Federal Court of Appeal | Cour d'appel fédérale

Date: 20110203

Docket: A-425-09

Citation: 2011 FCA 39

CORAM: **NADON J.A.**
TRUDEL J.A.
MAINVILLE J.A.

BETWEEN:

PIERINO DIVITO

Appellant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

and

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

Heard at Montréal, Québec, on October 14, 2010.

Judgment delivered at Ottawa, Ontario, on February 3, 2011.

REASONS FOR JUDGMENT BY: NADON J.A

CONCURRED IN BY: TRUDEL J.A
CONCURRING REASONS BY: MAINVILLE J.A

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REASONS FOR JUDGMENT

MAINVILLE J.A. (CONCURRING)

[1] This appeal raises for the first time in this Court the relationship between the right to enter and remain in Canada guaranteed to every citizen under subsection 6(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11(the "*Charter*") and the authority of the Minister of Public Safety and

Emergency Preparedness (the "Minister") under the *International Transfer of Offenders Act*, S.C. 2004, c. 21 to refuse a transfer to Canada of an offender who is a Canadian citizen incarcerated abroad.

[2] The appellant in this case, supported by the intervener the Canadian Civil Liberties Association, seeks to have declared unconstitutional subsection 8(1) and paragraphs 10(1)(a) and 10(2)(a) of the *International Transfer of Offenders Act* which empower the Minister to refuse the transfer of a Canadian offender incarcerated abroad where the offender's return to Canada would constitute a threat to the security of Canada or where, in the Minister's opinion, the offender will commit, after the transfer, a terrorism offence or a criminal organization offence.

[3] For the reasons further set out below, I find that subsection 8(1) and paragraphs 10(1)(a) and 10(2)(a) of the *International Transfer of Offenders Act* do constitute *prima facie* infringements of the right of a Canadian citizen to enter and remain in Canada guaranteed under subsection 6(1) of the *Charter*, but that these legislative provisions are nevertheless reasonable limits to that right as can be demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*.

Background to the appeal

[4] The appellant, born in 1937, immigrated to Canada when he was 16, and subsequently became a Canadian citizen in 1980. The record shows that he has had a difficult relationship with the law, going back many years, including prior convictions in 1962 for attempted false pretences, in 1963 for possession of a restricted weapon outside a dwelling house, in 1963 for living on the

avails of prostitution, in 1966 for the possession of a still, in 1976 for possession of stolen property, and in 1987 for assault.

[5] In March of 1995, the appellant was found guilty by a Canadian court of serious drug related offences involving the importation of 5400 kilograms of cocaine having a street value of over $500 million, and was sentenced to a long imprisonment term.

[6] While he was serving his sentence in Canada, authorities in the United States sought his extradition from Canada in order to answer serious charges related to the possession and distribution of drugs in the state of Florida involving 300 kilograms of cocaine. After serving his incarceration time in Canada, the appellant was extradited to the United States in June of 2005. He pleaded guilty to cocaine distribution charges and was sentenced by an American court to 90 months of imprisonment. In determining this sentence, the American court took into account and credited 145 months for time served in Canada.

[7] It is noteworthy that various Canadian courts involved in adjudicating criminal charges or extradition proceedings concerning the appellant's associates have concluded that the appellant was the leader of a criminal organization heavily involved in drug trafficking: *Divito c. Le Ministre de la justice du Canada*, J.E. 2004-2034 (C.A.) at paras. 34, 50; *Divito c. Canada (Ministre de la Justice)*, J.E. 2005-96; 194 C.C.C. (3d) 148 (C.A) at para. 5; *R. c. Gauvin*, 187 N.B.R. (2d) 262 (C.A.); *R. v. Rumbaut*, 1998 CanLII 9816 (ND Q.B.).

[8] In December of 2006, the appellant submitted a first transfer request under the *International Transfer of Offenders Act*, which was approved by the authorities of the United States Department of Justice but refused by the Minister in October of 2007. This refusal was not challenged by the appellant.

[9] However, shortly after this first refusal, the appellant submitted a second transfer request under the act. The Minister denied the second request for a transfer to Canada for the following reasons:

> The offender has been identified as an organized crime member, convicted for an offence involving a significant quantity of drugs. The nature of his offence and his affiliations suggest that the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada.

Federal Court judgment

[10] The appellant challenged this second refusal through a judicial review application before the Federal Court. The application was heard and decided by Harrington J. at the same time as a challenge brought by the appellant's son to a similar refusal by the Minister. Indeed, the appellant's son was also incarcerated in the United States and had also sought a transfer to Canada under the *International Transfer of Offenders Act.* Harrington J. rejected the appellant's application for judicial review and the constitutional challenge to the impugned provisions of the legislation in short reasons which refer to the lengthier reasons stated in the case of the appellant's son and reported at 2009 FC 983. The reasons for the decision in the appellant's case are thus to be found in the decision concerning his son, and can be briefly summarized as follows.

[11] Harrington J. relied on his reasons in *Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 866, [2008] 2 F.C.R. 377 (*Kozarov*) to find that the *International Transfer of Offenders Act* did not engage subsection 6(1) of the *Charter*. Under his reasoning in *Kozarov*, Harrington J. found that the restrictions on the mobility of offenders seeking a transfer to Canada arise from the actions and criminal activities of the offenders themselves. Consequently what is at issue in a transfer request under the *International Transfer of Offenders Act* is not a mobility right, but rather "the transfer of supervision of a prison sentence" (*Kozarov* at para. 32).

[12] In the event he was found to be wrong on this issue, Harrington J. further found, for the reasons set out by Kelen J. in *Getkate v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 965, [2009] 3 F.C.R. 26 (*Getkate*), that the impugned provisions of the *International Transfer of Offenders Act* were reasonable limits as can be demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*, "given that the applicant has already had his mobility restricted due to his own illegal activity" (*Getkate* at para. 27).

