Federal Court  Cour fédérale

Date: 20140716

Docket: T-357-14

Citation: 2014 FC 695

Vancouver, British Columbia, July 16, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MARTIN CHAMBERS

Applicant

and

JOSEPH DAOU, IN HIS CAPACITY AS SENIOR MANAGER OF THE INTERNATIONAL TRANSFER UNIT OF THE CORRECTIONAL SERVICE OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s. 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 for judicial review of a decision of the Senior Manager, International Transfers Unit, Correctional Service Canada [ITU], dated September 17, 2013 [Decision], which found that the Applicant is ineligible for a transfer under the *International Transfer of Offenders Act*, SC 2004, c 21 [*ITOA*].

II. BACKGROUND

[2] The Applicant is a Canadian citizen currently serving a prison sentence in the United States [US] after being convicted of one count of conspiracy to commit money-laundering and four counts of money laundering under US federal law. On May 14, 2013, he applied for a transfer to complete his sentence in Canada under the *ITOA*, which implements in Canadian law the *Treaty between Canada and the United States of America on the Execution of Penal Sentences*, 2 March 1977, Can TS 1978 No. 12 [Treaty] and the *Convention on the Transfer of Sentenced Persons*, Council of Europe, 21 March 1983, ETS 112 [Convention] (to which both Canada and the US are parties), among other instruments.

[3] Under the *ITOA* and the Treaty, the offender and both states must agree to such a transfer. The US approved the Applicant's request on September 4, 2013, and it was forwarded to the ITU. By letter of September 17, 2013, the Senior Manager of that unit, Joseph Daou, informed the Applicant that he was ineligible for a transfer. After further submissions from the Applicant's counsel, Mr. Daou reiterated this position in letters of October 23, 2013 and December 10, 2013. It is this decision finding Mr. Daou ineligible for a transfer that is at issue in this proceeding. Had Mr. Daou been determined to be eligible, it would have remained for the Minister of Public Safety and Emergency Preparedness [Minister] to decide whether to approve the transfer or not.

[4] The Applicant began serving an 188-month sentence (15 years and 8 months) on August 18, 2003. Counting jail credit and good conduct time, he says his projected release date in the US is September 7, 2016. However, the parties agree that his maximum sentence for the equivalent offences under Canadian law would have been 10 years. Since the *ITOA*

provides that a transferred offender is to serve the lesser of the two sentences, and given the credits noted above, this means that the Canadian sentence would have already expired. If the Applicant remains in the US, he will continue to be incarcerated for some time. If he is transferred to Canada, he will be immediately released. The question in this application is whether the latter scenario is permitted by the *ITOA*, such that the Applicant should have been eligible for a transfer and his file should have been forwarded to the Minister for a decision. The Applicant seeks a declaration that he is eligible for a transfer under the *ITOA*, and an order of mandamus to compel the Respondent to complete the processing of his application and forward it to the Minister for a decision.

[5] Concurrently with his application to this Court, the Applicant also brought a petition before the Supreme Court of British Columbia seeking an order in the nature of *habeas corpus*, with certiorari in aid, and remedies under s. 24(1) of the *Canadian Charter of Rights and Freedoms* [*Charter*]. In reasons issued orally on July 4, 2014, Mr. Justice Silverman of that Court found that the same decision at issue here was based on an incorrect interpretation of the *ITOA* and was unlawful, and that the Applicant's continued detention, being the result of the actions or inaction of Canadian authorities, was a violation of his rights under s. 7 of the *Charter*: *Chambers v Daou*, 2014 BCSC 1284 [*Chambers (BCSC)*]. While declining on jurisdictional grounds to issue an order in the nature of *mandamus* requiring the application to be forwarded to the Minister for a decision, Mr. Justice Silverman granted an order in the nature of *habeas corpus* and, relying on s. 24(1) of the *Charter*, a declaration that the Applicant "has been and continues to be unlawfully detained according to Canadian law, and that his Charter rights have been breached, all as a result of an erroneous interpretation of the *International Transfer of*

Offenders Act." The B.C. Supreme Court anticipated that as a result of its order "Mr. Daou would then forward the petitioner's application in the usual way to the Minister for a decision to be made" (at para 110).

