Date: 20070829

Docket: T-1846-06

Citation: 2007 FC 866

Ottawa, Ontario, August 29, 2007

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

PLAMEN KOZAROV

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] Plamen Kozarov is a Canadian citizen; not a very good one, but a citizen nevertheless. He is a convicted drug dealer. He is currently serving a sentence in the United States for having distributed not less than 100 kilos of cocaine, 100 kilos of marijuana and 97,000 units of Ecstasy.

[2] In accordance with the treaty between Canada and the United States and the *International Transfer of Offenders Act*, he applied to serve the remainder of his sentence here. The American authorities have consented, but our Minister, the Honourable Stockwell Day, did not. He denied the application for the following reasons:

> The offender has spent at least the past ten years in the United States.
>
> File information suggests the offender left Canada with no intention of returning.
>
> File information states that there do not appear sufficient ties in Canada to warrant a transfer.

[3] This is a judicial review of his decision. In fact, he made the same decision twice. He was asked to reconsider. He did so but maintained his position as quoted above.

[4] The Minister based himself upon subsections 10(1)(b) and (c) of the Act which provide:

10. (1) In determining whether to consent to the transfer of a Canadian offender, the Minister shall consider the following factors:	**10.** (1) Le ministre tient compte des facteurs ci-après pour décider s'il consent au transfèrement du délinquant canadien :
[…]	[…]
(*b*) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;	*b*) le délinquant a quitté le Canada ou est demeuré à l'étranger avec l'intention de ne plus considérer le Canada comme le lieu de sa résidence permanente;
(*c*) whether the offender has social or family ties in Canada; and	*c*) le délinquant a des liens sociaux ou familiaux au Canada;

[5] Mr. Kozarov submits that in the circumstances of this case the Act did not authorize the Minister to deny his return to Canada. However, if they do, the relevant provisions of the Act violate his mobility rights as set out in the *Canadian Charter of Rights and Freedoms*. Section 6(1) thereof confirms:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.	**6.** (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.

BACKGROUND

[6] Mr. Kozarov is 52 years of age. He was born and raised in Bulgaria. After spending a year in Italy, he came to Canada as a refugee in 1977. While here, he became romantically involved with a Canadian citizen. In 1982, he himself became a citizen. The same year they moved to Florida, apparently because her parents had moved there and she wanted to be close to them. While there, they had a daughter in 1983 and subsequently married in 1984. The marriage broke up. His wife and daughter returned to Canada where they remain. By 1996 they were divorced.

[7] He had no legal status in the United States but nevertheless spent most of his time there, although at first, he did travel back and forth to Canada. In 1995, however, he was arrested in Buffalo by the United States Immigration Service and charged with a violation of American immigration laws. He returned to Canada, but afterwards re-entered the United States allegedly to be closer to his now former father-in-law and to look after his business interests. Thereafter, he only returned here once. In the summer of 2001, he made a road trip across Canada with his then current girlfriend whom he married in Las Vegas in 2003. Her exact status in Canada is unclear.

[8] In September 2003, he was arrested in Florida and charged with Conspiracy to Possess with Intent to Distribute detectable amounts of cocaine, marijuana and Ecstasy. He subsequently pleaded

guilty and was sentenced to 5 years and 10 months imprisonment and ordered deported from the United States to Canada once his sentence was served.

[9] After the conviction, but before filing the application under review, his wife established a residence in Canada, but has shuttled back and forth to the United States visiting him in prison and looking after their business interests.

[10] As part of the application process the American authorities prepared a case summary and the Canadian authorities conducted a community assessment on his wife and attempted to conduct one on his daughter. She initially refused. The Americans approved his transfer in January 2006. However the Act also requires Canada's consent. In May 2006, the Minister refused for the reasons given above.

[11] Mr. Kozarov asked that the matter be reconsidered, and his daughter then consented to a community assessment. However, in October the Minister maintained his earlier decision.