[13] Having upheld the constitutional validity of the legislation, Harrington J. then reviewed the decision of the Minister on administrative law grounds. Applying a reasonableness standard of review, he found that in light of the appellant's criminal record, it was not unreasonable for the Minister to opine that the appellant would renew his contacts with elements of organized crime once transferred to Canada in order to serve his sentence. Consequently, the refusal of the transfer on the basis of that opinion was reasonable.

Positions of the parties on appeal

[14] The appellant's position in this Court is strictly limited to constitutional grounds, and consequently the appellant does not raise any administrative law arguments to challenge the Minister's decision to refuse his transfer.

[15] The appellant and the intervener argue that the right to enter and to remain in Canada guaranteed to every Canadian citizen by subsection 6(1) of the *Charter* is a particularly fundamental right in light, notably, of the fact that Parliament may not derogate from that right pursuant to section 33 of the *Charter*. They add that the right to return to one's country of citizenship is set out in numerous international instruments to which Canada is a party, thus emphasising the importance and fundamental value of this right. They bolster their argument relying by analogy on *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469 (*United States v. Cotroni*) and on *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, in which the Supreme Court of Canada found that the extradition of a citizen from Canada infringes the right to remain in Canada guaranteed by subsection 6(1) of the *Charter*.

[16] The appellant and the intervener further argue that the infringements to the right to enter and to remain in Canada resulting from the *International Transfer of Offenders Act* are not justifiable under section 1 of the *Charter* since there is no rational link between, on the one hand, the protection of the safety of Canadians and the security of Canada and, on the other hand, the objectives of rehabilitation and reintegration underlying the offender transfer scheme as explicitly stated in section 3 of the legislation. The appellant and the intervener assert that the safety of

Canadians and the security of Canada would be better served by allowing all Canadian offenders imprisoned abroad to benefit from a transfer to Canada, thus allowing them to be directly supervised by Canadian authorities pursuant to Canada's correctional system, which notably provides for supervised conditional releases.

[17] The Minister, for his part, relies on the reasoning found in *Kozarov* to conclude that subsection 6(1) of the *Charter* is not engaged in this case. The *International Transfer of Offenders Act* simply provides special modalities for the execution of a foreign sentence imposed upon a Canadian citizen by allowing, in appropriate circumstances, the citizen to serve his sentence in Canada. No mobility right is engaged since the offender incarcerated abroad would not be physically able to avail himself of the right to enter Canada were it not for the transfer legislation itself. The mobility rights of the offender are already limited by the incarceration sentence, and the offender's mobility rights will continue to be restricted whether or not a transfer is agreed to by the Minister.

[18] The Minister adds that should this Court find that subsection 6(1) of the *Charter* is nevertheless engaged, then the impugned provisions of the *International Transfer of Offenders Act* are justified under section 1 of the *Charter*. The objectives of these provisions are the protection of the security of Canada and of the safety of Canadian citizens, and such objectives are incontestably pressing and substantial, and the means provided in the legislation to meet these objectives satisfy the test of *R. v. Oakes*, [1986] 1 S.C.R. 103.

Issues

[19] This appeal raises the two following issues:

a. Do subsection 8(1) and paragraphs 10(1)(a) and 10(2)(a) of the *International Transfer of Offenders Act* infringe subsection 6(1) of the *Charter*?

b. If so, are these legislative provisions justified under section 1 of the *Charter*?

Analysis

a) The standard of review

[20] This appeal raises the constitutional validity of subsection 8(1) and of paragraphs 10(1)(a) and 10(2)(a) of the *International Transfer of Offenders Act* in light of subsection 6(1) and section 1 of the *Charter*. In these circumstances the standard of review is that of correctness. The role of an appellate court, when deciding an appeal from an application for judicial review, is to determine whether the reviewing court identified the applicable standard of review and applied it correctly.

b) The statutory scheme

[21] In 1977, Canada and the United States of America signed a *Treaty between Canada and the United States of America on the Execution of Penal Sentences*, March 2, 1977, [1978] Can. T.S. No. 12. Under the treaty, offenders sentenced to imprisonment in one of the signing countries may be transferred to the other country if the sending state, the receiving state and the concerned offender concur to the transfer, and if the offender is a citizen of the receiving country. Both parties to the treaty are committed to establish by legislation or regulation the procedures necessary and

appropriate to give legal effect within their respective territories to sentences pronounced by courts of the other party, and to mutually collaborate in these procedures. Moreover, under the terms of the treaty, save exception, the completion of a transferred offender's sentence is to be carried out according to the laws and procedures of the receiving country, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise.

[22] Parliament adopted the *Transfer of Offenders Act*, S.C. 1977-78, c. 9 in large part to ensure the implementation of this treaty and a similar treaty with Mexico, as well as eventual future treaties with other countries. Under subsection 6(1) of that act, the responsible Minister was provided with an unfettered discretion to approve or disapprove the transfer under the act of a Canadian citizen found guilty of an offence in a foreign state with which Canada has entered into a treaty for the transfer of offenders:

> **6.** (1) Where the Minister is informed on behalf of a foreign state that a Canadian offender has requested transfer to Canada and that the responsible authority in that state agrees to such transfer, the Minister shall cause the foreign state to be advised whether he approves or disapproves the transfer of such offender and, where he approves the transfer, he shall make the necessary arrangements therefor.
>
> **6.** (1) Lorsque le Ministre est avisé par un État étranger qu'un délinquant canadien demande son transfèrement au Canada et que l'autorité compétente de cet État l'a approuvé, il informe l'État étranger de son acceptation ou de son refus de ce transfèrement et, en cas d'acceptation, il prend les mesures nécessaires à ce transfèrement.

