of the intimidation of mayors, killing took place. It appears that that killing was authorized at a relatively high level and the organization took part in it. I'm sure that the organization at that time thought that it was warranted, that that would bring about the change that was required. However, the homily itself says do not kill and the organization took part in it.
>
> So the allegation is founded. I conclude that Mr. Figueroa was a member of the FMLN. I conclude that the particular activities that I've stressed today, namely the intimidation and killing of mayors, fits within the types of activities covered by the *Suresh* definition of "terrorism". So the allegation itself is founded.
>
> I believe that the submissions that were made by Mr. Figueroa and his counsel were valid, understandable submissions. However, they're the kind of submissions that unfortunately didn't really help me at this level. At this level I have a very specific legal question to look at and that is your inadmissibility. I don't have any say or comment on the types of cases that the Minister

> prepares referrals and reports on. Those are decisions that are made in a different place and, I would expect, ultimately by very much higher officials in the government of Canada. My obligation is to consider the allegation once it's presented.
>
> (Page 11 of the Decision)

The Immigration Division found the Applicant to be inadmissible.

[31] I believe it would not do justice to the Immigration Division decision if I did not quote 3 more paragraphs taken from page 12 of the Decision. They read:

> On the other hand, it seems to me that certain facts in your case would suggest that there wouldn't be harm in asking for an exemption and I'll point out very generally some of those.
>
> First of all, you weren't involved in any of the bad activities that we've referred to. You were involved only in the political end of the organization, trying to get people to better understand new and potentially better political realities that might arise if they agreed to join a new political force. There's nothing wrong with that. You were young. You were very young at the time that these things took place.
>
> Another thing which one might expect that would be considered on an exemption application would be the nature of the conflict in the country at the time. What the people appear to have been trying to do was to stop a regime that ran death squads. There's some legitimacy, I would say, in trying to arrange matters so that death squads can be eliminated. So the ultimate purpose of the organization is legitimate. The problem is that there were some very problematic actions that took place which fall within the description of "terrorism" in the context of this hearing.

[32] As indicated earlier, this Decision of the Immigration Division, which is tasked with making the decisions on admissibility, was made the subject of an application for leave and judicial review. That application was dismissed on August 30, 2010. Because the test to grant

leave to seek judicial review is that there be a fairly arguable case in *Bains*, it is argued that this Court has already expressed itself on the matter of the Applicant's inadmissibility. The argument would benefit from more nuance.

[33] For our present purpose, it is not necessary to discuss other trips to this Court undertaken by the Applicant since the leave refusal of 2010. That takes us to the judicial review application of the report which gave rise to the decision of the Immigration Division.

III. Analysis

[34] There are four issues that should be analysed in reaching the conclusion that this application must be dismissed.

A. *The application is irremediably late*

[35] Section 72 of IRPA requires that the application for leave and judicial review must be "within 15 days after the day of which the applicant is notified of or otherwise becomes aware of the matter." The leave application was made at the end of 2015. The Applicant stated in his application for leave and for judicial review that he became aware of "the failure to communication the decision…on September 29, 2015". This is not accurate. This cannot be accurate.

[36] The inadmissibility process by reason of section 34 of IRPA was started by the report under review in this case. That report was disclosed at the latest to the Applicant in December

2009 as part of the evidentiary package for the Immigration Division hearing, which commenced on April 14, 2010. Indeed, it was included in the application for leave and for judicial review of the Immigration Division decision.

[37] Section 72 of IRPA allows for an extension of time to be granted in appropriate cases. However, the Applicant would have to satisfy the four-part test elaborated in *Canada (Attorney General) v Hennelly* (1999), 244 N R 399 (FCA):

i. A continuing intention to pursue the application
ii. The application has some merit;
iii. No prejudice to the Respondent arises from the delay;
iv. There is a reasonable explanation for the delay.

