Federal Court  Cour fédérale

Date: 20111103

Docket: T-1649-10

Citation: 2011 FC 1261

Vancouver, British Columbia, November 3, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SCOTT NEWBERRY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] "I am mindful that transfers under the *International Transfer of Offenders' Act* (ITOA) are a discretionary privilege for offenders incarcerated abroad. There is no right to a transfer under the ITOA at any time. The Minister may come to his or her own conclusion. The fact that a Minister has come to a given conclusion before, does not prevent the same Minister or a different Minister from lawfully changing his or her mind if faced with the same set of facts at a later date." Justice John O'Keefe, subsequent to the respective *Kozarov* and *Getkate* decisions, acknowledged the

deference owed the Minister by having agreed in paragraph 30 of *Dudas* that it could basically not be otherwise than to defer to the Minister. It is the discretion of the Minister to do as he did, per the reasons (which demonstrate the existence of an inherent logic in which justification, transparency and intelligibility are evident), not to transfer the Applicant to Canada.

[2] Justice Near, in *Grant* #2, above, framed the specific test for reasonableness, in the context of a decision based at least in part on the factor specified in paragraph 10(2)(*a*) of the *ITOA*:

> [38] The real issue to deal with then is whether there was sufficient evidence to allow the Minister to make a good-faith finding that the Applicant presents a significant risk of committing a criminal organization offence once transferred to Canada. In my view, the Minister acted reasonably in concluding that such evidence exists.

[3] Due to the manner in which the case below has been set out for analysis by both parties, having presented their respective differing positions, the Court, under the circumstances in respect of the standard of review of reasonableness, agrees wholly with the position of the Respondent (the decisions referred to in the introduction are cited below in context).

II. Background

[4] The Applicant, Mr. Scott Newberry, a Canadian citizen, was sentenced and incarcerated in the United States of America on conviction for conspiracy to distribute more than 5 kilograms of cocaine.

[5] In an application, dated June 11, 2009, the Applicant requested, pursuant to the provisions of the *International Transfer of Offenders Act*, SC 2004, c 21 [*ITOA*], that he be transferred to Canada

in order to serve the remainder of the sentence of imprisonment that had been imposed upon him in the United States.

[6] In addition to the information provided in his application, supplementary material, in the form of an assessment prepared by Correctional Service of Canada [CSC], a U.S. Certified Case Summary, a comprehensive community assessment and letters of support, was presented to the Minister for his consideration.

[7] On September 2, 2010, the Minister of Public Safety and Emergency Preparedness refused to approve the transfer application on the basis that the objectives of the international transfer of offenders scheme could not be as effectively achieved through transfer of the Applicant to Canada at that time.

III. Issues

[8] As the Applicant concedes, the constitutional issue raised has been previously determined by the Federal Court of Appeal in *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 39, in favour of the Respondent.

[9] The sole remaining issue is whether the Minister acted improperly, or in an unreasonable manner, in exercising his discretion under the *ITOA* by refusing to approve the Applicant's request for transfer.

IV. Analysis

[10] The Federal Court in reviewing the exercise of executive discretion has recognized that unless the Minister can be said to have acted improperly, in a wholly unreasonable manner, or to have committed an error of law, the exercise of his discretion cannot be successfully assailed (*Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2; *Kozarov v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 866, [2008] 2 FCR 377; *Getkate v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 965, [2009] 3 FCR 26; *Grant v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 958, 373 FTR 281 [*Grant #2*]; *Holmes v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112; *Duarte v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 602).

[11] The Court agrees with the position of the Respondent that, on the facts of this matter, as per their significance in light of the jurisprudence and legal instruments, the Minister's decision was a proper exercise of his discretion.

A. *Constitutional Challenge*

[12] Counsel appearing on this matter have argued the constitutional issue on a number of previous occasions before this Court.

