

Federal Court



Cour fédérale

Date: 20110202

Docket: T-1298-09

Citation: 2011 FC 113

Ottawa, Ontario, February 2, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

RADGE MARKEVICH

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is one of the five judicial reviews heard together in Vancouver arising from decisions and reconsiderations of the Minister's refusal to approve requests to transfer from U.S. prisons to Canadian prisons pursuant to the *International Transfer of Offenders Act*, S.C. 2004, c. 21.

[2] The principal legal issues and analysis are contained in *Holmes v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112, which deals with the administrative law issues as well as *Charter* issues. As the Court finds in this judicial review that the Minister's decision is reasonable, its findings in *Holmes* on the *Charter* issues are equally applicable.

II. FACTUAL BACKGROUND

[3] Markevich is a mid-forties Canadian sentenced to 7 years and 3 months in a U.S. prison to be followed by a 3 year term of supervised release. He was arrested attempting to take possession of a plastic bag containing 100,000 Ecstasy pills from a co-accused who had been collaborating with authorities.

[4] In the 1st departmental assessment by Correctional Service Canada, officials noted to the Minister that Markevich was born in the Ukraine and obtained Canadian citizenship in 1995. He moved to New York on a temporary work permit approximately one year before his arrest. Prior to his arrest he travelled to Vancouver every two months to see his parents and daughter (he was separated from his wife).

[5] Of critical importance is the Department's advice that Markevich was believed to be linked to organized crime, where he was involved in trafficking Ecstasy in the U.S.A. He had been a Vancouver police informant from 1990 to 1992 after which he was imprisoned in Ecuador.

[6] In the portion of the departmental assessment dealing with Public Safety Risk, it was noted that Markevich had an unverified criminal history of serving an eight-year sentence for cocaine

trafficking in Ecuador. He was believed to have escaped from that prison. Officials noted their concern, arising from intelligence sources, that Markevich had links to a sophisticated organized crime syndicate, and that if the information about Ecuador was correct, then his current offences are reflective of his offence cycle and he presents some risk to the community. His post-release support was considered questionable, and the likelihood of his return to a pro-social life, given his ties to a crime syndicate, also questionable.

[7] The Minister's 1st refusal decision cited his consideration of various interests and factors said to be consistent with the Act but which went beyond the s. 10 factors in the Act. These interests and factors and their relationship to the statutory purpose of the Act were unspecified and unexplained.

[8] Despite these unspecified interests and factors, the Minister did address factors more clearly linked to the Act in denying the request. The Minister found that it was not in the interests of or consistent with the goal of administration of justice to have Markevich forego the rehabilitative purpose of the 3 years of supervised release which would occur if he were transferred to a Canadian prison.

[9] The Minister focused particularly on the limited ties to Canada (social and familial ties) in comparison to Markevich's links to organized crime. In that regard, he found that it was neither acceptable in the context of the administration of justice nor s. 10(2)(a) or s. 10 (1)(a) of the Act to allow this transfer.

[10] To justify his conclusions and authority, the Minister referred again to the unspecified factors in the Act, unspecified factors said to be consistent with the Act and claimed to be available to the Minister as part of his residual decision making powers.

[11] In the reconsideration of the 1st refusal decision, the 2nd departmental assessment is more favourable to the Applicant. The Department's conclusion, apparently based on verifications from Correctional Service Canada's counterparts in Security and Intelligence areas and from CSIS, is that the information available would not lead one to believe that Markevich would commit an act of terrorism or organized crime.

[12] The 2nd departmental assessment contains curious references to Markevich's incarceration in Ecuador. In one paragraph it is noted that Markevich indicated that he had served eight years in an Ecuadorian prison for cocaine trafficking; in the next paragraph, however, there is reference to the absence of substantiating information that Markevich had served an eight-year sentence but it is concluded that, if true, it reflected his offence cycle. There is no explanation of the basis for doubting the Applicant's admission that he had been jailed in Ecuador for drug trafficking.

[13] The 2nd departmental assessment concludes on the issue of likelihood of re-offending that the U.S. information is that Markevich has no affiliations with drug cartels or gangs.

[14] In the Minister's 2nd decision (a different Minister), the Minister abandons the highly problematic conclusions about unspecified factors and interests and returns attention to the stated purposes of the Act. The Minister finds that Markevich has links to organized crime.

[15] The Minister acknowledges the Applicant's admission of his eight-year Ecuadorian incarceration and his continued involvement in drug trafficking.

[16] Most importantly, the Minister focuses on the issue of abandonment – whether Markevich left Canada with the intent to abandon Canada as his place of permanent residence. Consideration of the issue of abandonment is mandated by s. 10(1)(b) of the Act.

10. (1) In determining whether to consent to the transfer of a Canadian offender, the Minister shall consider the following factors:

...

(b) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;

10. (1) Le ministre tient compte des facteurs ci-après pour décider s'il consent au transfèrement du délinquant canadien :

...

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;

[17] The Minister took into consideration Markevich's obtaining a work visa; his working in the U.S.A. for 11 months prior to his arrest; his use of his own apartment in making periodic visits to Canada to visit family; and his ex-wife's evidence that Markevich had indicated that as long as there was work in New York, he had no intention of returning to Vancouver. The Minister concluded that Markevich intended to abandon Canada as his place of permanent residence. The result of the Minister's consideration of the factors enumerated in s. 10 was the refusal to consent to the transfer.

III. ANALYSIS

[18] The standard of review has been described in *Holmes*, above.

[19] It is evident from the nature and content of the Minister's 2nd decision that it was a true reconsideration of the present case. It reverts to the proper legal framework, the purposes of the Act, and it takes the relevant factors into account in a manner which is clear and understandable. In this regard, the decision meets the *Dunsmuir v. New Brunswick*, 2008 SCC 9, test of transparency and intelligibility potentially lacking in the 1st decision.

[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).

[21] The Minister reaches a conclusion on Markevich's links to organized crime which is inconsistent with the current evidence before him. There is no explanation of how the Minister arrived at his conclusion in the face of all of the contrary evidence. However, that unreasonable finding is not fatal to this decision.

[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.

[23] In this regard, the Court ought to defer to the Minister's judgment on whether this factor is sufficient to justify the Minister's exercise of his discretion to refuse to consent to the transfer. The Minister's decision must be examined both on its constituent parts and as a whole. There is nothing unreasonable in the Minister's conclusion.

IV. CONCLUSION

[24] For these reasons, this judicial review will be dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review is dismissed with costs.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1298-09

STYLE OF CAUSE: RADGE MARKEVICH

and

THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 27 and 28, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: February 2, 2011

APPEARANCES:

Mr. John Conroy, Q.C. FOR THE APPLICANT

Mr. Curtis Workun FOR THE RESPONDENT

SOLICITORS OF RECORD:

CONROY & COMPANY FOR THE APPLICANT
Barristers & Solicitors
Abbotsford, British Columbia

MR. MYLES J. KIRVAN FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, British Columbia