[23] Canada has since concluded numerous bilateral and multilateral treaties concerning the transfer of offenders. Though more recent statistical information has not been placed before us, the

record nevertheless shows that between 1978 and 2003, a total of 118 offenders were transferred from Canada to a foreign country, for the most part the United States (106 transfers) while, during the same period, 1,066 offenders were transferred to Canada from various foreign countries, mainly the United States (836 offenders): *Legislative Summary: Bill C-33 International Transfer of Offenders Act*, (Parliamentary Information And Research Service, 29 July 2003) at 4 (page 95 of the Appeal Record).

[24] Major modifications to the offender transfer system were however adopted in 2004 through the *International Transfer of Offenders Act*, S.C. 2004, c. 21, which modernized and replaced the prior *Transfer of Offenders Act*. For the purposes of this appeal, the most notable changes introduced in 2004 concern new provisions setting out the purposes of the legislation, and also providing for specific criteria which the Minister must consider in determining whether to consent to the transfer of Canadian and foreign offenders. A requirement that reasons be provided when the Minister's consent is refused was also added. For our purposes, the pertinent provisions of the *International Transfer of Offenders Act* introduced in 2004 read as follows:

3. The purpose of this 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.	**3.** La présente loi a pour objet de faciliter l'administration de la justice et la réadaptation et la réinsertion sociale des délinquants en permettant à ceux-ci de purger leur peine dans le pays dont ils sont citoyens ou nationaux.
7. A person may not be transferred under a treaty, or an administrative arrangement entered into under section 31 or 32, unless a request is made, in	**7.** Le transfèrement d'une personne en vertu d'un traité ou d'une entente administrative conclue en vertu des articles 31 ou 32 est subordonné à la

writing, to the Minister.

présentation d'une demande écrite au ministre.

8. (1) The consent of the three parties to a transfer — the offender, the foreign entity and Canada — is required.

8. (1) Le transfèrement nécessite le consentement des trois parties en cause, soit le délinquant, l'entité étrangère et le Canada.

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 remained outside Canada with the intention of abandoning Canada as their place of permanent residence;

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;

(*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

b) le délinquant a déjà été transféré en

transferred under this Act or the *Transfer of Offenders Act*, chapter T-15 of the Revised Statutes of Canada, 1985.	vertu de la présente loi ou de la *Loi sur le transfèrement des délinquants*, chapitre T-15 des Lois révisées du Canada (1985).
11. (1) A consent, a refusal of consent or a withdrawal of consent is to be given in writing.	**11.** (1) Le consentement au transfèrement, le refus de consentement et le retrait de consentement se font par écrit.
(2) If the Minister does not consent to a transfer, the Minister shall give reasons.	(2) Le ministre est tenu de motiver tout refus de consentement.
13. The 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.	**13.** La peine imposée au délinquant canadien transféré continue de s'appliquer en conformité avec le droit canadien, comme si la condamnation et la peine avaient été prononcées au Canada.

c) Do subsection 8(1) and paragraphs 10(1)(a) and 10(2)(a) of the International Transfer of Offenders Act infringe subsection 6(1) of the Charter?

[25] As noted above, in order to be transferred from incarceration in a foreign country to incarceration in Canada, the *International Transfer of Offenders Act* requires that an offender who is a Canadian citizen submit a request in writing to the Minister, and such request is subject to refusal by the Minister for certain specified reasons, including reasons related to the security of Canada, to the threat of terrorism, or to the threat of organized criminal activity.

[26] The first issue before this Court is whether these provisions of the legislation infringe on subsection 6(1) of the *Charter*, which enshrines every Canadian citizen's "right to enter, remain in and leave Canada".

[27] To interpret the right to enter and to remain in Canada guaranteed by subsection 6(1) of the *Charter*, it is useful to adopt a purposive approach. The often quoted words of Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344 set out the appropriate analysis to be carried out:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

[28] The right of a Canadian citizen to enter and to remain in Canada is one of the most fundamental rights associated with citizenship. The fundamental nature of this right is clearly reflected both in domestic legislation and in international instruments, and has been reiterated on many occasions by the Canadian judiciary, most notably by the Supreme Court of Canada.

[29] The *Citizenship Act*, R.S.C. 1985, c. C-29 sets out a detailed and stringent framework for the acquisition of citizenship. Subsection 19(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 specifically provides that every Canadian citizen within the meaning of the *Citizenship Act* has the unqualified and unrestricted right to enter and remain in Canada, and that an officer must allow a person to enter Canada if satisfied that the person is a citizen. The legislative history related to this provision establishes that this is a right which predates the coming into force of the *Charter*. Section 3 of the *Immigration Act*, S.C. 1952, c. 325 and R.S.C. 1970, c. I-2, for example, provided for a citizen's right to "come in to Canada".

[30] The right of British citizens to enter and remain in the royal realm has been a fundamental right since at least the time of the *Magna Carta*, which forbade the exile of a freeman without lawful judgment. A similar prohibition against arbitrary exile is found in paragraph 2(a) of the *Canadian Bill of Rights* S.C. 1960, c. 44. However, prior to its incorporation in the *Charter*, the right was subject to legislative override: *Co-operative Committee on Japanese Canadians v. Attorney-General of Canada*, [1947] A.C. 87. The origin of the right can probably be traced back to feudal principles of allegiance to, and protection by, a lord and, ultimately, the reigning monarch.

[31] The right to enter and to remain in one's country of citizenship has also been reiterated in numerous international instruments to which Canada is a signatory, including notably the 1948 *Universal Declaration of Human Rights*, GA Res. 217 (III), UN Doc. A/810 (1948), in which paragraph 13(2) provides that "[e]veryone has the right to leave any country, including his own, and to return to his country", and the 1966 *International Covenant on Civil and Political Rights*, 999

U.N.T.S. 172, in which paragraph 12(4) similarly provides that "[n]o one shall be arbitrarily deprived of the right to enter his own country".