[13] In *Kozarov*, above, appeal to the Federal Court of Appeal, 2008 FCA 185, dismissed on other grounds, the Court determined that sections 8 and 10 of the *ITOA* do not infringe upon the rights contained in section 6 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, enacted as Schedule B to the *Canada Act 1982* (UK) 1982, c 11 [*Charter*]:

> [37] I would dismiss the application for judicial review with costs, and answer the constitutional questions as follows. Is the applicant entitled to:
>
> a. A declaration that … [Mr. Kozarov] by virtue of his Canadian citizenship and s. 6(1) of **the Canadian Charter of Rights and Freedoms**, has a constitutional right to enter Canada, and that the Respondent Minister has no lawful jurisdiction to deny, refuge or postpone such entry and return to Canada;
>
> b. A declaration that the Respondent Minister is obliged and is under a legal duty to approve the Applicant's application for transfer pursuant to the … [*International Transfer of Offenders Act*] and s. 6 of the **Canadian Charter of Rights and Freedoms**, subject only to the Applicant being a Canadian citizen.
>
> c. A declaration that the provisions of the …[*International Transfer of Offenders Act*], namely, s. 8(1) and s. 10, and in particular s. 10(1)(*b*) and (*c*) are unconstitutional as being inconsistent with s. 6(1) of the **Canadian Charter of Rights and Freedoms** and, as such, are of no force or effect by virtue of s. 52 of the **Canadian Charter of Rights and Freedoms**.
>
> d. declaration that the constitutional rights of the applicant, pursuant to s. 6 of the **Canadian Charter of Rights and Freedoms**, have been violated by the Respondent Minister since approximately January 11, 2006, when the United States of American approved his transfer back to Canada, and therefore that the Applicant is entitled to an appropriate and just remedy, pursuant to s. 24(1) of the **Charter**, including an order for his immediate transfer back to Canada pursuant to the terms of the… [*International Transfer of Offenders Act*], and the applicable treaty or convention between Canada and the United States of America.
>
> The answer is: no.

[14] This Court had the further opportunity to consider the same constitutional argument in *Getkate*, above. The Court, in that case, concurred with the conclusion reached by the Court in *Kozarov*. Justice Michael Kelen, stated:

> [26] The mobility rights of the applicant to enter and leave Canada are temporarily restricted by the applicant's U.S. prison sentence.

> The *Transfer of Offenders Act* is to assist rehabilitation and reintegration in appropriate situations, not to allow all Canadians serving sentences outside of Canada an automatic right to return to Canada to serve their sentence. As Justice Harrington held in *Kozarov*, above, para. 32.
>
> At the present time, we are not really speaking of mobility rights at all. We are rather speaking of the transfer of supervision of a prison sentence. Had the Minister given his consent, Mr. Kozarov could not on his arrival here have immediately asserted his mobility right to leave the country.
> Accordingly, I agree with Justice Harrington that the Act does not affect the applicant's mobility rights under the Charter.
>
> [27] I agree with Justice Harrington's conclusion that in the context of a transfer under the Act, an applicant's Charter mobility rights under section 6 are not engaged and, if they were, the provisions contained in the Act are a reasonable limitation on those rights given that the applicant has already had his mobility restricted due to his own illegal activity.

(Reference is also made to *Divito*, above; *Dudas v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 942, 373 FTR 253; *Curtis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 958, 373 FTR 281).

[15] More recently, on February 2, 2011, after performing a full section 1 analysis, Justice Michael Phelan, in *Holmes v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112, endorsed the previous reasoning of this Court in *Kozarov* and *Getkate*, above.

[16] More significantly, on February 3, 2011, the Federal Court of Appeal, in *Divito*, above, endorsed this Court's preceding jurisprudence on this issue and found section 6 not to be engaged in this context and, in the event that it was, any limit placed upon that right by the legislation was justifiable in accordance with section 1.

[17] In this light, the Court agrees with the position of the Respondent that the constitutional issue has been dealt with by courts that have previously addressed this issue.

B. *Decision Challenged*

[18] In this matter, the Minister considered the factors under section 10 of the *ITOA* as he was required by law. The Minister also took into account the information contained in the material that has been filed in this proceeding pursuant to the Applicant's Rule 317 request. That information was in large part provided by the Applicant.

[19] Upon taking into account all relevant considerations, the Minister concluded that approval of the transfer request would not assist in achieving the objectives of the international transfer of offenders system.

[20] The Minister, in his decision, stated:

> The purposes of the *International Transfer of Offenders Act* (the Act) are to contribute to the administration of justice and the rehabilitation of offenders and their reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals. These purposes serve to enhance public safety in Canada. For each application for transfer, I examine the unique facts and circumstances as presented to me in the context of the purposes of the Act and the specific factors enumerated in section 10.
>
> The applicant, Scott Newberry, is a Canadian citizen serving a sentence of imprisonment for 10 years in the United States (U.S.) for conspiracy to distribute more than 5 kilograms of cocaine. On September 14, 2005, following an investigation by the Regional Organized Crime Narcotics Task Force, Mr. Newberry was arrested after loading 39 kilograms of cocaine into a hidden compartment of his truck. He was found in possession of $85,000 in U.S. currency. This case is identified as a large drug smuggling conspiracy, in

