Federal Court Cour fédérale

Date: 20121220

Docket: T-1414-12

Citation: 2012 FC 1500

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

YVES LEBON

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a Canadian citizen who is currently incarcerated in a low-security correctional institution in Pennsylvania in the United States and wishes to serve the remainder of his sentence in a correctional facility in Canada. This is the second time the Court is asked to review the legality of a decision by the Minister of Public Safety and Emergency Preparedness [Minister] refusing his request for a transfer.

[2] In August 2007, the applicant entered the United States near Champlain, New York by car. A few days later, he was stopped by an Illinois state trooper for a minor traffic violation, but it turned out that there were 119 kilograms of cocaine in the vehicle. The applicant pled guilty to charges of possession with intent to distribute cocaine and improper entry into the United States. He was sentenced in July 2008 to 120 months of imprisonment, to be followed by 5 years of supervised release.

[3] In November 2008, the applicant requested to be transferred to a Canadian correctional facility pursuant to section 7 of the *International Transfer of Offenders Act*, SC 2004, c 21 [Act]. As set out in section 3, the purpose of the Act is "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". The offender, the foreign state and the Minister are each required to consent to any transfer (subsection 8(1)). In March 2009, the American authorities approved his request.

[4] In the exercise of the discretion conferred to the Minister, the factors enumerated in subsections 10(1) and (2) must be considered:

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	b) le délinquant a quitté le

remained outside Canada with the intention of abandoning Canada as their place of permanent residence;	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.
(2) In determining whether to consent to the transfer of a Canadian or foreign offender, the Minister shall consider the following factors:	(2) Il tient compte des facteurs ci-après pour décider s'il consent au transfèrement du délinquant canadien ou étranger :
(a) whether, in the Minister's opinion, the offender will, after the transfer, commit a terrorism offence or criminal organization offence within the meaning of section 2 of the *Criminal Code*; and	a) à son avis, le délinquant commettra, après son transfèrement, une infraction de terrorisme ou une infraction d'organisation criminelle, au sens de l'article 2 du *Code criminel*;
(b) whether the offender was previously transferred under this Act or the *Transfer of Offenders Act*, chapter T-15 of the Revised Statutes of Canada, 1985.	b) le délinquant a déjà été transféré en vertu de la présente loi ou de la *Loi sur le transfèrement des délinquants*, chapitre T-15 des Lois révisées du Canada (1985).

[5] In August 2010, contrary to the conclusion of an absence of risk and the positive recommendation made by the Correctional Service of Canada [CSC], the Minister refused to consent to the transfer, essentially because, in his personal opinion, the applicant was likely to

commit a "criminal organization offence" considering the absence of cooperation with the police and the nature of the offence:

> 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 the nature of the criminal activity suggests that other accomplices were involved who were not apprehended and is indicative of a serious criminal organization activity. I also note that the applicant did not provide a statement to the police after his arrest and it appears from the file that the applicant did not cooperate with the police in identifying other participants in the crime. Furthermore, the offence involved a large quantity of cocaine, which is destructive to society. The applicant was involved in the commission of a serious offence involving a significant quantity of drugs that, if successfully committed, would likely result in the receipt of a material or financial benefit by the group he assisted.
>
> [My emphasis]

[6] In view of the foregoing, despite the fact that there were many positive factors in terms of admission of guilt and rehabilitation, including strong family ties and a very supportive network in Canada, the Minister did not believe that a transfer "would achieve the purposes of the Act", and accordingly, refused the request, leading to the first judicial review. In August 2011, Justice Shore dismissed the application (2011 FC 1018), and in April 2012, the Federal Court of Appeal allowed the appeal of this decision (2012 FCA 132) [*LeBon FCA*].

[7] The issue before both the Federal Court and the Federal Court of Appeal was whether the refusal of the transfer fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", considering that this requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-48 [*Dunsmuir*]. Interestingly, the Federal

Court of Appeal's judgment postdates *Dunsmuir* as well as the clarification made by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16, as to the nature of review on the reasonableness standard.

[8] The Federal Court of Appeal acknowledged that transfers under the Act are a privilege for Canadian offenders and that the Minister was not bound to follow the advice of the CSC (*LeBon FCA*, at para 19). However, because the Minister's decision was not "justified, transparent and intelligible", it was unreasonable and was set aside by the Federal Court of Appeal: "[w]here, as in the present case, there are factors that support a transfer, the Minister must demonstrate some assessment of the competing factors so as to explain why he refused to consent to a transfer." Otherwise, the Minister's decision is "neither transparent nor intelligible", nor does it comply with the statutory requirement to provide reasons imposed to the Minister by subsection 11(2) of the Act (*LeBon FCA*, at para 25).