[32] Moreover, the Supreme Court of Canada has repeatedly found that the right under subsection 6(1) of the *Charter* is engaged in the context of extradition proceedings against a Canadian citizen, most notably in *United States v. Cotroni*, *supra* at pp. 1480-81, *United States v. Burns*, *supra* at para. 41; and *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761 at paras. 28 and 42. This Court has also held in *Kamel v. Canada*, 2009 FCA 21, [2009] 4 F.C.R. 449 at para. 15 (leave to appeal to the Supreme Court of Canada refused), that subsection 6(1) of the *Charter* is also engaged when a request for a passport is denied.

[33] If a Canadian citizen's *Charter* right to remain in Canada under subsection 6(1) is engaged when Canadian authorities seek his extradition in order to face charges and eventual imprisonment in a foreign jurisdiction, it seems logical that the citizen's right to enter and remain in Canada would also be engaged when that same foreign jurisdiction agrees to transfer that Canadian citizen to Canada in order to serve his sentence here.

[34] These legislative provisions, international instruments and court decisions are all strong indications that subsection 6(1) of the *Charter* is engaged by the impugned provisions of the *International Transfer of Offenders Act.*

[35] Nevertheless, the Minister invites us to find that the right to enter and to remain in Canada is not engaged by these legislative provisions. The Minister advances three propositions to support his

assertion : 1) the concerned offenders are in any event imprisoned and the legislation simply provides for the management by Canada of the foreign sentences to which the offenders are subject; 2) the offenders would have no right to enter Canada were it not for the legislation; and 3) the international treaty scheme pursuant to which the legislation was adopted provides for the unqualified right of participating states to refuse the transfer of an offender. I find none of these propositions persuasive.

[36] Dealing with these propositions in reverse order, the fact that the 1977 *Treaty on the execution of penal sentences* between Canada and the United States does not qualify the consent which Canada must provide for the transfer of an offender under the treaty has no bearing whatsoever on the constitutional rights of the concerned offenders. First, the treaty was entered into prior to the coming into force of the *Charter*, and it would be curious indeed if the rights guaranteed by the *Charter* would somehow be subservient to prior treaty instruments. The Minister has submitted no authority to support such a proposition. Second, though the treaty itself requires the consent of Canada and does not provide for any fettering of this consent, this does not mean that Canadian legislation fettering that consent cannot be adopted. In fact, the Minister's discretion to consent to an offender transfer was substantially fettered in 2004 through the adoption by Parliament of the *International Transfer of Offenders Act*. I see no reason why the *Charter* itself could not also fetter that discretion.

[37] I also reject the proposition that subsection 6(1) of the *Charter* is not engaged by the legislation since offenders would have no right to enter Canada where it not for the legislation.

Though it is true that offenders imprisoned in foreign jurisdictions cannot in fact exercise their right to enter and remain in Canada, this situation results from the superior force of the foreign jurisdiction over the offenders, and not from the loss of the right itself by the offenders. The very purpose of the *International Transfer of Offenders Act* and its related treaty system is to facilitate the repatriation of offenders to their countries of citizenship, and to thus facilitate, in the case of Canadian citizens, the exercise of their right to enter and to remain in Canada.

[38] Finally, this brings me to the proposition that what is at issue in a transfer request under the *International Transfer of Offenders Act* is not a mobility right, but rather the transfer of the supervision of a prison sentence.

[39] Obviously, imprisonment in Canada restricts *Charter* mobility rights of offenders in Canada. However, we are not concerned here with a restriction on the mobility rights of an offender sentenced in Canada, but rather with the mobility rights of a Canadian citizen incarcerated in a foreign jurisdiction.

[40] In the case of an offender incarcerated in a foreign jurisdiction, the restriction on the offender's mobility rights under the *Charter* resulting from the foreign incarceration is only effected for the purposes of the *Charter* after the offender is transferred to Canada pursuant to the *International Transfer of Offenders Act*: see section 13 of the act. The definition of "sentence" in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (as amended by the *International Transfer of Offenders Act*) is instructive in this regard [emphasis added]:

"sentence" means a sentence of imprisonment and includes a sentence imposed by a foreign entity on a Canadian offender who has been transferred to Canada under the *International Transfer of Offenders Act* […];	« peine » ou « peine d'emprisonnement » S'entend notamment […] d'une peine d'emprisonnement imposée par une entité étrangère à un Canadien qui a été transféré au Canada sous le régime de la *Loi sur le transfèrement international des délinquants*

[41] Prior to a transfer to Canada pursuant to the legislation, from the perspective of the *Charter*, no sentence of incarceration restricting mobility rights has been recognized by Canadian authorities. The fact that the Canadian citizen committed an offence in a foreign jurisdiction, and the fact that he is detained in a foreign jurisdiction, do not restrict *de jure* the right. Consequently, there is no legal restriction to the *Charter* right resulting from imprisonment in a foreign jurisdiction, though of course there is a practical impediment to the exercise of that right resulting from the foreign imprisonment itself.

[42] However, once the foreign jurisdiction expresses its consent to transfer an offender to Canada, that practical impediment is lifted. Thereafter, the only legal restriction to that offender's right to enter and remain in Canada guaranteed under subsection 6(1) of the *Charter* is the required consent of the Minister pursuant to the *International Transfer of Offenders Act*.

[43] Consequently, an offender's *Charter* right to enter and to remain in Canada is engaged once a request for a transfer to Canada is approved by the foreign jurisdiction. This is so notably in light of the fact that the *Corrections and Conditional Release Act* does not apply to that Canadian citizen prior to the Minister's consent under the *International Transfer of Offenders Act*.

[44] The Minister recognizes that if the American authorities deported the appellant to Canada, subsection 6(1) of the *Charter* would be engaged. If this *Charter* provision is engaged when a Canadian citizen is deported from a foreign jurisdiction to Canada, I fail to grasp why it would not be engaged in the context of a transfer of a Canadian citizen from a foreign jurisdiction. The Minister's reasoning transforms the foreign sentence of a Canadian citizen into a legal exile from Canada in the event the foreign jurisdiction agrees to allow the Canadian citizen to serve his sentence in Canada. This, in my opinion, is not only contrary to the *Charter*, but also contrary to the *Canadian Bill of Rights*, which curtails arbitrary exile.