STANDARD OF REVIEW

[12] Leaving the Charter aside, the courts should not readily interfere with a discretionary decision of a Minister. It was held in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2, 44 N.R. 354 that the courts, wherever possible, avoid a narrow technical construction and endeavour to make effective the intent of the legislature. As stated by Mr. Justice McIntyre at pages 7 and 8:

> Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice,

> and where reliance has not been placed on considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[13] Since then, the concept of a pragmatic and functional approach to judicial review has been fully developed.

[14] Even under this approach, decisions of Ministers of the Crown, in the exercise of discretionary administrative powers, usually receive the highest standard of deference, that is to say they are not disturbed unless patently unreasonable (*Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281), although in certain circumstances the standard of reasonableness simplicitor applies (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39). Relying on the principles enumerated by the Supreme Court of Canada in such cases as *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, and *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, I am of the opinion that the Minister's discretionary decision should be assessed against the standard of patent unreasonableness.

[15] However, on legal interpretation the standard of review is correctness. The Minister is owed no deference.

[16] The first step is to determine whether on the applicable standards of judicial review Mr. Kozarov's application should be granted. If so, there is no need to consider the Charter. If not, the

question arises whether the relevant sections of the Act offend. As required, Mr. Kozarov filed and served a notice of constitutional question.

INTERNATIONAL TRANSFER OF OFFENDERS ACT

[17] The following provisions of the Act, the full title of which is “An Act to implement treaties and administrative arrangements on the international transfer of persons found guilty of criminal offences” are relevant:

2. […]"Canadian offender" «*délinquant canadien* » "Canadian offender" means a Canadian citizen within the meaning of the *Citizenship* […]	2. «délinquant canadien » "*Canadian offender*" «délinquant canadien » Citoyen canadien au sens de la *Loi sur la citoyenneté* […]
8. (1) The consent of the three parties to a transfer — the offender, the foreign entity and Canada — is required. […]	8. (1) Le transfèrement nécessite le consentement des trois parties en cause, soit le délinquant, l'entité étrangère et le Canada. […]
10. (1) In determining whether to consent to the transfer of a Canadian offender, the Minister shall consider the following factors:	10. (1) Le ministre tient compte des facteurs ci-après pour décider s'il consent au transfèrement du délinquant canadien :
(*a*) whether the offender's return to Canada would constitute a threat to the security of Canada;	*a*) le retour au Canada du délinquant peut constituer une menace pour la sécurité du Canada;
(*b*) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;	*b*) le délinquant a quitté le Canada ou est demeuré à l'étranger avec l'intention de ne plus considérer le Canada comme le lieu de sa résidence permanente;

(*c*) whether the offender has social or family ties in Canada; and	*c*) le délinquant a des liens sociaux ou familiaux au Canada;
(*d*) whether the foreign entity or its prison system presents a serious threat to the offender's security or human rights.	*d*) l'entité étrangère ou son système carcéral constitue une menace sérieuse pour la sécurité du délinquant ou ses droits de la personne.

[18] Apart from the Charter, Mr. Kozarov submits that the Minister erred in his interpretation of section 8 and that his discretion was not exercised in good faith, or was based on irrelevant or extraneous considerations.

[19] It was argued that once Mr. Kozarov applied for a transfer and the American authorities agreed, the Minister's consent under section 8 was limited to determining whether or not he was a Canadian citizen. That cannot be so. That is a fact-finding mission, not a discretionary decision. It is clear that subsection 10(1) as opposed to subsection 10(2) only applies to "Canadian offenders" i.e. Canadian citizens.