[38] In my estimation, the Applicant fails every branch of the test. There was never any explanation given for the delay as there was no intention expressed until September 2015 to pursue this type of an application. In fact, I have been persuaded that the Applicant is now seeking, many years after he has been found to be inadmissible, to re-litigate the matter through an attempt to attack the report which merely started the process that led to a decision. As we shall see, the judicial review is without any merit. As for the prejudice to the Respondent, I accept that there is some prejudice caused by the passage of time, as memories fade and details become blurred. However, that would not have been a decisive factor. It is much more significant that the Applicant sought to discover late in 2015 a new procedural vehicle to bring about new litigation about an issue that had been finally decided, that of his inadmissibility. That can hardly qualify as a continuing intention to pursue the application, but rather a continuing intention to litigate that which has been completed. Indeed, there is no explanation for the delay.

[39] In fact, the Applicant does not suggest in his memorandum of fact and law (as opposed to what is said in the application) that he did not know about the report until September 2015. Rather he claims that he realized at that time that he had not received "a fair opportunity to meaningfully argue the allegation" (para 30). This confirms that the Applicant wishes to re-litigate rather than have a continuing intention to pursue an application to challenge a report that was at the heart of the earlier litigation.

B. *Res Judicata*

[40] The issue of the admissibility of the Applicant has been heard and decided. There are conditions that must be met to prevent the re-litigation of the same issues of law or material facts where they have been determined by an administrative tribunal or a court of law:

i. The same issue has been previously decided in an earlier proceeding;

ii. The previous decision was final;

iii. The parties are the same.

(*Danyluk v Ainsworth Technologies Inc.,* 2001 SCC 44, [2001] 2 SCR 460, at para 25)

[41] The policy consideration at the heart of the *res judicata* doctrine was vividly described in *Danyluk,* at para 18:

> [18] The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative

> litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[42] Here, there is no doubt that the Applicant is seeking to re-litigate the very same issue that was disposed of in 2010. The issue was whether or not the Applicant was inadmissible, following a report made pursuant to section 44 of IRPA: the decision of the Immigration Division could not have been any clearer. For all intents and purposes, the Immigration Division confirmed the findings made in the subsection 44(1) report.

[43] As I understand the Applicant's argument at this stage, he contends that the report is not reasonable and that the process followed to prepare the report was deficient. Those may be different issues than those that were decided in the previous litigation.

[44] The Crown, for its part, argues that the issue of inadmissibility has been decided, with this Court refusing leave.

[45] In view of the paucity of arguments on the matter, I would be reluctant to decide this case on the sole basis of *res judicata*, issue estoppel or case of action estoppel. The policy rationale behind each appears to be the same and applies equally in this case: there should be an end to litigation and it should not be possible to sue twice for the same cause of action.

[46] However, the Crown seems to rely on the fact that leave to appeal was refused to claim that *res judicata* has been established. My reluctance comes from the limited weight that is carried by a decision on leave. In *Krishnapillai v Canada*, 2001 FCA 378, [2002] 3 FCR 74, the

Federal Court of Appeal was also reluctant to decide a case "on the basis that the denial without reasons of an application for leave to seek judicial review gives rise to *estoppel* with respect to a constitutional issue raised in the application"(para 8). The Court elaborated on its reasons in paragraphs 9 and 11:

> [9] For the doctrine of issue *estoppel* (as opposed to the doctrine of cause of action *estoppel*, which is not argued here) to apply, the same question must have been actually decided in the first proceeding. For the same question to have been actually decided in the first proceeding, it must be clear from the facts that the question has indeed been decided and the issue out of which the *estoppel* is said to arise must have been fundamental to the decision arrived at in the earlier proceeding. For the issue to have been fundamental to the earlier proceeding, there must be no doubt that the decision could not have been made without that issue being addressed and actually decided. There is no equivocal finding which can found issue *estoppel*. (See *Angle v. M.N.R.*, [1975] 2 S.C.R. 248; *The Doctrine of Res Judicata in Canada*, Donald J. Lange, Butterworths, 2000, at page 38 ff.)
>
> …
>
> [11] The issue, in a leave application under the *Immigration Act*, is whether a fairly arguable case has been made. Once leave has been granted, the issue is whether the case has been made. One cannot say, for the purpose of the doctrine of *res judicata*, that the two issues are unequivocally similar. Neither a decision granting leave nor a decision denying leave may be said to be a decision on the merit of any given issue. I have yet to see either type of decision successfully invoked as authority for the proposition that the issues raised in a leave application have been actually decided one way or the other.