[45] I consequently find that the right to enter and to remain in Canada is infringed by the *International Transfer of Offenders Act*.

[46] In closing on the infringement inquiry, I add that the concerned *Charter* right should not be lightly discarded. As discussed further below, the *Charter* analysis in this case results in the conclusion that the legislative scheme at issue here is justified under section 1 of the *Charter*. But this legislative scheme was not the one in force prior to 2004 and may well change in the future. To refuse in principle the engagement of the *Charter* in all offender transfers to Canada would consequently, in my considered opinion, be contrary to the very purposes which lead to enshrining in the *Charter* the right of all citizens, even bad citizens, to enter and to remain in Canada. The noble purposes underlying the *Charter* would be lost if the legislation under which such refusals are made was not subject to scrutiny under section 1.

[47] The engagement of the *Charter* in this case also serves an important purpose even if the impugned provisions of the *International Transfer of Offenders Act* are justified under section 1. Indeed, the Minister's power to consent or to refuse such a transfer must be exercised in accordance not only with the provisions of the legislation, but also in accordance with the *Charter*. Since a *Charter* right is engaged in these circumstances, the Minister must therefore take into account the offender's *Charter* rights, including his rights under subsection 6(1), in reaching his decision: see by analogy with extradition *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170 at paras. 36, 38 and 39; *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 65.

d) Are the impugned provisions of the act justified under section 1 of the Charter?

[48] Having found that subsection 8(1) and paragraphs 10(1)(a) and 10(2)(a) of the *International Transfer of Offenders Act* infringe on the right to enter and to remain in Canada guaranteed under subsection 6(1) of the *Charter*, it is now necessary to determine if these legislative provisions are justified under section 1 of the *Charter*.

[49] The analysis used for such purpose is the one first set out in the well known case of *R. v. Oakes*, *supra*. This analysis has been recently summarized as follows in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 at paras. 138-139:

> The analysis for assessing whether or not a law violating the *Charter* can be saved as a reasonable limit under s. 1 is set out in *Oakes*. A limit on *Charter* rights must be prescribed by law to be saved under s. 1. Once it is determined that the limit is prescribed by law, then there are four components to the *Oakes* test for establishing that the limit is reasonably justifiable in a free and democratic society (*Oakes*, at pp. 138-40). First, the objective of the law must be pressing and

> substantial. Second, there must be a rational connection between the pressing and substantial objective and the means chosen by the law to achieve the objective. Third, the impugned law must be minimally impairing. Finally, there must be proportionality between the objective and the measures adopted by the law, and more specifically, between the salutary and deleterious effects of the law (*Oakes*, at p. 140; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 889).
>
> The s. 1 analysis focuses on the particular context of the law at issue. Contextual factors to be considered include the nature of the harm addressed, the vulnerability of the group protected, ameliorative measures considered to address the harm, and the nature and importance of the infringed activity: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, and *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33. This said, the basic template of *Oakes* remains applicable, and each of the elements required by that test must be satisfied. The government bears the onus of establishing each of the elements of the *Oakes* test and hence of showing that a law is a reasonable limit on *Charter* rights on a balance of probabilities (see *Oakes*, at pp. 136-37).

(i) Is the limit prescribed by law?

[50] There is no dispute here that the limits to the right to enter and remain in Canada set out in the impugned provisions of the *International Transfer of Offenders Act* are prescribed by law.

(ii) Is the objective or purpose for which the limit is imposed pressing and substantial?

[51] The appellant and the intervener both rightfully recognize that the security of Canada and the prevention of offences related to terrorism or to organized crime are pressing and substantial objectives (at paragraph 23 of the appellant's Memorandum and at paragraph 42 of the intervener's Memorandum).

[52] This is consistent with teachings of the judiciary, notably the Supreme Court of Canada's decision in *Suresh v. Canada*, [2002] 1 S.C.R. 3 at paras. 85 and 89 to 92 reached in the context of deportation proceedings, and the decision of this Court in *Kamel v. Canada*, *supra*.

(iii) Is the limit rationally connected to the objective or purpose?

[53] There also appears to be a *prima facie* rational connection between, on the one hand, the security of Canada and the prevention of offences related to terrorism or to organized crime and, on the other hand, the authority of the Minister to refuse the transfer of an offender under the *International Transfer of Offenders Act.* Logic, reason and common sense seem to readily establish a causal relationship between the pressing and substantial objectives at issue and refusing a transfer to an offender whose return to Canada would constitute a threat to these objectives. This rational connection seems moreover clearly established where, as in this case, the offender has been found guilty of serious offences connected to organized criminality.

[54] Yet, the appellant and the intervener contend that such a rational connection is not self-evident. Rather, they assert that the safety of Canadians and the security of Canada would be better served by allowing all Canadian offenders imprisoned abroad to be transferred to Canada, including offenders posing threats to the security of Canada or likely to commit terrorist or organized crime offences, thus allowing these offenders to be directly supervised by Canadian authorities pursuant to Canada's correctional system. This, they say, is consistent with the objectives of rehabilitation and reintegration stated in section 3 of the *International Transfer of Offenders Act.* They therefore contend that Parliament was irrational and acted contrary to the *Charter* when it granted the

Minister the authority to refuse offender transfers on the basis of threats to the security of Canada, or of likely offences of terrorism or of organized criminality.

[55] I do not accept these contentions. Though I do not dispute that Canada's correctional system can, in most circumstances, adequately protect Canadian citizens from convicted terrorists, organized crime members or felons threatening the security of Canada, Parliament has decided that it may be preferable, in certain circumstances, not to allow convicted offenders who pose such threats to be allowed to serve their sentence in Canada. I cannot conclude that this legislative choice is itself irrational.