[6] The Applicant has chosen to continue with the current proceeding despite this ruling from the B.C. Supreme Court, issued one week before the hearing before this Court. As might be expected in these circumstances, the issue of whether the Court should consider the present application was raised at the hearing. The Respondent took the position that the matter is now *res judicata* and this Court cannot hear and decide the application.

III. DECISION UNDER REVIEW

[7] In his letter of September 17, 2013, Mr. Daou informed the Applicant that pursuant to Articles 3(1)(c) and (e) of the Convention and s. 4 of the *ITOA*, he was not eligible for transfer. Mr. Daou provided the following explanation:

> The offences for which you were convicted and sentenced to a term of imprisonment of fifteen (15) years eight (8) months… would constitute an offence in Canada for which the maximum penalty is imprisonment for ten (10) years contrary to sections 465(1)(c) and 462.31 of the *Criminal Code*.
>
> Your sentence of ten (10) years in Canada would have begun on August 18, 2003. You have 431 days jail credit and 418 days good conduct time; therefore, your warrant expiry date would be August 8, 2011. As noted in Article 3(1)(c) of the Convention, a sentenced person requesting transfer must still have at least six months of the sentence left to serve in order to transfer. As this date has already passed, we cannot transfer your sentence.

[8] This position was reiterated in Mr. Daou's letter of October 23, 2013. This second letter stated that since the Applicant's warrant expiry date would have been August 8, 2011 according to calculations made under s. 22 of the ITOA, and this date had already passed, "the sentence cannot be administered in Canada." Mr. Daou also called the Applicant's attention to s. 13 of the *ITOA*, which states that "[t]he enforcement of a Canadian offender's sentence is to be continued in accordance with the laws of Canada as if the offender had been convicted and their sentence imposed by a court in Canada," as well as Article 10, section 2 of the Convention, which states that a sentence "shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum prescribed by the law of the administering State."

[9] The third letter, dated December 10, 2013, added the following:

> … Based on the information provided to us by the United States authorities, the sentences imposed on Mr. Chambers for one count of "Conspiracy to commit money laundering" and four counts of "Money laundering" were to be served *concurrently*. Therefore, Mr. Chambers' sentence of imprisonment of fifteen (15) years and eight (8) months for all five counts can only be executed in Canada as a ten (10) year sentence.

[10] Mr. Daou reiterated that the Applicant was ineligible for a transfer, and stated that "[u]nfortunately, exceptions are not granted to the legal rules and regulations surrounding the transfer of offenders from the United States to Canada."

IV. ISSUES

[11] The substantive issue raised in this application is whether the Respondent erred in finding that the Applicant was ineligible for a transfer under the *ITOA*. The Applicant raises a second

issue of whether the provisions in the Treaty and the Convention stating that only those with at least six months remaining in their sentence are eligible for a transfer form part of the law of Canada in the absence of having been expressly implemented in the *ITOA*. In my view this is not a separate issue but is simply part of what must be considered in answering the first question.

[12] Since this matter was filed with the Court, Mr. Justice Silverman of the Supreme Court of British Columbia has rendered a decision on the same facts, involving the same parties, and the same issues that are now before me. The appeal period for Justice Silverman's decision has not yet lapsed, and at this point we do not know how this matter will evolve in the BC Courts.

[13] This raises issues of *res reducata*, issue estoppel and judicial comity and whether this Court should exercise its discretion to consider the present application given the B.C. Supreme Court's recent decision in a parallel proceeding.

V. ANALYSIS

[14] The Applicant's concern with the B.C. Supreme Court judgment is that Justice Silverman did not feel he could award *mandamus* as ancillary relief to *habeas corpus* and a *Charter* breach. This was an issue that the Applicant placed before Justice Silverman and, if he feels the issue was not decided correctly, he could conceivably appeal the decision on that issue, although I realize this may not be any kind of practical solution to his problems.

[15] The remedies available under s. 18.1 of the *Federal Courts Act* are discretionary. While I must be mindful of the importance of judicial review in upholding the rule of law, this Court has

discretion whether to undertake judicial review, or whether to grant a remedy: *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, [1995] SCJ No 1; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paras 36-41; *MiningWatch Canada v Canada (Fisheries and Oceans)*, [2010] 1 SCR 6, 2010 SCC 2 at paras 43-52. In my view this is an appropriate case for the Court to exercise its discretion not to undertake judicial review, or to grant the remedy of mandamus requested by the Applicant.

