Federal Court  Cour fédérale

Date: 20090623

Docket: IMM-2455-08

Citation: 2009 FC 660

Ottawa, Ontario, June 23, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ALVIN JOHN BROWN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The issue in this judicial review is whether the Immigration Appeal Division (IAD) lacked jurisdiction to hear an appeal on the grounds that pre-sentence incarceration of 17 months was deemed a credit of 34 months' imprisonment. The result of this pre-trial credit would be to deprive the Applicant of a right of appeal as a result of being sentenced to a term of imprisonment of at least two years.

[2] The jurisdictional issue arises in relation to section 64 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), which reads:

64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	**64.** (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.	(2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.

[3] While this judicial review was heard in late November, due to unknown circumstances, the Applicant's submissions on a question of certification did not reach the Court until May. No fault is attributed to any party.

II. BACKGROUND

[4] The Applicant Brown is in his mid-30s and is a citizen of Jamaica. He has been in Canada since he was eight years old, and has been a permanent resident almost all of that time.

[5] On September 10, 2002, Brown was convicted of two counts of robbery and one count of using an imitation firearm during the commission of an offence.

[6] At Brown's criminal trial, counsel for the Crown and counsel for Brown made a joint submission as to the appropriate sentence given Brown's time (17 months) in pre-trial custody, some of which was during a strike at the jail. The Ontario Court judge accepted the agreed sentence of one day in jail plus 18 months' probation.

[7] The sentencing transcript, contained in the Certified Tribunal Record, contains a single reference by the Crown to the possibility that pre-trial custody could be considered as double time for purposes of sentencing. That reference is as follows:

> So that would be thirty-four months if you double it, which is the normal practice in these courts. I understand though that some Judges have been giving some extra time for time spent during the strike. I leave that to Your Honour entirely. At any rate it's seventeen months pretrial custody and I do believe that that's sufficient and it's on that basis that we've resolved this matter.

[8] The transcript then shows that the attention focuses on the probation and its conditions. The formal sentencing by the judge makes no reference to pre-trial custody, much less to any doubling of credit for time served.

[9] As a result of the sentence, and following an admissibility hearing before the Immigration Division, Brown was found to be inadmissible to Canada due to serious criminality. A deportation order was issued.

[10] Brown filed a Notice of Appeal with the IAD. The IAD, having had the jurisdiction issue raised, determined that it would not decide the appeal until it had heard the Humanitarian and Compassionate (H&C) considerations raised by Brown in his appeal.

[11] However, before the appeal and H&C hearing took place, the IAD determined that it did not have jurisdiction, cancelled the hearing, and dismissed the appeal.

[12] In so doing, the IAD determined that the issue was whether the pre-trial incarceration was to be considered as straight time (1:1), or whether it was to be considered such that each day served in jail was equivalent to two days of "imprisonment" (2:1).

[13] The IAD concluded that, based on 17 months of pre-trial custody, the term of imprisonment for purposes of s. 64(2) was 34 months and therefore Brown had no right of appeal.

[14] The critical finding of the IAD was stated as follows:

> The panel is of the opinion that the terms of the joint submission could not be clearer on the intention of the counsels and the acceptance of the trial judge.
>
> …
>
> It was clear in the wording used by both counsels [*sic*] that they were satisfied with a seventeen months [*sic*] pre-trial custody which is equivalent to thirty-four months by doubling it.

III. ANALYSIS

[15] The Applicant raised two issues:

(1) whether pre-trial custody forms part of the "term of imprisonment" under s. 64 of the IRPA; and

(2) whether the Applicant's 17 months of pre-trial custody constituted a term of imprisonment of at least two years.

A. *Standard of Review*

[16] The standard of review with regards to the first issue is correctness (see *Sherzad v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 757 at paragraph 18), as it is a question of jurisdiction and statutory interpretation. While the decision in *Sherzad*, above, was decided pre-*Dunsmuir* (*Dunsmuir v. New Brunswick*, 2008 SCC 9), its conclusion as to the standard of review is still appropriate.