[56] Indeed, I do not find it irrational for Parliament to empower the Minister to refuse the transfer of a convicted terrorist if it is reasonable to believe that the incarceration of that terrorist in Canada would result in retaliatory terrorist attacks on Canadian citizens. Likewise, I do not find it irrational for Parliament to empower the Minister to refuse the transfer of an international drug cartel kingpin if it is reasonable to believe that such a transfer would result in attacks on Canadian prison guards or would facilitate the criminal operations of that offender or of his criminal organization. These are clear cases were the Minister could properly refuse a transfer to Canada.

[57] Of course, these examples are extreme, and not all the offenders convicted of security or related offences, or of offences related to terrorism or organized crime, pose a threat to Canada or to Canadians should they serve their foreign sentences in Canada. There are some cases which clearly justify refusing a transfer on the grounds set out by Parliament, and other cases where such a refusal

would clearly be inappropriate and contrary to the *Charter* right at issue. Many cases will however fall between these two extremes. This is precisely why Parliament has empowered the Minister to decide each individual case on its particular facts, taking into account pertinent circumstances and prescribed factors.

[58] The legislative framework in which the Minister's discretion is exercised is therefore reasonable and it is clearly rationally linked to the pressing and substantial objectives at hand. First, the Minister's discretion is strongly fettered by specific enumerated factors which must be considered, including notably whether the offender's return to Canada would constitute a threat to the security of Canada (paragraph 10(1)(a) of the act) or whether the offender will, after the transfer to Canada, commit a terrorism offence or criminal organization offence (paragraph 10(2)(a) of the act). These are serious and important constraints on the Minister's discretion. Second, the scheme of the legislation allows the offender to make prior representations to the Minister through a written request in which all pertinent factors and circumstances can be addressed (section 7 of the act). Third, the Minister must provide written reasons if he refuses his consent to the transfer (section 11 of the act). Finally, the decision of the Minister is subject to judicial review before the Federal Court, and the decision of that court is itself subject to appeal to this Court and ultimately, in appropriate cases, to the Supreme Court of Canada.

(iv) Does the limit minimally impair the right?

[59] The minimal impairment must be understood and analysed keeping in mind that the concerned offender has been found guilty of an offence by a foreign jurisdiction, in this case the

United States, and is already incarcerated by that foreign jurisdiction. The legislation only provides for the enforcement of an offender's sentence in Canada in accordance with the laws of Canada. Consequently, a refusal under the legislation for the pressing and substantial objectives set out therein results in the offender serving his sentence in the foreign jurisdiction in accordance with the laws of the jurisdiction in which he committed an offence, rather than in Canada.

[60] The principal practical impacts of the refusal are thus twofold: first, the offender will not be incarcerated in Canada, thus limiting potential visits from family and friends in an incarceration facility more easily accessible to them, and second, the offender will lose the benefit of Canada's correctional system, including the benefit of a statutory release, parole or other conditional release under the *Corrections and Conditional Release Act* which may, in certain circumstances, allow for an earlier albeit supervised release from incarceration than what the offender would have otherwise benefited from in the foreign jurisdiction.

[61] Concerning the first practical impact, it is useful to keep in mind that though the *Corrections and Conditional Release Act* takes into account an offender's accessibility to his home community and family in inmate placement decisions, it does not guarantee such a placement to offenders in Canada. Though it is preferable for an offender sentenced in Canada to be incarcerated in an institution which is easily accessible for family visits, this is not always possible, and in certain cases not desirable. Consequently, the fact that the refusal of a transfer under the *International Transfer of Offenders Act* could result in the offender remaining incarcerated in a foreign institution

which may be more difficult to access for visits from family or friends is not in itself sufficient to constitutionally override the impugned provisions of the act.

[62] I now consider the second practical impact. Though for some offenders the loss of the perceived “benefit” of a potential earlier conditional release under the Canadian correctional system may be unfair, I do not agree that this consequence of the transfer refusal is in fact unfair or affects the rights of the offenders to such an extent as to constitutionally invalidate the impugned legislative provision in the context where the offender’s return to Canada would constitute a threat to the security of Canada or would result in a terrorism offence or a criminal organization offence.

[63] These offenders have committed offences in foreign jurisdictions. Barring exceptional circumstances, there is nothing unfair or unreasonable in the fact that these offenders are subject to the incarceration systems of the foreign jurisdictions in which they committed their offences. Canada’s entire extradition system is in fact based on this premise.

[64] The Supreme Court of Canada has already found that the right to remain in Canada is minimally impaired by extradition procedures which can result in the conviction and incarceration of a Canadian citizen in a foreign jurisdiction. The same logic applies here. As noted by La Forest J. in *United States v. Cotroni*, *supra*, at pp. 1488-89:

> The more serious attack of the respondents is based on the second component of the proportionality test. In *R. v. Oakes*, *supra*, Dickson C.J. observed that "the means, even if rationally connected to the objective . . . should impair `as little as possible' the right or freedom in question". The objective of transnational crimes, the respondents say, can, in the circumstances of the present cases, be achieved without

> infringing on the right set forth in s. 6(1) of the *Charter* by prosecuting them in Canada.
>
> The difficulty I have with this approach is that it seeks to apply the *Oakes* test in too rigid a fashion, without regard to the context in which it is to be applied. It must be remembered that the language of the *Charter*, which allows "reasonable limits", invites a measure of flexibility […]

[65] Likewise here, the prevention of threats to the security of Canada, or of offences of terrorism or of organized criminality, invites a measure of flexibility in the analysis.

(v) Is the legislation proportionate in its effect?

[66] The fact that a convicted offender would have to serve his sentence in a foreign jurisdiction for crimes committed in that jurisdiction must be assessed in light of the importance of the pressing and substantial objectives reflected in paragraphs 10(1)(a) and 10(2)(a) of the *International Transfer of Offenders Act*. This is moreover the case since there appears to be no other reasonable method of achieving these pressing and substantive objectives in the case of offenders convicted and incarcerated in a foreign jurisdiction.