> which Mr. Newberry was identified as "just below" the head of a Canadian drug organization by the Assistant United States Attorney.
>
> The Act requires that I consider whether, in my opinion, the offender will, after the transfer, commit a criminal organization offence within the meaning of section 2 of the *Criminal Code*. In considering this factor, I note that accomplices were involved in the offence who had been investigated by the authorities and the nature of the offence also suggests that others were involved who were not apprehended. Ties to organized crime are suggested by certain indications in the file that the applicant was in direct contact with the head of the Canadian drug organization being investigated by the U.S.
>
> The applicant was involved in the commission of a serious offence involving a large quantity of drugs that, if successfully committed, would likely result in the receipt of a material or financial benefit by the group he assisted. He transported cocaine and money from the U.S. to Canada and high quality marijuana and ecstasy from Canada to the U.S. in numerous trips over many years, involving huge quantities of cocaine. The applicant was identified as a key link in the transportation of the drugs across the border as it was his truck, registered in his name and containing a secret hydraulic compartment that was used between 1998 and 2005. He was held accountable for 279 kilograms of cocaine and the money that he transported was reported to be used to pay others involved in the criminal activity.
>
> The Act requires that I consider whether the offender has social or family ties in Canada. I recognize the family ties of the applicant in Canada and the fact that the applicant's family members remain supportive. I also note the applicant's mother's illness.
>
> Having considered the unique facts and circumstances of this application and the factors enumerated in section 10, I do not believe that a transfer would achieve the purposes of the Act.

[21] The Court in *Kozarov*, [2008] 2 FCR 377, above, recognized the flexibility inherent in the international transfer of offenders system:

> [21] In any event, the section 10 factors, taken into account by the international community with respect to the transfer of prisoners from one jurisdiction to another, are fairly new, and fairly fluid …

[22] The Minister's discretion is not circumscribed by any of the factors contained within section 10. It is in the purview of the Respondent to base his decision to refuse or approve a transfer request on any other relevant consideration in the context. The process necessarily involves a weighing of the factors. It is not, as the Applicant would have it, an all or nothing proposition. The presence of absence of a particular factor does not dictate or compel a result.

[23] In this particular case, consideration of the factor specified in paragraph 10(2)(*a*) of the *ITOA*, when coupled with all of the other circumstances of the application, caused the Minister sufficient cause for consternation that he concluded that the objectives of the international transfer of offender's scheme could not be effectively achieved through transfer of the Applicant to Canada. That factor, in the Minister's view, tipped the scale against a transfer and, on that basis, he specifically referred to it in his reasons.

C. *Standard of Review*

[24] The reasonableness of the Minister's decision is gauged by reference to the information in the record and on the standard provided by *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. In establishing what constitutes a reasonable decision in paragraph 47 of that case, the Supreme Court of Canada, specifies:

> [48] … We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., The Province of Administrative Law (1997), 279, at p. 286 (quoted with approval in Baker, at para. 65, per L'Heureux-Dubé J.; Ryan, at para. 49).

[25] In *Dudas*, above, Justice John O'Keefe followed *Kozarov* and *Getkate*, above, and confirmed that the Minister's decision is entitled to significant deference upon review. At paragraph 30 of *Dudas*, Justice O'Keefe further emphasized the degree of deference owed and stated:

> I am mindful that transfers under the ITOA are a discretionary privilege for offenders incarcerated abroad. There is no right to a transfer under the ITOA at any time. The Minister may lawfully come to his or her own conclusion. The fact that a Minister has come to a given conclusion before, does not prevent that same Minister or a different Minister from lawfully changing his or her mind if faced with the same set of facts at a later date.

[26] Justice David Near in *Grant* #2, above, upholding a decision on the basis of reasonableness, likewise found that the Minister is owed a significant degree of deference.

[27] In *Holmes*, above, Justice Phelan stated:

> [46] … As noted in the discussion on Legislative Framework, the Minister's discretion is broad and the deference owed to the Minister's assessment of relevant factors is significant.

[28] The question for this Court to answer is whether, on the information contained in the record, one could reasonably conclude that there was a basis for the Minister to come to the conclusion that the objectives of the international transfer of offender's system, being protection of society and rehabilitation of the offender through reintegration into society, could not be as effectively achieved through transfer to Canada.

