Date: 20080429

Docket: T-1249-07

Citation: 2008 FC 544

Ottawa, Ontario, the 29th day of April 2008

Present: The Honourable Orville Frenette

BETWEEN:

ANTHONY DAOULOV

Applicant

and

ATTORNEY GENERAL OF CANADA and CRIMINAL CONVICTION REVIEW GROUP

Respondents

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision by Martin Lamontagne, a lawyer working in the Criminal Conviction Review Group (hereafter the "CCRG"), who found that there was no reasonable basis to conclude that a miscarriage of justice likely occurred in the applicant's case.

[2] The applicant was found guilty of the offence of possession of heroin in a trial by judge and jury on December 17, 1998. On appeal, a new trial was ordered.

[3] During the above-mentioned appeal, the applicant had claimed that he wished to call several witnesses in support of his defence of compulsion, including someone called Dominico Di Capua (hereafter "Di Capua"). Di Capua was allegedly the one who persuaded the applicant to transport the heroin. The applicant suspects that Di Capua was the police informant in this case.

[4] On May 3, 2000, Attorney General's prosecutor Manon Ouimet wrote a letter to Jérôme Choquette, counsel for the applicant, recommending that he call Di Capua as a defence witness.

[5] The applicant stated at the hearing before this Court that after having discussed the situation with his counsel, they had agreed not to call him as a witness. At the time, the applicant was himself a lawyer.

[6] During the second trial, the applicant presented a defence of compulsion, submitting that he had been forced by Di Capua to bring the heroin into the prison, but he did not call Di Capua as a witness.

[7] On December 20, 2000, the applicant was found guilty of possession of heroin, and on January 4, 2001, he was sentenced to ten years in prison. The Court of Appeal of Québec upheld the conviction as well as the trial judge's decision not to authorize the disclosure of the informant's identity, but the sentence was reduced to eight years (*R. c. Daoulov*, [2002] J.Q. no 1203 (QL); *R. c. Daoulov*, [2002] J.Q. no 3003 (QL)). The Supreme Court refused to grant the applicant leave to appeal.

[8] In June 2003, the applicant filed a private criminal complaint against Di Capua, alleging that he had been threatened and forced to traffic the drugs. However, the proceedings related to the complaint were suspended by a *nolle prosequi* filed by the Attorney General's prosecutor for Quebec.

[9] The applicant then filed an application to have his conviction reviewed by the CCRG in light of the decision of the Attorney General's prosecutor, which, according to the applicant, indicated that it had been Di Capua who had informed the police about the drugs possessed by the applicant. When the applicant received no response, as required by the *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice*, SOR/2002-416 (hereafter the "Regulations"), the applicant contacted a representative of the respondent, who informed him that his file had been mislaid.

[10] The applicant filed a new application, either on March 1, 2004 (according to Mr. Lamontagne's letter dated June 12, 2007), or June 2, 2004 (according to the applicant's affidavit). The exact date has no bearing on this application.

[11] In a nine-page explanatory letter dated July 26, 2005, Mr. Lamontagne informed the applicant of his preliminary assessment that [TRANSLATION] "there is no reasonable basis to conclude that a miscarriage of justice likely occurred in your case; accordingly, your application will not be sent on to the investigation stage." According to Mr. Lamontagne:

> [TRANSLATION]
>
> Most of the arguments that you now raise in support of your *application* have already been considered by the Court of Appeal of Québec; on top of this, a panel of judges from the highest court in the land has decided not to grant you leave to appeal the decision.
>
> […]
>
> Your application reveals no *new* evidence constituting a matter of significance related to your criminal liability that could give rise to a review of your conviction.

[12] Noting that the Court of Appeal had refused the request to have the informant's identity disclosed, Mr. Lamontagne dealt with the applicant's arguments regarding his complaint against Di Capua in light of the discretion of the Attorney General's prosecutor in criminal proceedings:

> [TRANSLATION]
>
> The prosecution was acting within its powers when it filed a stay of proceedings with respect to this information, and this in no way affects the judicial recognition of your criminal liability, nor is the recognition of the establishment by the Attorney General of the essential elements of the offences of which you have been accused affected in any way.
>
> Moreover, there is no tangible or credible proof that this discretion was not properly exercised, nor that you have been the victim of a miscarriage of justice.