[67] In circumstances where the transfer “would constitute a threat to the security of Canada” or if “in the Minister’s opinion, the offender will, after the transfer, commit a terrorism offence or criminal organization offence”, it is hard to imagine what other reasonable measure could be devised to impair to a lesser extent the offender’s right.

(e) Conclusions

[68] I have concluded that the provisions of paragraphs 10(1)(a) and 10(2)(a) of the *International Transfer of Offenders Act* constitute *prima facie* infringements to the right guaranteed by subsection 6(1) of the *Charter*, but are nevertheless reasonable limits to that right as can be demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter*.

[69] In deciding a request for a transfer under the *International Transfer of Offenders Act*, the Minister must thus be alive not only to the terms of the legislation itself, but also to the *Charter* right of the offender under subsection 6(1). Consideration of the *Charter* right by the Minister will, in most cases, be subsumed in his consideration of the factors set out in the legislation.

[70] Thus, the Minister's decision is subject to judicial review not only on administrative law grounds, but equally on *Charter* grounds in light of the fact his decision itself engages a *Charter* right. The reviewing court's role is to determine whether the Minister considered the relevant facts and the relevant constitutionally defensible factors set out in the legislation, and reached a defensible conclusion based on those facts and those factors. This is primarily a form of administrative law review to be conducted in accordance with applicable administrative law standards, which of course remain informed by the *Charter*. This approach does not however change the applicable standard of review, which remains reasonableness. This standard of review does not minimize the protection afforded by the *Charter*, but rather recognizes that in the case of the international transfer of an offender, the proper assessment under subsection 6(1) of the *Charter*

involves primarily a fact-based balancing test: see by analogy with extradition *Lake v. Canada (Minister of Justice)*, *supra* at paras. 34 to 41.

[71] In this appeal, the appellant does not challenge the reasonableness of the decision of the Minister. The only challenge before us concerns the constitutional validity of the impugned provisions of the legislation. As I have already found, the impugned provisions of the legislation are constitutional. Consequently, I would dismiss the appeal with costs to the respondent.

"Robert M. Mainville"
J.A.

NADON J.A.

[72] I have had the benefit of reading the Reasons of my colleague Mainville J.A. for dismissing the appeal. While I agree with his disposal of the appeal, I do so on different grounds. More particularly, I agree with his justification analysis under section 1 of the *Canadian Charter of Human Rights and Freedom* (the "*Charter*"), but disagree with his conclusion that the *International Treatment of Offenders Act* (the "*Act*") violates the appellant's right to enter Canada under subsection 6(1) of the *Charter*.

[73] I need not repeat the facts or the submissions which the parties made in support of their respective positions as they have been carefully and thoroughly reviewed by Mainville J.A.

[74] Before stating my reasons for dismissing the appeal, it is important to note that the appellant does not challenge the Minister's decision on any ground other than that the provisions on which the Minister relies in making his decision are unconstitutional. In other words, the appellant does not challenge the Minister's determination that his transfer to Canada to serve out his sentence "would constitute a potential threat to the safety of Canadians and the security of Canada". Rather, he says that subsection 8(1) and paragraphs 10(1)(a) and 10(2)(a) of the *Act* – which allow the Minister to consider whether an offender's return to Canada could constitute a threat to the security of Canada or whether, in the Minister's opinion, the offender will commit, after his transfer, a terrorism or criminal organization offence – violate his right to enter Canada under subsection 6(1) of the *Charter* and that, as a result, the Minister's decision cannot stand.

[75] In dismissing the appellant's judicial review application, Harrington J. concluded that subsection 8(1) and paragraphs 10(1)(a) and 10(2)(a) of the *Act* were constitutional. In so concluding, he relied on the reasons he gave in dismissing the appellant's son's judicial review application of the Minister's decision to refuse his transfer to Canada to serve out his U.S. sentence, in *Divito v. Canada*, 2009 FC 1158. At paragraphs 12, 13 and 17 of his Reasons, Harrington J. wrote:

> [12] As I indicated in *Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness*), 2007 FC 866, [2008] 2 F.C.R. No. 377 at paragraphs 27 and 28, ''current restrictions on the mobility'' of Mr. DiVito, in this case, ''arise from his own actions, his own criminal activities. A natural and foreseeable consequence of a criminal conviction …''.
>
> > [28] However the American authorities have put a condition on his transfer. The condition is that he serve his sentence here. Upon his transfer he could not immediately invoke his constitutional right as a citizen to leave Canada. His freedom would properly be restricted in accordance with the *Corrections and Conditional Release Act*. I have come to the conclusion that neither section 8 of the *International Transfer of Offenders Act* which requires the consent of the offender, the foreign entity and Canada, nor subsections 10(1) (b) and (c) which call upon the Minister to consider whether Mr. Kozarov has social or family ties here or whether he left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence offends his mobility rights under the *Charter*.
>
> [13] Consequently, I conclude that the Act does not violate Mr. DiVito's mobility rights. On the contrary, I find, as Justice Kelen did in *Getkate v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 965, that the Act constitutes a reasonable limit as can be demonstrably justified in a free and democratic society (section 1 of the *Charter*).
>
> …

> [17] The case of Mr. Kozarov illustrates the limits on mobility rights. Mr. Kozarov appealed the decision, but was released by the U.S. authorities before the appeal could be heard. The Court of Appeal refused to hear the case because it was moot: *Kozarov v. Minister of Public Safety and Emergency Preparedness*, 2008 FCA 185. Similarly, if the U.S. authorities pardoned Mr. DiVito tomorrow, he would have an absolute right to return to Canada. He would even be deported to Canada.