[9] In particular, the Federal Court of Appeal found that the Minister's decision was unreasonable when "read fairly in light of the evidentiary record", and this, notwithstanding the very strong view personally held by the Minister that "the likelihood that [the applicant] would commit an act of organized crime <u>outweighed</u> the positive effect of [the applicant]'s supportive family ties so that the transfer would not achieve the purposes of the Act" (my emphasis) (*LeBon FCA*, at para 20). As noted by the Federal Court of Appeal, the opinion of the CSC was "unequivocal" that it did not believe that the applicant "would, after the transfer, commit an act of organized crime", nor was he "likely to commit any indictable crime" (*LeBon FCA*, at para 23).

[10] The Federal Court of Appeal remarked that during oral argument, counsel for the Attorney General of Canada "could not point to any cogent evidence in the record that could reasonably undermine or contradict the opinions of the CSC" (*LeBon FCA*, at para 23). I pause to mention that at best, the opinion of the Minister was speculative. Section 10 of the Act calls for an objective assessment by the Minister. In other words, his conclusion of risk must be based on the evidence on record and must also be rationally measured against positive factors indicated by the evidence.

[11] Accordingly, the Minister must engage in a true balancing exercise, which he failed to do in this case. Indeed, the Federal Court of Appeal considered that two fundamental questions had been left unanswered in the first assessment made by the Minister:

a. On what basis did the Minister depart from the CSC's advice?

b. How did the Minister assess the relevant factors so as to conclude that the factors which did not favour Mr. LeBon's return outweighed those which favoured his return?

[12] Thus, in setting the Minister's decision aside and remitting the matter back for redetermination, the Federal Court of Appeal specifically directed the Minister "to decide [the applicant's] transfer request <u>in accordance</u> with the Court's reasons within 60 days" (my emphasis). The Minister chose not to appeal the judgment of the Federal Court of Appeal to the Supreme Court of Canada, so it became final. The Minister rendered his redetermination decision on June 22, 2012. The result was the same, leading to the present judicial review.

[13] Having read the new decision as a whole in light of the facts and the law, including the additional evidence adduced by the applicant, it is apparent that the Minister only paid lip service to the reasons and directions given by the Federal Court of Appeal. The Minister basically reasserted his previous reasoning to support his opinion that the applicant was likely to commit an organized crime offence after his transfer and that the transfer would be contrary to the objectives of the Act, particularly the administration of justice. I have examined the Minister's first and second decisions in this file very closely. I agree with the applicant that although the second decision is longer, it is essentially a rewording of the Minister's first decision.

[14] In his reconsideration of the applicant's request, despite extensive new evidence favouring rehabilitation and an absence of risk, including updated assessments by the CSC, the Royal Canadian Mounted Police and the Canadian Security Intelligence Service, the Minister, again, denied the applicant's transfer to a Canadian correctional facility. Again, it is not possible to understand on what rational basis the Minister disagreed with the expert opinions of the CSC and the criminologist who provided in May 2012 an affidavit in support of the reconsideration of the request for transfer. Moreover, there is no effort to explain how the Minister balanced the factors mentioned in section 10 of the Act and other relevant factors he retained against the positive factors mentioned in the impugned decision. As a whole, I find this second decision of the Minister unreasonable.

[15] In comparison with Canadian correctional facilities, no similar rehabilitation programs are available to the applicant at his present institution and the detention conditions are more severe in his case (notably because he is a French-speaking Canadian citizen). A reasonably informed person

would have the clear impression that the Minister, in denying the applicant's transfer request, simply wanted to punish him because he was caught transporting a large quantity of drugs and did not provide the names of his accomplices. This illustrates an intransigency which is symptomatic of a closed mind and leads to the conclusion that a reasonable apprehension of bias existed on the part of the Minister.

[16] The Minister acknowledged the existence of a number of positive factors in the applicant's file that would support his transfer to Canada, including the fact that this was his first offence, that he is married and has a son, that the CSC's evaluation indicated his social and family ties are very strong, that he has had a good behaviour in prison and that he benefitted from a sentence reduction because of his admission of responsibility. Be that as it may, the Minister disagreed with CSC's opinion and considered that there was an "important risk" that he will commit a criminal organization offence within the meaning of section 2 of the *Criminal Code*, RSC 1985, c C-46. The Minister inferred from the distance travelled by the applicant and the large quantity of drugs found in the vehicle that there were at least two other persons involved in the "transaction" which would be for the benefit of a criminal organization. The Minister also noted that the applicant refused to name his accomplices in his transfer application and did not provide a declaration to the police after his arrest.

[17] Regarding the first unanswered question noted by the Federal Court of Appeal, which was on what basis the Minister departed from the CSC's advice, I agree with the applicant that the considerations raised by the Minister are spurious, illogical, speculative and not evidence-based. The fact that the applicant pled guilty to a charge of possession with intent to distribute – which can

be perhaps qualified as a "criminal organization offence" – is not sufficient in itself for denying a transfer under the Act (*Divito v Canada (Minister of Public Safety and Emergency Preparedness*), 2011 FCA 39 at para 57). Paragraph 10(2)(a) of the Act is forward looking (*Del Vecchio v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1135 at para 53 [*Del Vecchio*]) and there is absolutely no objective and cogent evidence on record that the transfer of the applicant represents a serious risk in terms of committing a criminal organization offence.