[47] Here, because of the peculiarity of the case, no tribunal has found *res judicata*, contrary for instance to the case *Tang v Canada (Citizenship and Immigration)*, 2016 FC 754, where the Court had to rule on judicial review whether the tribunal considered appropriately that the doctrine applied before it. Without more fulsome argument on the part of the parties, one of

whom is not represented by counsel, I refrain from concluding that *res judicata* has been established such that the matter has been fully disposed of.

C. *Was the report reasonable?*

[48] I prefer, given the long history of Mr. Figueroa before this Court, to consider the merits of his application.

[49] Mr. Figueroa claims that the report is wrong: the FMLN has never been a terrorist organization and, as a matter of fact, the FMLN has not been listed as a terrorist organization in Canada. Furthermore, another officer, when she examined his H&C application in 2004, concluded that he was not inadmissible.

[50] There is no doubt that the merits of the decision to prepare a report under section 44 in order to conclude that someone is inadmissible are reviewable on a standard of reasonableness (*Berisha v Canada (Attorney General)*, 2016 FC 755). The decision depends on findings of facts, whether the person is a member of an organization, and there are reasonable grounds to believe that the organization has engaged in terrorism. In the case at bar, the Applicant has never contested his membership in the FMLN. In fact, he relied on the membership to seek refugee status in this country. It is also the basis of the decision on inadmissibility that was left undisturbed more than six years ago. As for the reasonable grounds to believe the organization has been engaged in acts of terrorism, that is a question of mixed facts and law also reviewable on a standard of reasonableness.

[51] Considering the arguments of Mr. Figueroa, he is mistaken in his suggestion that the H&C officer ruled in 2004 that he was not inadmissible. The only indication on which he relies is in fact an indication of the applicant's status at the time his H&C application was decided: the immigration officer was merely indicating, by checking one box in the form used to give a decision, that the Applicant was not inadmissible at the time, not that there had been a decision taken on his admissibility to Canada. That decision was to come 5 years later. There is no merit to this argument.

[52] Whether or not an organization has been listed in Canada as a "terrorist organization", I do not believe any argument can be drawn from that. The purpose of listing "terrorist groups", as in the Criminal Code, is specific to the legislation under which the listing occurs. What is important is, in the case of individuals considered under IRPA because of their membership in an organization, that there are reasonable grounds to believe that the organization has engaged in terrorism. There is no indication that Parliament intended only for organizations or groups that have been listed somewhere to be subject to section 34 of IRPA.

[53] In the context of immigration law, the Applicant must rather contend with the definition of "terrorism" adopted by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, at para 98:

> [98] In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain

> from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.

[54] The officer did not have to be satisfied on a balance of probabilities that the FMLN, the organization of which the Applicant conceded he was a member, had been engaged in terrorism. It suffices that the officer had reasonable grounds to believe such was the case. As is well known, that standard falls short of the balance of probabilities, the usual standard in civil litigation (*Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56) and it has been described as the "bona fide belief in a serious possibility based on credible evidence" (*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FCR 297 (FCA), at para 24).

[55] The Applicant has not shown that it was unreasonable for the officer to have the reasonable grounds to believe in this case. The decision of the Immigration Division of May 5, 2010, is very clear and lucid in reaching the conclusion that the organization has been engaged in terrorism. No wonder. The evidence was abundant.

[56] It should be stressed that the role of the officer in making a report pursuant to subsection 44(1) of IRPA is limited: it is a fact-finding mission. In *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 FCR 409 [*Cha*], the Federal Court of Appeal ruled:

> [35] I conclude that the wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in

> Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.
>
> [36] This view is consistent with that expressed by Sopinka J. in *Chiarelli*. To paraphrase him, this condition (of not committing certain offences in Canada) represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. It is true that the personal circumstances of the criminals may vary widely. It is true that the offences vary in gravity, as may the factual circumstances surrounding the commission of a particular offence. But the fact is, they all deliberately violated an essential condition under which they were permitted to remain in Canada. It is not necessary to look beyond this fact to other aggravating or mitigating circumstances.

[57] The burden on the Applicant to show that the report was unreasonable was not met.

