Federal Court of Appeal | Cour d'appel fédérale

Date: 20120427

Docket: A-351-11

Citation: 2012 FCA 132

CORAM: **LÉTOURNEAU J.A.**
SHARLOW J.A.
DAWSON J.A.

BETWEEN:

YVES LEBON

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 18, 2012.

Judgment delivered at Ottawa, Ontario, on April 27, 2012.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: LÉTOURNEAU J.A
SHARLOW J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] The Federal Court dismissed Mr. LeBon's application for judicial review of the decision of the Minister of Public Safety and Emergency Preparedness (Minister), which denied Mr. LeBon's request for a transfer to Canada under section 7 of the *International Transfer of Offenders Act*, S.C. 2004, c. 21 (Act) (2011 FC 1018, [2011] F.C.J. No. 1261). The Federal Court Judge applied the standard of review of reasonableness to the Minister's decision, and concluded that the decision was "defensible in respect of the facts and law. [The Minister's] reasons are complete, intelligible and sufficient to allow the Applicant to know that all of the factors set out in section 10 of the [Act] were fairly considered" (reasons, paragraph 47).

[2] This is an appeal from the decision of the Federal Court. Despite the articulate and forceful submissions of counsel for the Attorney General, for the following reasons I have concluded that the appeal should be allowed.

The Issue on Appeal

[3] While the appellant asserts a number of errors on the part of the Judge, in my view the issue to be determined is whether the Judge erred by finding that the Minister's decision was reasonable.

The Facts

[4] Mr. LeBon, a Canadian citizen, entered the United States near Champlain, New York by car on August 17, 2007. He advised the American authorities that he was entering the United States for the purpose of meeting family members in Maine. This was untrue. On August 22, 2007, Mr. LeBon was stopped by an Illinois State Trooper for a minor traffic violation. When asked, Mr. LeBon agreed to allow the officer to search his car. The officer found 119 packages, each containing 1 kilogram of cocaine.

[5] Mr. LeBon was charged with possession with intent to distribute cocaine and improper entry into the United States by an alien. He pled guilty to the charges and was sentenced to 10 years imprisonment, to be followed by 5 years supervised release. Mr. LeBon is currently incarcerated in a low security correctional institution in Allenwood, Pennsylvania.

[6] On November 25, 2008, Mr. LeBon requested that he be transferred to Canada. American authorities approved his request on March 6, 2009. On August 16, 2010, the Minister refused to consent to the transfer.

Legislative Framework

[7] The Act allows Canadian citizens to serve sentences imposed by foreign courts in Canadian institutions. The purpose of the Act is set out in section 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.	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.

[8] The offender, the foreign state and the Minister are each required to consent to any transfer (subsection 8(1)).

[9] At the time the Minister made his decision, the Act required him to consider the factors enumerated in subsections 10(1) and (2), which are as follows:

10. (1) In determining whether to consent to the transfer of a Canadian offender, the Minister shall consider the following factors: (*a*) whether the offender's return to Canada would constitute a threat to the security of Canada; (*b*) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;	10. (1) Le ministre tient compte des facteurs ci-après pour décider s'il consent au transfèrement du délinquant canadien : *a*) le retour au Canada du délinquant peut constituer une menace pour la sécurité du Canada; *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 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).

[10] The Minister is obliged to give reasons when he does not consent to a transfer (subsection 11(2)).

The Information before the Minister

[11] The Minister received a short memorandum relating to Mr. LeBon's request. Attached to the memorandum were an executive summary prepared by the Correctional Service of Canada (CSC) and supporting documentation, including Mr. LeBon's application for transfer.

[12] Information provided to the Minister by the CSC included:

i. Sources, including Canadian Security Intelligence Service (CSIS), had provided information that "does not lead one to believe that Mr. LeBon's return to Canada would pose a threat to the security of Canada".

ii. Mr. LeBon had not indicated that he intended to abandon Canada as his place of residence. He was in the United States for the purpose of committing the offence.

iii. Mr. LeBon has supportive family ties in Canada. Both his wife and adult son were willing to offer support to him and on release he would reside with his wife.

iv. Neither the United States nor its prison system presented a serious threat to Mr. LeBon's security or human rights. He was currently employed in the institution's dining room and his adjustment was reported to be positive.

v. Sources, including CSIS, had provided information that "does not lead one to believe that [Mr. LeBon] would, after the transfer, commit an act of terrorism or organized crime, within the meaning of section 2 of the *Criminal Code*".

vi. Mr. LeBon had never been transferred under the Act.

vii. Mr. LeBon had no criminal record in Canada and no outstanding charges in the United States.

viii. With respect to the likelihood of Mr. LeBon re-offending, the CSC wrote:

> *The following statement is based on the results or conclusion based on the information known of the offender and a synthesis of information about his offence and conviction.*
>
> Mr. LeBon is presently incarcerated in a Minimum security facility. He has demonstrated a pattern of

> satisfactory institutional adjustment with no or little intervention required and has not incurred any disciplinary charges. He has no criminal record and no outstanding convictions. He has no history of violence or sexual offending.
>
> Mr. LeBon scored +21 on the Revised Statistical Information on Recidivism Scale (SIR-R1). This suggests that 4 out of 5 offenders will not commit an indictable offence after release.