[16] It is not clear that the Court would be prevented from doing so by the doctrine of *res judicata*. Nevertheless, there are, in my view, important practical reasons why the Court should exercise its discretion in this manner.

[17] The doctrine of *res judicata* was succinctly summarized by the Supreme Court of Canada in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 as follows:

> 20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq….

[18] In my view, cause of action estoppel may not apply here. It bars claims that "properly belonged" to the prior litigation: *Britannia Airways Ltd. v Royal Bank of Canada*, [2005] OJ No

2 at para 13, 5 CPC (6th) 262 (Ont SC), citing *Maynard v Maynard*, [1951] SCR 346. In this case the B.C. Supreme Court found that it did not have jurisdiction to grant *mandamus*.

[19] Most of the issues that this Court would need to decide in order to consider the merits of this application have been determined by the BC Supreme Court – notably, whether the "six months remaining" requirement forms part of Canadian law, and if so, whether it applies by its terms to make the Applicant ineligible for a transfer under the *ITOA*. In this case, the pre-conditions for the operation of issue estoppel are met (the same question was decided, the judicial decision was final, and the parties were the same: see *Danlyluk*, above, at para 25), but the doctrine is not to be mechanically applied (*Danlyluk*, above, at para 33):

> 33 The rules governing issue estoppel should not be mechanically applied. The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case. (There are corresponding private interests.) The first step is to determine whether the moving party (in this case the respondent) has established the preconditions to the operation of issue estoppel set out by Dickson J. in *Angle*, supra. If successful, the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc*. (1998), 50 B.C.L.R. (3d) 1 (C.A.), at para. 32; *Schweneke v. Ontario* (2000), 47 O.R. (3d) 97 (C.A.), at paras. 38-39; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.), at para. 56.

[20] If this Court were to find that issue estoppel should not apply, and consider the matter afresh on its merits, there would be a risk of inconsistent findings. In addition, there is a risk of parallel appeals with overlapping issues proceeding in separate courts of appeal. This would have negative effects on judicial economy and pose a further risk of inconsistent results.

[21] The Applicant is asking the Court to rely upon the BC Supreme Court's findings on the merits, but issue the remedial order that court found it did not have the power to grant. Whether or not it would be appropriate for this Court to issue such an order without making its own findings on the merits, such an approach would not alleviate the concern about possible parallel appeals noted above.

[22] In affirming that the Federal Court and the provincial superior courts have concurrent jurisdiction in this area of the law, the Supreme Court has consistently characterized the matter as a choice of forums and remedies that is available to the prisoner (see *May v Ferndale Institution*, 2005 SCC 82, [2005] 3 SCR 809 at paras 16, 32-33, 44, 66-67 [*May*]; *Mission Institution v Khela*, 2014 SCC 24 at paras 44, 56, 72 [*Khela*]). For example, in May at 44, the Court said:

> 44 To sum up therefore, the jurisprudence of this Court establishes that prisoners may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of *habeas corpus* or in the Federal Court by way of judicial review. As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. *Habeas corpus* jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its habeas corpus jurisdiction…
>
> [emphasis added]

[23] Justice Lebel discussed the similarities and differences between these options in *Khela*. The differences include the fact that the remedies available through judicial review are discretionary, while *habeas corpus* is not. This was one of the reasons why provincial superior

courts should not decline to exercise their *habeas corpus* jurisdiction despite the fact that an effective alternative remedy might be available through the Federal Court. The choice is left to the prisoner:

> 37 …[T]here are, from a functional standpoint, many similarities between a proceeding for *habeas corpus* with *certiorari* in aid and a judicial review proceeding in the Federal Court. After all, "judicial review", "[i]n its broadest sense", simply refers to the supervisory role played by the courts to ensure that executive power is exercised in a manner consistent with the rule of law (Farbey, Sharpe and Atrill, at pp. 18 and 56). This is also the purpose of *habeas corpus*, if distilled to its essence (see generally, Farbey, Sharpe and Atrill, at pp. 18 and 52-56).
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> 38 Despite the functional similarities between *certiorari* applied for in aid of habeas corpus in a provincial superior court and certiorari applied for on its own under the FCA, however, there are major remedial and procedural differences between them. These differences include (a) the remedies available in each forum, (b) the burden of proof and (c) the non-discretionary nature of habeas corpus.
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> […]
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> 41 … [J]udicial review is an inherently discretionary remedy (C. Ford, "Dogs and Tails: Remedies in Administrative Law", in C. M. Flood and L. Sossin, eds., Administrative Law in Context (2nd ed. 2013), 85, at pp. 107-9). On an application for judicial review, the court has the authority to determine at the beginning of the hearing whether the case should proceed (D. J. Mullan, Administrative Law (2001), at p. 481). In contrast, a writ of habeas corpus issues as of right if the applicant proves a deprivation of liberty and raises a legitimate ground upon which to question the legality of the deprivation. In other words, the matter must proceed to a hearing if the inmate shows some basis for concluding that the detention is unlawful (*May*, at paras. 33 and 71; Farbey, Sharpe and Atrill, at pp. 52-54).
>
> 42 Twenty years after the *Miller* trilogy, in *May*, this Court stressed the importance of having superior courts hear *habeas corpus* applications. The majority in *May* unambiguously upheld the ratio of *Miller*: "[h]abeas corpus jurisdiction should not be declined merely because of the existence of an alternative remedy" (para. 34)…

[24] Later in the decision, Justice Lebel raised issues of judicial economy that would arise from parallel proceedings. At issue was the appellant's position that prisoners should not be able to attack the reasonableness of a transfer decision (as a method of demonstrating its unlawfulness) on a *habeas corpus* application before a provincial superior court:

> 70 Finally, requiring inmates to challenge the reasonableness of a CSC transfer decision in the Federal Court could also result in a waste of judicial resources. For example, an inmate may take issue with both the process and the reasonableness of such a decision. Were we to accept the appellants' position, it would be possible for the inmate to first challenge that decision for want of procedural fairness by applying for habeas corpus with certiorari in aid in a provincial superior court and then, should that application fail, challenge the reasonableness of the same decision by seeking *certiorari* in the Federal Court. This bifurcation makes little sense given that *certiorari* in aid is available, and it would undoubtedly lead to a duplication of proceedings and have a negative impact on judicial economy.
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> [emphasis added]

[25] By contrast to the writ of *habeas corpus*, it is notable that one of the preconditions for issuing an order of *mandamus* is that "[n]o other adequate remedy is available to the applicant." Moreover, the order sought must be "of some practical value or effect": *Apotex Inc. v Canada (Attorney General)*, [1994] 1 FC 742, [1993] FCJ No 1098 at para 45.

[26] The BC Supreme Court has stated its expectation that the Respondent will act in accordance with its declaration of the Applicant's legal rights, and forward the application to the Minister for a decision according to the normal process. This remedy may well prove to be effective, such that an order of *mandamus* from this Court would not be necessary and would have no practical effect.

[27] The issue is not academic. Presently, should the Respondent wish to attack the merits of the BC Supreme Court's ruling, it need only file an appeal with the BC Court of Appeal. If this Court were to issue a *mandamus* order based on similar findings, the Respondent would face the need to litigate the same or very similar issues in two different courts of appeal. This would carry a risk of inconsistent results and expend valuable judicial resources.

[28] On the other hand, if this Court were to consider the merits of the application and come to a different conclusion, the inconsistent results would have a detrimental effect on the reputation of justice.

[29] Where no necessity for a *mandamus* order has been demonstrated, none of these risks is warranted. As such, this is an appropriate case to exercise the Court's discretion not to consider the merits of the application.

[30] This is not to say that, if the Respondent were to decide not to appeal the BC Supreme Court's ruling and yet fail to act in accordance with that court's declaration of the Applicant's legal rights, no remedy would be available in this Court. This Court might well be justified in granting a remedy in those circumstances, as rule of law considerations would arise. However, that is not the question currently before the Court, and must be left for determination if and when it arises.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Court declines to exercise its discretion to hear this application.

2. If the parties wish to have the Court deal with costs, they should make their submission in writing within 60 days of the date of this order.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-357-14
STYLE OF CAUSE:	MARTIN CHAMBERS v JOSEPH DAOU, IN HIS CAPACITY AS SENIOR MANAGER OF THE INTERNATIONAL TRANSFER UNIT OF THE CORRECTIONAL SERVICE OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JULY 14, 2014
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JULY 16, 2014

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