[29] To that end, in light of the broad discretion granted to the Minister under the *ITOA* and the deference which is afforded by the Court to the exercise of that discretion, unless the record is

absent, evident upon which such a conclusion could be based (*Getkate*, above), this Court defers to the Respondent's decision.

[30] In *Duarte*, above, Justice Yvon Pinard accepted that test in finding the Minister's decision withstood review:

> [21] I also consider that the meaning of the term "will" in paragraph 10(2)(a) is not necessarily that it is certain that the applicant will commit a criminal organization offence, and that the Minister can interpret this factor as being that there is a "significant risk" that the applicant will do so. As held by Justice David Near in *Grant v. Minister of Public Safety and Emergency Preparedness*, 2010 FC 958, 373 F.T.R. 281, at paragraph 37:
>
> > In any case, while Parliament could not have intended the Minister to be clairvoyant, the term "will" is tempered by the preceding, "in the opinion of the Minister." In my opinion, the phrase "in the opinion of the Minister" trumps the need for any continued academic debate on the exact meaning of "will", whether it be a significant or substantial risk of future action, in the provision. A more helpful formulation of the issue at hand is whether, in the opinion of the Minister, there is evidence that leads him to reasonably conclude that an organized criminal offence will be committed by the Applicant after the transfer.

[31] In determining that the Minister acted reasonably in *Holmes*, above, Justice Phelan, after adopting the Federal Court of Appeal's reasoning in *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158, as to the purposes for which adequate reasons are required, expounded on the exercise of the Minister's discretion in this context:

> [61] With respect to the reasonableness of the decision, it is evident that the Minister weighed the aspects of administration of justice, such as the nature of the offence, its circumstances and consequences, more heavily than the other purposes of the Act –

> rehabilitation and reintegration. However, he did not ignore these other purposes. The Applicant's challenge to the Minister's decision is a challenge to the relative weight the Minister gave.
>
> [62] While it is arguable that Holmes appears to be a perfect candidate for transfer given the strong facts of rehabilitation and reintegration, the very essence of deference in this case is to acknowledge that having addressed the relevant considerations, the actual weighing or balancing is for the Minister to conduct. Absent unreasonableness or bad faith or similar such grounds, it is not for the Court to supervise the Minister.
>
> [63] There is nothing unreasonable in the Minister's decision; it takes into consideration the relevant factors and imports no new and unknown factors, and it is intelligible and transparent as to how the Minister came to his conclusion. It therefore meets the requirements of law and should not be disturbed.

[32] Applying Justice Phelan's reasoning in *Holmes*, above, Justice Pinard, in *Duarte*, above, upheld the Minister's decision stating:

> [20] In view of the jurisprudence establishing the importance of the Minister's discretion in making such a decision, the Minister, in the present case, was not bound by the CSC report's conclusions, and was entitled to come to a contradictory conclusion. While, as the applicant points out, there was considerable evidence pointing in favour of him being transferred to Canada, such as the clear support of his community and the CSC report, I find that the Minister clearly set out the evidence upon which he chose to rely in coming to a different conclusion. I do not see any factual error in the factors listed by the Minister: the applicant's ties to a criminal organization, the existence of a criminal record in Canada, the likelihood that a criminal organization would have benefited from the successful commission of the offence, the amount of drugs involved, the premeditation of the enterprise involving multiple actors, and the potential long-term implications on society. In my view these are all relevant considerations and the Minister was entitled to come to a different view than CSC.

D. *Sufficiency of Reasons*

[33] Earlier in *Grant v MPSEP* (March 4, 2010) T-1414-09 [*Grant* #1], Justice Robert Barnes had the opportunity of addressing the reasonableness of a previous Minister's decision, and more particularly the sufficiency of the reasons provided by the Minister. In subsequent cases, the Respondent has addressed *Grant* #1, in suggesting the proper analytical framework that ought to be applied by the Court when reviewing Minister's decisions that relay, in part, on paragraph 10(2)(*a*) of the *ITOA*.

[34] That framework involves a three-fold analysis. Firstly, are there circumstances present that call for a more detailed explanation of the refusal by the Minister? In *Grant*, there were three individuals involved in the offence (the number being important insofar as the definition of criminal organization offence in the *Criminal Code* requires an association of three or more) two of whom had been accepted for transfer and the remaining individual, Grant, had been refused. In those circumstances, Justice Barnes determined that some explanation as to why the other offenders were accepted for transfer and the applicant was not, was required. The decision of Justice Near in *Grant* #2 arguably diminishes the significance of this factor.