[17] As to the second issue, to the extent that it depends on a determination of whether the 2:1 rule on pre-trial custody is a legal norm, it is a determination outside the IAD's field of expertise and should be decided on the basis of correctness. To the extent that the issue is whether the 2:1 rule is applicable and was applied, it is a question of mixed law and fact and subject to review on a standard of reasonableness.

B. *Pre-Trial Custody/Term of Imprisonment*

[18] There is significant case law in this Court which concludes that pre-trial custody can form part of the "term of imprisonment" as the term is used in s. 64. The Applicant's reliance on the Supreme Court's decision in *R. v. Mathieu*, 2008 SCC 21 is misplaced, as that decision was centered on different considerations in respect of the definition of "sentence" in relation to a "term of imprisonment". I do not interpret *Mathieu* as reversing *R. v. Wust*, 2000 SCC 18.

[19] The Supreme Court in *Wust*, above, determined that pre-trial custody may form part of the punishment imposed following a conviction. Justice Arbour, writing for the Court, stated at paragraph 41 of *Wust*, above, that:

> …while pre-trial detention is not intended as punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3). The effect of deeming such detention punishment is not unlike the determination, discussed earlier in these reasons, that time spent lawfully at large while on parole is considered nonetheless a continuation of the offender's sentence of incarceration.

[20] Similarly to *Wust* (and unlike the issues raised in *Mathieu*, above), section 64(2) of the IRPA takes into consideration how the person was actually punished, as is expressed by the phrasing "punished in Canada by a term of imprisonment."

[21] Further, the purpose of s. 36 of the IRPA is to exclude from Canada non-citizens who have committed certain serious crimes. A measure of the seriousness of the crimes is the length of

imprisonment imposed or - in the case of pre-trial custody - that which was considered as part of the punishment by the sentencing judge.

[22] For purposes of IRPA, the focus is on the term of imprisonment which the sentencing judge imposed or considered as part of the punishment. That is the measure of seriousness to which IRPA is directed.

[23] Therefore, the IAD was correct that pre-sentencing custody could be part of the calculation in determining whether the Applicant had been punished by a term of imprisonment of at least two years. The question that remains is whether the IAD properly determined that that was the situation in this instance.

C. *17 Months/Term of Imprisonment*

[24] The critical issue is whether the sentencing judge gave a 2:1 credit to Brown for having been in pre-trial custody for 17 months, such that he was punished by a term of imprisonment of 34 months plus 1 day to be followed by 18 months' probation.

[25] The policy reasons behind this 2:1 credit are described by Justice Arbour in *Wust*, above at paragraph 45, and it is made clear that this credit is not automatic.

> In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational,

> vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the *Corrections and Conditional Release Act* apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

[26] In this case, the IAD was unreasonable in concluding that the sentencing judge "could not be clearer" in accepting a 2:1 credit. The sentencing judge was completely silent on the point and even Crown counsel was unsure what the credit should be.

[27] The fact that the sentencing judge imposed only one extra day of jail time suggests that the term served was an adequate punishment, and indicates that pre-sentence custody was taken into account. However, there is nothing to suggest that the judge thought 34 months was the appropriate term of imprisonment.

[28] The IAD should be cautious in reaching a conclusion the result of which is to deny a person the right of an appeal. The IAD should only reach the conclusion that the punishment was intended as in excess of two years on clear evidence. This record does not allow for such a conclusion.

IV. CONCLUSION

[29] The IAD has jurisdiction to consider Brown's appeal. The IAD's decision will be quashed. The specific question of whether there is a right to an appeal will not be referred back to another panel. The IAD is to proceed with the appeal in the usual manner.

[30] As this judicial review, while based on a legal determination, is largely fact-driven by the record at the sentencing hearing, no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the Immigration Appeal Division's decision is quashed, and the matter will not be referred back to another panel. The Immigration Appeal Division is to proceed with the appeal in the usual manner.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2455-08
STYLE OF CAUSE:	ALVIN JOHN BROWN and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 27, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Phelan J.
DATED:	June 23, 2009

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