[13] However, Mr. Lamontagne did invite the applicant to provide new information. He had one year to make a submission, and he submitted the letters dated November 21, 2005, and December 12, 2005. According to the applicant, Mr. Lamontagne failed to address his main argument, to the effect that Di Capua and the informant were the same person. In his letter dated December 12, 2005, the applicant added that staying the proceedings against Di Capua constituted

an abuse of discretion by the Attorney General because it made it clear that Di Capua was being protected by [TRANSLATION] "the police and the prosecution."

[14] It appears that telephone calls took place between the applicant and some representatives of the respondent, as well as a meeting between the applicant and Mr. Lamontagne. Finally, in a four-page letter dated June 12, 2007, Mr. Lamontagne informed the applicant that he had reached the following conclusion:

> [TRANSLATION]
>
> I recently completed another segment of the preliminary assessment of this case, taking into account the new evidence that you provided to us last December during our meeting in Montreal. But this only confirmed the informant's identity, and we are still of the opinion that this matter is not sufficiently significant or determinative to justify an investigation that would ultimately lead to any kind of remedy from the Minister.

I. Relevant legislation

[15] The following provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, are relevant to this case:

696.1 (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a	696.1 (1) Une demande de révision auprès du ministre au motif qu'une erreur judiciaire aurait été commise peut être présentée au ministre de la Justice par ou pour une personne qui a été condamnée pour une infraction à une loi fédérale ou à ses règlements ou qui a été déclarée délinquant dangereux ou délinquant à

long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

[…]

696.2 (1) On receipt of an application under this Part, the Minister of Justice shall review it in accordance with the regulations.

[…]

696.3 […] (3) On an application under this Part, the Minister of Justice may

(a) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or

(ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may

contrôler en application de la partie XXIV, si toutes les voies de recours relativement à la condamnation ou à la déclaration ont été épuisées.

[…]

696.2 (1) Sur réception d'une demande présentée sous le régime de la présente partie, le ministre de la Justice l'examine conformément aux règlements.

[…]

696.3 […] (3) Le ministre de la Justice peut, à l'égard d'une demande présentée sous le régime de la présente partie :

a) s'il est convaincu qu'il y a des motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite :

(i) prescrire, au moyen d'une ordonnance écrite, un nouveau procès devant tout tribunal qu'il juge approprié ou, dans le cas d'une personne déclarée délinquant dangereux ou délinquant à contrôler en vertu de la partie XXIV, une nouvelle audition en vertu de cette partie,

(ii) à tout moment, renvoyer la cause devant la cour d'appel pour audition et décision comme s'il s'agissait d'un appel interjeté par la personne déclarée coupable ou par la

be; or

(b) dismiss the application.

(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

696.4 In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including

(a) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;
(b) the relevance and reliability of information that is presented in connection with the application; and
(c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

personne déclarée délinquant dangereux ou délinquant à contrôler en vertu de la partie XXIV, selon le cas;

b) rejeter la demande.

(4) La décision du ministre de la Justice prise en vertu du paragraphe (3) est sans appel.

696.4 Lorsqu'il rend sa décision en vertu du paragraphe 696.3(3), le ministre de la Justice prend en compte tous les éléments qu'il estime se rapporter à la demande, notamment :

a) la question de savoir si la demande repose sur de nouvelles questions importantes qui n'ont pas été étudiées par les tribunaux ou prises en considération par le ministre dans une demande précédente concernant la même condamnation ou la déclaration en vertu de la partie XXIV;
b) la pertinence et la fiabilité des renseignements présentés relativement à la demande;
c) le fait que la demande présentée sous le régime de la présente partie ne doit pas tenir lieu d'appel ultérieur et les mesures de redressement prévues sont des recours extraordinaires.

The applications for review are governed by the Regulations, the relevant provisions of which are the following:

3. On receipt of an application completed in accordance with section 2, the Minister shall	3. Sur réception d'une demande de révision présentée conformément à l'article 2, le ministre :
(a) send an acknowledgment letter to the applicant and the person acting on the applicant's behalf, if any; and	a) transmet un accusé de réception au demandeur et, le cas échéant, à la personne qui a présenté la demande en son nom;
(b) conduct a preliminary assessment of the application.	b) procède a une évaluation préliminaire de la demande.
4. (1) After the preliminary assessment has been completed, the Minister	4. (1) Une fois l'évaluation préliminaire terminée, le ministre :
(a) shall conduct an investigation in respect of the application if the Minister determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred; or	a) enquête sur la demande s'il constate qu'il pourrait y avoir des motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite;
(b) shall not conduct an investigation if the Minister	b) ne mène pas d'enquête dans les cas où :
(i) is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred and that there is an urgent need for a decision to be made under paragraph 696.3(3)(a) of the Code for humanitarian reasons or to avoid a blatant continued prejudice to the applicant, or	(i) il est convaincu qu'il y a des motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite et que, pour éviter un déni de justice ou pour des raisons humanitaires, une décision doit être rendue promptement en vertu de l'alinéa 696.3(3)a) du Code,

(ii) is satisfied that there is no reasonable basis to conclude that a miscarriage of justice likely occurred.