D. *Process followed violated participatory rights*

[58] Procedural fairness issues are reviewed on a standard of correctness (*Mission Institution v Khela*, 2014 SCC 24; [2014] 1 SCR 502, para 79). The right to be heard, as part of the participatory rights, is one that is fundamental. Its content however will vary with the kind of decision with which the participation is concerned (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 21) [*Baker*].

[59] Here, as was seen from the passages taken from *Cha*, the discretion left to the officer is very limited. Once the conclusion is reached reasonably that the Applicant was a member of the

FMLN, which was not contested by the Applicant, and that the said organization had been engaged in terrorism, on the basis of reasonable grounds to believe, the fact-finding mission is complete (*Awed v Canada (Citizenship and Immigration)*, 2006 FC 469, at para 20). There exists a relatively low requirement for procedural fairness to be satisfied in those circumstances. Nevertheless, the person being made the subject of a subsection 44(1) report must know what the inquiry is about and he must be given an opportunity to make submissions. The report must also be communicated to the subject of the report (*Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, [2009] 1 FCR 675, affirmed on appeal, 2009 FCA 73).

[60] These requirements were satisfied in this case. I have read the transcript of the interview of July 6, 2009. There is no doubt that the Applicant was advised of the purpose of the interview. He was told who the interviewer was and that the purpose was to discuss “inadmissibilities”. Actually, the transcript of the interview was before the Immigration Division, together with the report and the referral under subsection 44(2). It is also clear that the Applicant was given a very fair opportunity to present his case as the interview lasted two hours. The Applicant never asked to supplement his submissions.

[61] In effect, the report is a preliminary instrument which is transmitted to the Minister who can refer the matter to the Immigration Division for an admissibility hearing; that is where the finding of inadmissibility is made, after evidence is led and parties heard. I note that the Applicant was represented by counsel. Thus, that will explain why the requirements to satisfy procedural fairness are seen as relaxed at this early stage. The five *Baker* factors affecting the

content of the duty of fairness all point in the direction of limited requirements, which were met in this case.

IV. Conclusion

[62] It follows that the judicial review application must be dismissed. The Applicant is 6 years late in making his application in an attempt to re-litigate the inadmissibility decision made in his case. This is not a matter that would deserve an extension of time.

[63] Be that as it may, the decision to prepare a report setting out the relevant facts, pursuant to subsection 44(1) of IRPA, is reasonable in that the Applicant never challenged that he had been a member of the Farabundo Marti National Liberation Front. It was reasonable for the officer to have reasonable grounds to believe that the organization of which the Applicant was a member has engaged in terrorism.

[64] As for procedural fairness, the Applicant was provided with an opportunity to present his case to the officer with the full knowledge that the interview was concerned with his admissibility to Canada. Procedural fairness requirements in the circumstances were met.

V. Style of Cause

[65] At the hearing, the Respondent sought that the Minister of Public Safety and Emergency Preparedness be listed as the sole respondent. That is because the officer who prepared the report in issue in this case is a member of the Canada Border Services Agency, an agency under the

responsibility of the Minister of Public Safety and Emergency Preparedness. Pursuant to Rule 5(2)(b) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, the Respondent in a case under IRPA is the "Minister who is responsible for the administration of that Act in respect of the matter for which leave is sought". Thus, the Minister of Public Safety and Emergency Preparedness is the appropriate respondent. The style of cause will be therefore be amended accordingly.

VI. Serious question of general importance

[66] The Court raised with the parties whether there exists a serious question of general importance (subsection 74(d) of IRPA). After a brief discussion, the parties agreed that none should be stated. The peculiar circumstances of this case, which make it rather unique, are not conducive to the identification of such question. Furthermore, "a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance" (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, at para 9). No serious question of general importance is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is ordered amended in order to have as the sole respondent the Minister of Public Safety and Emergency Preparedness.

2. The application for judicial review is dismissed; and

3. There is no serious question of general importance that is certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5463-15
STYLE OF CAUSE:	JOSE LUIS FIGUEROA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 30, 2016
JUDGMENT AND REASONS:	ROY J.
DATED:	DECEMBER 20, 2016

APPEARANCES:

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