[20] The language is unambiguous. Section 10 cannot be internally read down within the Statute. Indeed, I find no inconsistency between the stated purpose of the Act as set out in section 3, and subsections 10(1)(b) and (c). Although Mr. Kozarov is a citizen, it can hardly be said he is a member of the community. Only if two interpretations are possible is it presumed that Parliament did not intend to legislate contrary to international law and to Canada's international obligations. (See for example *R. v. Hape*, 2007 SCC 26, [2007] S.C.J. No. 26 at paragraph 39)

[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. The sections relied upon by the Minister do not offend international law. By letter issued in November 1991, the Secretary-General of the United Nations presented the Permanent Representative of Canada to the United Nations (Vienna) with "a Model treaty on the transfer of supervision of offenders conditionally sentenced or conditionally released" The model requires the consent of the state to whom the prisoner would be transferred. Article 7 goes on to provide, among other things, that "acceptance may be refused where: a) the sentenced person is not an ordinary resident in the administering state".

[22] Section 10 is neither all inclusive, nor does it require the Minister to either give or refuse consent depending on whether the factors set out therein are met.

[23] The Minister had conflicting advice. The Director General of the Offender Programs and Reintegration, Correctional Services of Canada, recommended he approve the transfer. However, one "Sharif" came to the opposite conclusion. The security classification of his or her memorandum was "confidential – not for distribution". Subsection 10(1) was considered in its entirety. Apart from the factors on which the Minister based his decision, Sharif reported, quite correctly, it would appear, that Mr. Kozarov's return would not constitute a threat to Canada's security, that there was no basis to suppose he would commit a terrorism offence, or a criminal organization offence, and that the United States prison system did not present a serious threat to his security or human rights.

[24] The Minister took advice, but he took the decision. He did not delegate. The findings that Mr. Kozarov had spent at least the last ten years in the United States, that he left Canada with no intention of returning, and that there did not appear to be sufficient ties in Canada to warrant a transfer, were not unreasonable, must less patently so.

[25] Mr. Kozarov would have it that as long as he had any tie to Canada, a transfer would be warranted. I do not read section 10 that way, but, as aforesaid, it does not exhaust the Minister's discretion. Mr. Kozarov goes on to suggest that the Minister acted in bad faith and had an agenda beyond that expressed by Parliament in such acts as the *Corrections and Conditional Release Act*, which would apply if he were to serve the remainder of his sentence here. Because of our system of parole, it is quite possible that Mr. Kozarov could get out on the street a lot sooner in Canada, than in the United States. However, there is no evidence in the file to justify that allegation, and so it is not entitled to consideration.

[26] Mr. Kozarov makes much of the fact that he is a naturalized Canadian, not native-born. The suggestion is that he is being stripped of his citizenship. There is no merit to that suggestion. Had he been born in Canada, but was ordinarily resident somewhere else for the past 25 years, he would have been treated the same way.

CHARTER MOBILITY RIGHTS

[27] Mr. Kozarov's current restrictions on his mobility arise from his own actions, his own criminal activities. A natural and foreseeable consequence of a criminal conviction is that the state

in which the offence is committed and in which the offender may be found may incarcerate him. Once Mr. Kozarov serves his sentence, he has the absolute right, as a citizen, to return here. The same holds true if his current sentence were commuted, or if he were pardoned. All citizens, unlike foreigners and permanent residents, have that constitutional mobility right (see *Catenacci v. Canada (Attorney General)*, 2006 FC 539, 144 C.R.R. (2d) 128).

[28] However the American authorities have put a condition on his transfer. The condition is that he serve his sentence here. Upon his transfer he could not immediately invoke his constitutional right as a citizen to leave Canada. His freedom would properly be restricted in accordance with the *Corrections and Conditional Release Act*. I have come to the conclusion that neither section 8 of the *International Transfer of Offenders Act* which requires the consent of the offender, the foreign entity and Canada nor subsections 10(1) (b) and (c) which call upon the Minister to consider whether Mr. Kozarov has social or family ties here or whether he left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence offends his mobility rights under the Charter.