(ii) il est convaincu qu'il n'y a pas de motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite.

(2) The Minister shall send a notice to the applicant and to the person acting on the applicant's behalf, if any, indicating whether or not an investigation will be conducted under subsection (1).

(2) Le ministre transmet au demandeur et, le cas échéant, à la personne qui présente la demande en son nom, un avis indiquant si une enquête sera ou non menée en application du paragraphe (1).

(3) If the Minister does not conduct an investigation for the reason described in subparagraph (1)(b)(ii), the notice under subsection (2) shall indicate that the applicant may provide further information in support of the application within one year after the date on which the notice was sent.

(3) Si le ministre ne mène pas d'enquête pour le motif visé au sous-alinéa (1)b)(ii), l'avis prévu au paragraphe (2) doit mentionner que le demandeur peut transmettre au ministre des renseignements additionnels à l'appui de la demande dans un délai d'un an à compter de la date d'envoi de l'avis.

(4) If the applicant fails, within the period prescribed in subsection (3), to provide further information, the Minister shall inform the applicant in writing that no investigation will be conducted.

(4) Si le demandeur ne transmet pas les renseignements additionnels dans le délai prévu au paragraphe (3), le ministre l'avise par écrit qu'il ne mènera pas d'enquête.

(5) If further information in support of the application is provided after the period prescribed in subsection (3) has expired, the Minister shall conduct a new preliminary assessment of the application under section 3.

(5) Si des renseignements additionnels sont transmis après l'expiration du délai prévu au paragraphe (3), le ministre procède à une nouvelle évaluation préliminaire de la demande en application de l'article 3.

5. (1) After completing an investigation under paragraph

5. (1) Une fois l'enquête visée à l'alinéa 4(1)a) terminée, le

4(1)(a), the Minister shall prepare an investigation report and provide a copy of it to the applicant and to the person acting on the applicant's behalf, if any. The Minister shall indicate in writing that the applicant may provide further information in support of the application within one year after the date on which the investigation report is sent. (2) If the applicant fails, within the period prescribed in subsection (1), to provide any further information, or if the applicant indicates in writing that no further information will be provided in support of the application, the Minister may proceed to make a decision under subsection 696.3(3) of the Code.	ministre rédige un rapport d'enquête, dont il transmet copie au demandeur et, le cas échéant, à la personne qui présente la demande en son nom. Le ministre doit informer par écrit le demandeur que des renseignements additionnels peuvent lui être fournis à l'appui de la demande dans un délai d'un an à compter de la date d'envoi du rapport d'enquête. (2) Si le demandeur ne transmet pas les renseignements additionnels dans le délai prévu au paragraphe (1), ou s'il informe le ministre par écrit qu'aucun autre renseignement ne sera fourni, le ministre peut rendre une décision en vertu du paragraphe 696.3(3) du Code.
6. The Minister shall provide a copy of the Minister's decision made under subsection 696.3(3) of the Code to the applicant and to the person acting on the applicant's behalf, if any.	6. Le ministre transmet au demandeur et, le cas échéant, à la personne qui présente la demande en son nom, une copie de la décision rendue en vertu du paragraphe 696.3(3) du Code.

II. The issues

[16] The only general issue raised in this case is whether Mr. Lamontagne came to an erroneous conclusion with respect to the applicant’s application.

[17] The applicant also raises the issue of procedural fairness regarding the loss of the first application he had submitted. The applicant is seeking for this Court to order [TRANSLATION] "the respondent party to return to the undersigned the missing file in its entirety". However, this does not seem to me to be possible, given that the file is, according to the evidence, lost.

III. Analysis

[18] The applicant claims that Mr. Lamontagne based his decision to reject his application on three reasons:

(1) The acts had already been dealt with during the various legal proceedings;

(2) The Attorney General was simply exercising his discretionary power in staying the proceedings against Di Capua;

(3) The fact that the informant's identity was irrelevant.

According to the applicant, these reasons are based on erroneous conclusions, which justifies the intervention of this Court in Mr. Lamontagne's decision.