The Minister's Decision

[13] The Minister's decision was brief, and was as follows:

> The purposes of the *International Transfer of Offenders Act* (the Act) are 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. These purposes serve to enhance public safety in Canada. For each application for transfer, I examine the unique facts and circumstances as presented to me in the context of the purposes of the Act and the specific factors enumerated in section 10.
>
> The applicant, Yves LeBon, is a Canadian citizen serving a sentence of imprisonment of 10 years in the United States (U.S.) for the following offences: possession with intent to distribute cocaine; and, improper entry by an alien. On August 17, 2007, the offender entered the U.S. stating that he was on his way to visit with family in Maine. On August 22, 2007, during a routine traffic stop, an Illinois State Trooper asked Mr. LeBon if he could search his vehicle. The police officer discovered 119 packages in the trunk, each containing one kilogram of cocaine.
>
> 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.
>
> The Act also requires that I consider whether the offender has social or family ties in Canada. I recognize the family ties of the applicant in Canada, including the fact that his wife and son remain supportive.
>
> Having considered the unique facts and circumstances of this application and the factors enumerated in section 10, I do not believe that a transfer would achieve the purposes of the Act.

The Standard of Review

[14] On an appeal from a decision of the Federal Court disposing of an application for judicial review, this Court is required to determine whether the Federal Court identified the appropriate standard of review and applied it correctly (*Telfer v. Canada (Revenue Agency)*, 2009 FCA 23, 386 N.R. 212 at paragraph 18). If the Federal Court selected and applied the wrong standard, this Court then proceeds to apply the correct standard of review. If the correct standard was applied by the Federal Court, this Court then ensures that it was applied properly and, where necessary, remedies errors which were made.

[15] In the present case, the Minister's decision whether to consent to the transfer to Canada of the Canadian offender is fact-specific and discretionary in nature. Generally, reasonableness is the standard of review applicable to such decisions (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 53). Given the nature of the Minister's decision, the Judge correctly selected reasonableness as the applicable standard of review.

Application of the Standard of Review

[16] In *Telfer*, this Court explained the nature of review on the reasonableness standard in the following terms:

> 25. When reviewing for unreasonableness, a court must examine the decision-making process (including the reasons given for the decision), in order to ensure that it contains a rational "justification" for the decision, and is transparent and intelligible. In addition, a reviewing court must determine whether the decision itself falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir* at para. 47.

[17] More recently, the Supreme Court has provided further clarification as to the nature of review on the reasonableness standard. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 Justice Abella wrote as follows for the Court at paragraphs 14 to 16:

> 14. Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at ss. 12: 5330 and 12: 5510). It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> 15. In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> 16. Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a

> reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[18] Therefore, having regard to the record before the Minister, the question to be answered is whether the Minister's reasons allow the reviewing Court to understand why the Minister made his decision and then to determine whether the Minister's conclusion was within the range of acceptable outcomes.

[19] Before turning to consider the Minister's decision, it is important to acknowledge the correctness of the Attorney General's submission that transfers under the Act are a privilege for Canadian offenders who are incarcerated outside of Canada. There is no right to be returned to Canada. Equally correct is the submission that the Minister is not bound to follow the advice of the CSC.

[20] Turning now to the Minister's decision, read fairly in light of the evidentiary record before him, it is apparent that the Minister disagreed with the advice provided by the CSC that Mr. LeBon was not likely to commit an act of organized crime. In the Minister's view, the likelihood that Mr. LeBon would commit an act of organized crime outweighed the positive effect of Mr. LeBon's supportive family ties so that the transfer would not achieve the purposes of the Act.

[21] However, what the reasons leave unanswered are:

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

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

[22] Dealing with the first unanswered question, in my view there is no bright line test which determines what level of explanation is required when the Minister disagrees with advice he has received. Each case will depend upon the record before the Minister. In some cases the record may make it apparent why the Minister disagreed with the advice he received. In such a case, little or no explanation would be required. This, however, is not one of those cases.

[23] Here, the opinion of the CSC was unequivocal that it did not believe that Mr. LeBon would, after transfer, commit an act of organized crime. CSC was of the further opinion that Mr. LeBon was not likely to commit any indictable crime after release. During oral argument, counsel for the Attorney General could not point to any cogent evidence in the record that could reasonably undermine or contradict the opinions of the CSC. In this circumstance, whatever contrary conclusion the Minister reached about the likelihood of an act of organized crime being committed is not justified, transparent or intelligible.

[24] Turning to the second unanswered question, the statutory requirement that the Minister provide reasons when refusing a transfer mandates the Minister to do more than simply assert that

"[h]aving considered the unique facts and circumstances of this application and the factors enumerated in section 10, I do not believe that a transfer would achieve the purposes of the Act".

[25] Where, 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. Without such an assessment, the Minister's decision is neither transparent nor intelligible. Nor does the decision comply with the statutory requirement imposed by subsection 11(2) that the Minister give reasons.

Conclusion

[26] Because the Minister's decision was not justified, transparent and intelligible it was unreasonable and so it should be set aside.

[27] It is not necessary for me to consider Mr. LeBon's Charter-based argument that the Minister could not draw any adverse conclusion from Mr. LeBon's post-arrest silence, and I decline to do so.

[28] It follows that I would allow the appeal and set aside the judgment of the Federal Court. Making the judgment that the Federal Court should have made, I would allow the application for judicial review of the Minister's decision, set aside the Minister's decision, remit the matter back to the Minister and require the Minister to decide on Mr. LeBon's transfer request in accordance with these reasons within 60 days. I would further award Mr. LeBon his costs in this Court and in the Federal Court, which I would fix in the all-inclusive amount of $5,000.00.

"Eleanor R. Dawson"
J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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