[29] Consequently, it is not necessary to consider whether the challenged provisions can be saved as "reasonable limits prescribed by law" that are "demonstratively justified in a free and democratic society" under section 1 of the Charter as set out in the four-step test enunciated in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 and subsequent cases. In coming to the conclusion that sections 8 and subsections 10(1)(b) and (c) do not offend against Charter mobility rights. I have considered the case law relating to extradition, the case particularly urged upon me by Mr. Kozarov

(*Van Vlymen v. Canada (Solicitor General)*, 2004 FC 1054, [2005] 1 F.C.R. 617) and the recent Supreme Court case relied upon by the Minister (*R. v. Hape*, above).

[30] Extradition affects a citizen's right to remain in Canada, and so brings section 6 of the Charter into play. The State is active in such cases, not passive as in this. In *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, (1989) 48 CCC (3d) 193, the constitutional questions were whether the surrender of a Canadian citizen to a foreign state constituted an infringement of his right to remain in Canada, and if so, would a surrender in the circumstances of that case constitute a reasonable limit under section 1. The United States requested Mr. Cotroni's extradition on a charge of conspiracy to possess and distribute heroin. However, all his personal actions relating to the alleged conspiracy took place while he was in Canada.

[31] The Court held that Mr. Cotroni's mobility rights were affected, but the relevant provisions of the *Extradition Act* were saved by section 1. To my way of thinking, the key to that case is at page 1480 where Mr. Justice La Forest said:

> The right to remain in one's country is of such a character that if it is to be interfered with, such interference must be justified as being required to meet a reasonable state purpose.

However, he went on to say at page 1482:

> An accused may return to Canada following his trial and acquittal or, if he has been convicted, <u>after he has served his sentence</u>. The impact of extradition on the rights of a citizen to remain in Canada appears to me to be of secondary importance. In fact, so far as Canada and the United States are concerned, a person convicted may, in some cases, be permitted to serve his sentence in Canada; see *Transfer of Offenders Act*, S.C. 1977-78, c. 9.
> [Emphasis added]

That Act was replaced by the current *International Transfer of Offenders Act*.

[32] In this case, it was Mr. Kozarov who chose to leave Canada and to commit a crime in the United States. He has the absolute mobility right, as a Canadian citizen, to return to Canada once his sentence is served. 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.

[33] The Minister's reliance upon *R. v. Hape*, above, is misplaced. That case dealt with the extraterritorial application of the Charter as regards police activity outside Canada. The activity in question in this case, the decision of the Minister, was made in Canada. If one were to say the Charter had no application to Mr. Kozarov while he was outside Canada, then his constitutional right to return to Canada, once his sentence is served, would be violated.

[34] I do not think that the decision of Mr. Justice Russell in *Van Vlymen*, above, assists Mr. Kozarov. Although he held that Mr. Van Vlymen, as a Canadian citizen, had the constitutional right by virtue of section 6 of the Charter to enter Canada provided he remained incarcerated, subject only to his securing the approval of the U.S. authorities, and such reasonable limits as Parliament might prescribe by law, and can be demonstratively justified in a free and democratic society as per section 1 of the Charter, the facts of that case have to be carefully considered. The Minister was found to have neglected or to have deliberately failed to consider Mr. Van Vlymen's request for

transfer for close to ten years. In additional to breaching the Charter, it was held that the Minister breached his common law duty to act fairly in processing Mr. Van Vlymen's application.

[35] The driving force of that decision was the failure to decide within a reasonable time frame. That is not the case here.

[36] The section 10 provisions relied upon the Minister in this case were at that time found in regulations under the now repealed *Transfer of Offenders Act*. Mr. Justice Russell noted that the impugned regulations were not used to refuse Mr. Van Vlymen's transfer back to Canada (see paragraphs 106 and 109), and that the constitutionality of those regulations did not arise on the facts of the case.

[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. A 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.

ORDER

THIS COURT ORDERS that the application for judicial review of the decision of the Minister made 5 October 2006, maintaining his earlier decision made on 23 May 2006, denying the applicant's transfer to Canada, is dismissed, with costs.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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