IV. The Attorney General's discretionary power in criminal proceedings

[19] It is recognized by case law that in criminal proceedings, the Attorney General enjoys extensive discretionary powers, especially with respect to the decision to commence criminal proceedings. Recognizing that the power belongs to the Attorney General, this area is not

particularly conducive to judicial review. Except in cases of flagrant violation of the principles of fundamental justice, fraud or abuse of procedure, there can be no judicial intervention in the exercise of this discretionary power (*R. v. T. (V.) [V.T.]*, [1992] 1 S.C.R. 749; *R. v. Durette* (1992), 72 C.C.C. (3d) 421).

[20] It appears that this is the first time the Court has been seized of a judicial review of a decision by the Minister under section 696.3 of the *Criminal Code*. The first issue, then, is which standard of review is applicable to such a decision. The applicant submitted no arguments regarding this issue. According to the respondent, the applicable standard of review is that of reasonableness.

[21] The parties filed their written arguments before the Supreme Court rendered its judgment in *Dunsmuir v. New Brunswick*, 2008 SCC 9, in which it explained how to determine the applicable standard of review:

> [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600; *Dr Q*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.
>
> […]
>
> [55] A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> · A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> · A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

> · The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.
>
> [56] If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons.

[22] In this case, there is no privative clause and the decision is under appeal, but there is still reason to show considerable judicial deference. Mr. Lamontagne's expertise in the matter at hand has been established and must be taken into consideration (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, pp. 32 to 35). Moreover, the issue of whether there is a reasonable basis to conclude that a miscarriage of justice likely occurred is a mixed question, which requires an analysis of facts in relation to the law. In my opinion, the standard of reasonableness is applicable in this case.

[23] Therefore, the issue is whether Mr. Lamontagne's decision, in which he determined that there was no reasonable basis to conclude that a miscarriage of justice likely occurred, was unreasonable. Again according to the Supreme Court:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (*Dunsmuir*, *supra* at para. 47)

[24] In my opinion, the applicant has failed to demonstrate that Mr. Lamontagne's decision does not fall within the range of "possible, acceptable outcomes".

V. The alleged "new evidence"

[25] The applicant has primarily based his application for judicial review on his defence of compulsion. He maintains that the police informant was none other than Di Capua, the man who forced him to transport the heroin. He therefore filed a private complaint against him, but the Attorney General of Quebec filed a *nolle prosequi*; according to the applicant, this prevents him from forcing the witness in question to testify.

[26] However, Di Capua's role was raised at the trials and appeals, and the applicant did not call him as a witness, which he could have done. Secondly, even if the private complaint had made it to trial, as the applicant wished, Di Capua would not have been obliged to testify.

[27] It is therefore incongruous to claim now that this constitutes new evidence that could exonerate the applicant.

[28] The issue of the relevance of the informant's identity has already been considered by the Court of Québec, the Court of Appeal of Québec and the Supreme Court. In my opinion, Mr. Lamontagne's conclusion that the informant's identity is irrelevant to the issue of the applicant's criminal liability is not unreasonable.

VI. Additional case law cited by the applicant

[29] In his memorandum, the applicant cited several cases that he claimed supported his arguments. A simple analysis of these cases indicates the contrary. For example, he cites *R. v. Kelly* (1999), 135 C.C.C. (3d) 449, [2001] 1 S.C.R. 741.

[30] In that case, Kelly was convicted for the murder of his wife; subsequently, one of the principal witnesses changed her story. The Minister of Justice, exercising his discretionary power under section 96 (690 at the time), referred the case to the Court of Appeal, which decided on the admissibility of this new evidence. The Supreme Court then refused leave to appeal because the opinion of the Court of Appeal on this point was not a decision subject to appeal.

[31] The other significant case adduced by the applicant is *R. v. Stolar*, [1998] 1 S.C.R. 480. In that case, after being convicted, the applicant claimed that new evidence had been uncovered. The Court of Appeal held that this "new" evidence had no impact on the judgment and refused the application. The Supreme Court refused to intervene.

[32] None of the cases cited is factually related or relevant to this case.

[33] In light of the preceding, the application for judicial review cannot be allowed.

ORDER

THE COURT ORDERS that the application for judicial review be dismissed.

"Orville Frenette"
Deputy Judge

Certified true translation

Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	Anthony Daoulov **v.** AGC et al.
PLACE OF HEARING:	Montréal, Quebec
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DATED:	April 29, 2008

APPEARANCES:

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Jacques Savary	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

The applicant himself	FOR THE APPLICANT
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