[35] The second aspect of the analysis is concerned with whether the assessment by the others in the normal course of operations within CSC, substantially differs from the Minister's view. In *Grant*, CSC concluded that the applicant had no links to organized crime, yet, the Minister was satisfied there was sufficient information to warrant a refusal on the basis of the applicant's potential to commit a criminal organization offence. Justice Barnes concluded that, in such a case, some further explanation might be required as to why the Minister came to his conclusion.

[36] In *Markevich v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 113, Justice Phelan appears to concur with this view:

> [20] The Minister's decision does not follow the departmental advice – nor is it required to do so. However, to the extent that it departs from that advice or emphasizes other relevant factors, the decision clearly explains the departure and the shift of emphasis (except in respect of one area, that of links to organized crime).
> …
>
> [22] The Minister found that Markevich had abandoned Canada; a finding which can stand on its own as a basis for the exercise of the Minister's decision. On the evidence before the Minister, it was open to him to make that finding even where his departmental officials did not do so. The basis of that decision is articulated, clear and falls within a range of acceptable outcomes.

[37] The Court is of the view that such further explanation is only required in cases where, upon a review of the record, it is not readily apparent that only one of the positions can be reasonably supported.

[38] The final step in the framework is one of reviewing the record, the information, and the circumstances surrounding the offence and the applicant, thus, to determine whether there is an understanding of the reasonableness for the Minister's opinion that there is a risk of the applicant continuing in organized criminal activity such that the objectives of the system cannot be achieved through transfer. In reviewing the record, the definition of "criminal organization offence" set forth in subsection 467.1(1) of the *Criminal Code* must be borne in mind, as well as the exception provided under that definition for individuals who are caught up in a "random gathering" that attempts to seize an opportunity. Further, the circumstances of the offence and the role of the applicant in the offence are at the forefront of this aspect of the analysis.

[39] In the present case, the Minister took advice and chose to refuse the request on the basis that the Applicant:

a. Was involved in a large scale sophisticated criminal enterprise responsible for the transportation and distribution of large amounts of illegal drugs across international borders on multiple occasions;
b. Was described as being “just below” the head of the Canadian arm of the organization;
c. At the time of his arrest, was in possession of approximately $85,000.00 U.S. currency and 39 kilograms of cocaine;
d. Was identified as having links to organized crime;
e. Had been previously denied transfer by the U.S. on the basis of serious concern relating to his criminal activity;
f. Was responsible for the transfer of currency and drugs within the organization.

[40] The Applicant also raises the issue of procedural fairness relying on the decision in *Balili v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 396. As is evident from paragraph 14 of the Reasons for Judgment in that matter, the Court determined *Balili* on the basis of insufficient reasons. Following *Singh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 115, at paragraphs 15 and 16 of its Reasons for Judgment (a case in which none of the authorities had identified circumstances indicating a link to a criminal organization) the Court in *Balili* found that there was a complete absence of any information elsewhere in the record, other than the information contained in the CSC assessment, that could raise a concern regarding the applicant’s involvement with a criminal organization (*Balili* at para 9 and 12). As the CSC

assessment had not been shared with the applicant, the Court found that a breach of procedural fairness had occurred.

[41] In the present case, there was abundant material available within the U.S. Certified Case Summary that related to the criminal organization factor, paragraph 10(2)(*a*) of the *ITOA*. Contrary to the suggestions of the Applicant, that material was in fact shared with the Applicant by the U.S. authorities prior to any decision being made by the Minister. The letter of the U.S. authorities, dated August 31, 2009, was copied to the Applicant. There was information in the record, other than that contained in the CSC assessment that raised concerns relating to the Applicant's involvement in a criminal organization upon which the Minister relied. As that information was shared with the Applicant, no breach of procedural fairness has occurred in this matter.

V. Conclusion

[42] The Minister weighed the purposes of the *ITOA*, the positive and negative circumstances of the Applicant and the relevant factors.

[43] In these circumstances, the Respondent reached the decision that the objectives of the international transfer of offenders system, those of protecting society and rehabilitation, could not be as effectively achieved through transfer of the Applicant to Canada.

[44] A factual foundation exists for the decision and the Minister was entitled to act as he did. As a result, this Court defers to the decision as taken.

[45] For all of the above reasons, the Applicant’s application for judicial review is dismissed with costs.

JUDGMENT

IT IS THIS COURT'S JUDGMENT that the Applicant's application for judicial review be dismissed with costs.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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