[18] The inferences made by the Minister are not supported by the evidence on record. Although transporting drugs in such a large quantity must be for the benefit of a criminal organization, there is no evidence allowing the Minister to conclude that the applicant was a party to a "transaction" and that he was not just acting as a "mule". More importantly, the Minister failed to address the positive evidence on record that "this inmate's prediction scores for future criminal recidivism are low for future criminal recidivism" and that "[t]here is no evidence that he was a significant, decision-making member of a criminal organization as traditionally defined", as noted by Mr. Matthew G. Yeager, Ph.D., in his affidavit dated May 10, 2012

[19] More particularly, Mr. Yeager provides the following rationale which is not really discussed by the Minister in the impugned decision:

> With this conviction (in the U.S.), Mr. LeBon will not be permitted to re-enter the United States in the future, once transferred back to Canada. His criminal conviction will make him less attractive to members of criminal organizations, their networks and formations. Further, based on his institutional record at Loretto Federal Correctional Institution, there is evidence that Mr. LeBon has no intention of any further involvement in any criminal conspiracy. Even in the U.S. Government defines Mr. LeBon as low risk. In other words, Mr. LeBon is likely to have decided that the penal cost

> of involvement in organized crime, however defined, is not worth his liberty interest.

[20] The Minister also found that the transfer of the applicant would discredit the administration of justice. I am not persuaded that the fact the applicant was caught outside Canada in possession of a very large amount of cocaine can reasonably justify the finding that the transfer would discredit the administration of justice. Even if this finding were reasonable, it is not a sufficient explanation, in itself, for refusing the transfer.

[21] Indeed, the Minister has previously consented to the transfer of other convicted drug offenders, including the offenders in the following cases where the Minister's initial decision to deny the transfer request was set aside on judicial review: *Del Vecchio*, *Curtis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 943, and *Vatani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 114. In *Del Vecchio*, the applicant even had proven ties to known criminal organizations.

[22] I also agree with the applicant that the Minister's reasoning regarding what he believes to be the applicant's lack of frankness in the transfer application is a more longwinded version of the Minister's first decision and falls woefully short of being reasonable. I would add that, where the offence for which an applicant was convicted did not involve other accomplices also serving a sentence, it is not clear that the CSC Transfer Request Form requires an applicant to provide names of accomplices. During questioning by the Court, counsel for the respondent was unable to explain why it is relevant for the consideration of a transfer application that an applicant who pleaded guilty to an offence for which he is serving his sentence disclose the names of unknown "accomplices".

[23] I do not believe that on the guise of the "administration of justice", the Minister can refuse a transfer request because an applicant is not willing to act as an informant for the police or jail authorities. In view of my conclusion that the inferences made by the Minister are unreasonable in light of the facts in the law, it is not necessary to decide whether the same also violates the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* by drawing an adverse conclusion from the silence of the applicant.

[24] For the above reasons, the application for judicial review shall be allowed and the impugned decision shall be set aside by the Court.

[25] In the case the application is granted, the applicant has asked the Court to make a "directed verdict", while the respondent has invited the Court to set aside the impugned decision and to remit the matter back to the Minister for redetermination in accordance with the reasons or other directions of the Court. I agree with the applicant that the exceptional circumstances of the case at bar require the Court to order the Minister to accept the transfer request.

[26] There is no factual substratum in this case which is in dispute. The Minister made a conclusion based on speculation that cannot be rationally inferred from the facts. More than four years have elapsed since the request for transfer has been made. The Minister has shown a bias and has ignored the clear evidence on record supporting a transfer. The continued refusal of the applicant's transfer request has had a serious impact on him, including alienation from his family

and support network, frustration of his rehabilitation and deprivation of superior programming in a Canadian prison.

[27] In the better administration of justice, the Court seems fit to order the Minister to act in accordance with the directions of the Court within 45 days of the judgment. More particularly, the Minister shall be directed to accept the transfer request made by the applicant and confirm in writing to the applicant that all reasonable steps have been taken for his prompt transfer to a correctional facility in Canada.

[28] In view of the result, costs shall be in favour of the applicant. Should the parties be unable to agree on a reasonable amount, any party may at any time make a motion in writing to the Court to fix the amount of reasonable costs, whether on a party-to-party basis or a solicitor-and-client basis, as the case may be, in view of the particular circumstances of the case and all relevant factors.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's application for judicial review is allowed;
2. The impugned decision is set aside and the matter is remitted to the Minister who must act in accordance with the directions of the Court within 45 days;
3. The Minister is directed to accept the transfer request by the applicant and to confirm in writing to the applicant that all reasonable steps have been taken for his prompt transfer to a correctional facility in Canada;
4. Costs are in favour of the applicant. Should the parties be unable to agree on a reasonable amount, any party may at any time make a motion in writing to the Court to fix the amount of reasonable costs, whether on a party-to-party basis or a solicitor-and-client basis, as the case may be, in view of the particular circumstances of the case and all relevant factors.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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