[76] To complete the learned Judge's reasoning, I reproduce paragraph 27 of his Reasons in *Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 866, [2008] 2 F.C.R. No. 377 ("*Kozarov*")::

> [27] Mr. Kozarov's current restrictions on his mobility arise from his own actions, his own criminal activities. A natural and foreseeable consequence of a criminal conviction is that the state in which the offence is committed and in which the offender may be found may incarcerate him. Once Mr. Kozarov serves his sentence, he has the absolute right, as a citizen, to return here. The same holds true if his current sentence were commuted, or if he were pardoned. All citizens, unlike foreigners and permanent residents, have that constitutional mobility right (see *Catenacci v. Canada (Attorney General)*, 2006 FC 539, 144 C.R.R. (2d) 128).

[77] Thus, Harrington J. found that the appellant's right under subsection 6(1) of the *Charter* was not infringed by the impugned provisions and that, in any event, those provisions constituted a reasonable limit to his right to enter Canada under section 1 of the *Charter*.

[78] I substantially agree with Harrington J., but would add the following.

[79] First, let me say at the outset that I agree with Mainville J.A. that an immigration officer must allow a person to enter Canada if the officer is satisfied that the person is a Canadian citizen.

Thus, if the appellant had been brought to the Canadian border and released unconditionally by the American authorities, there can be no doubt that he would have been allowed to enter Canada. In *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, the Supreme Court of Canada held at page 1482 that: "… an accused may return to Canada following his trial and acquittal or, if he has been convicted, after he has served his sentence".

[80] Harrington J. put it similarly in *Kozarov* at paragraph 27, where he said that Mr. Kozarov would have an absolute right to enter Canada once he had served his sentence in the United States (see also: *Getkate v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 965; *Curtis v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 943, at paragraph 30).

[81] However, the appellant is not simply claiming that Canada must admit him; but rather, he is claiming that Canada must admit him in order to administer his sentence. He makes that claim because the United States has neither pardoned him nor commuted his sentence; its approval of his transfer is premised on Canada undertaking to administer his sentence.

[82] I cannot agree with the proposition that Canada is refusing to allow the appellant to enter Canada. Although it is beyond dispute that Canada cannot prevent one of its citizens from entering the country, such is not the situation before us. Rather, Canada is refusing to administer the appellant's sentence and the result of that refusal is that the appellant is unable to enter Canada because the United States will not release him. In essence, Canada's refusal to administer the

appellant's sentence does not constitute a violation of his right to enter Canada under subsection 6(1) of the *Charter* because there is an insufficient causal connection between Canada's refusal and the appellant's inability to enter

[83] In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 ("*Blencoe*"), the Supreme Court held that there must be a "sufficient causal connection" between state action and the harm suffered by a claimant for the *Charter* to be triggered (paragraph 60) (see also: *R. v. D.B.*, 2008 SCC 25). I see no such connection in this case. The appellant's inability to enter Canada stems from his decision to engage in the traffic of cocaine in Florida, the resulting conviction and sentence for that act in the United States and the United States' demand that Canada administer the remainder of his sentence. None of these actions are, in my view, state actions, since none is "a [matter] within the authority of Parliament" under paragraph 32(1)(a) of the *Charter* (see: *R. v. Hape*, 2007 SCC 26, paragraph 103). Thus, none of these actions is capable of causing a *Charter* violation.

[84] In other words, Canada's contribution to the appellant's inadmissibility to enter Canada is indirect and secondary. The direct causes are his criminal acts, his conviction and sentencing, coupled with the United States' insistence that Canada administer his sentence. Had the appellant not trafficked cocaine, he would no doubt be able to enter Canada at any time. If the United States did not require Canada to administer his sentence, he would also be able to enter Canada at any time. Consequently, these events are the direct causes of the appellant's inability to enter Canada.

[85] In my respectful view, the Minister's refusal to administer the appellant's sentence can only be found to constitute a sufficient cause of the violation of the appellant's right to enter if it is viewed entirely in isolation from its surrounding context. Such an approach, however, would be inconsistent with the Supreme Court's approach in *Blencoe*, where the events leading up to the appellant filing a human rights complaint were found to be central to the Court's analysis.

[86] In *Blencoe*, a majority of the Court found that the state action at issue was not a sufficient cause of the harm suffered by the claimant and so his *Charter* rights were not infringed. There, the claimant asserted that the delayed processing of his complaint by the BC Human Rights Commission had caused harm to his psyche and reputation. The Court disagreed, even though, viewed in isolation, this delay caused harm to the claimant. The majority found that the most prejudicial impact on the claimant resulted from the allegations which led to his being ejected from Cabinet and the related media treatment. These events all occurred prior to the government action at issue; that is, before the complaint came before the Commission. Thus, the events leading up to the human rights complaint were central to the Court's finding that there was an insufficient causal link between the delay by the Commission and the harm suffered by the claimant.

[87] Similarly, the appellant's illegal actions, his conviction in the United States and the latter's insistence that Canada administer his prison sentence all occurred before the Minister refused to admit the appellant. Thus, the reasoning in *Blencoe* is applicable because the appellant is in an analogous position.

[88] What the appellant seeks in the present matter is, in my respectful view, a declaration that subsection 6(1) of the *Charter* grants him a constitutional right to serve his foreign prison sentence in Canada once the foreign country has agreed to transfer him. There is no such right to be found under subsection 6(1). To repeat, the appellant is not asserting his right to enter Canada, but rather is asserting that Canada must allow him to enter so that he may serve the remainder of his prison sentence here. I see nothing in the language of subsection 6(1) of the *Charter*, or in the authorities which have dealt with that provision, which suggest that that provision includes a right to serve one's foreign prison sentence in Canada.

[89] I therefore conclude that the Minister's decision refusing to administer the appellant's United States prison sentence in Canada does not violate his right to enter this country under subsection 6(1) of the *Charter*. On that basis, I would dismiss the appeal with costs.

"M. Nadon"

J.A.

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

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