Federal Court  Cour fédérale

Date: 20100924

Docket: T-707-10

Citation: 2010 FC 958

Ottawa, Ontario, September 24, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

DWAYNE GRANT

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a redetermination by the Minister of Public Safety and Emergency Preparedness (the "Minister") which denied the Applicant's request for a transfer of his sentence pursuant to the *International Transfer of Offenders Act*, 2004, c. 21 (*ITOA*). The reconsideration decision of the Minister, dated April 19, 2010 followed an Order of the Federal Court dated March 4, 2010 in which the earlier decision of the Minister, dated July 19, 2009 was set aside and he was given 45 days to issue a new decision.

[2] For the reasons set out below the application is dismissed.

I. Background

[3] The Applicant, Dwayne Grant, is a 27 year old Canadian citizen presently serving a seven year prison sentence at the C.A.I. San Rafael in Costa Rica for international drug trafficking offences.

[4] The Applicant, along with his five traveling companions, was apprehended by Costa Rican authorities at the Liberian airport on May 20, 2007. The group, consisting of the Applicant, his aunt, Gwendolyn Lawrence, and four others (Delores Buchanan, Mercedes Shaina, Nicole Gayle and Gevon Attzs), was en route to Toronto after what the Applicant alleges was a one week holiday. The authorities found 5.79 kilograms of cocaine in the structures of the Applicant's suitcase. The authorities also found cocaine in the suitcases of the Applicant's traveling companions and seized a total of over 34 kilograms of cocaine from the group.

[5] The Applicant and the other travelers plead guilty to international drug trafficking on November 19, 2007 and were each sentenced to seven years in prison.

[6] On November 28, 2007, the Applicant made a transfer request to Correctional Services Canada (CSC) for a transfer from Costa Rica to Canada pursuant to section 7 of the *ITOA*.

[7] CSC received the Applicant's application on February 5, 2008, the same day receiving similar applications from the other Canadian citizens in the group, namely Ms. Lawrence, Ms. Shaina and Mr. Attzs. All four individuals received an acknowledgement receipt from CSC stating that the application would be processed within six to nine months.

[8] The Costa Rican authorities granted preliminary approval for the Applicant's transfer on January 24, 2008 and approved the Applicant's request in November 2008.

[9] Ms. Shaina's request for transfer was approved in November 2008 and she returned to Canada in March 2009. Ms. Lawrence's request for transfer was approved in December 2008 and she returned to Canada in March 2009. The status of Mr. Attzs' request for transfer is unknown.

A. *First Decision*

[10] The Applicant's request for transfer was denied by the Minister (then the Honourable Peter Van Loan) on July 6, 2009 based on his belief the Applicant "may, after the transfer, commit a criminal organization offence." (Emphasis added)

[11] The decision was set out and supported by four paragraphs of reasons on a single page. The decision of the Minister was contrary to the findings of CSC in an executive summary that "the information obtained to date does not lead one to believe that [the Applicant] would, after the transfer, commit…a criminal organization offence," (Applicant's Record, page 87).

B. *Judicial Review of First Decision*

[12] The Applicant applied for judicial review of the first decision. On March 4, 2010 Justice Robert Barnes of the Federal Court set aside the Minister's decision and sent it back for redetermination. The Court held that the reasons provided by the Minister were "entirely insufficient" rendering the decision unreasonable as it lacked transparency and intelligibility.

[13] At paragraph 2 of *Grant v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] F.C.J. No. 386 (FC) (QL), Justice Barnes found that:

> […] in a case such as this one where the Minister decides not to follow the advice received, he has a duty to explain why and to clearly identify where his assessment differs from that of his advisors. […]

[14] Justice Barnes also noted at paragraph 5:

> The Minister's negative conclusion was that Mr. Grant may, after the transfer, commit a criminal organization offence as defined by s.2 of the Criminal Code. This is of course, inconsistent with the language of the ss.10(2)(a) of the Act which requires that, in the opinion of the Minister, the offender <u>will</u> commit a criminal organization offence.
>
> (Emphasis in original)

[15] Justice Barnes gave the Minister 45 days in which to reconsider the request.

[16] On March 18, 2010 the Applicant made further submissions in support of his application for transfer and CSC submitted an updated assessment of the Applicant's case.

C. *Reconsideration Decision – The Decision Under Review*

[17] On April 19, 2010, the Minister again denied the Applicant's request for transfer. The decision was accompanied by 6 pages of reasons and based the denial on the grounds that: (1) the Applicant is a significant risk to commit an organized crime offence; and (2) that he remains a threat to the security of Canada.

II. Issues

[18] The Applicant raises the following issues:

1) Should the Minister's decision of April 19, 2010 be set aside on the basis of reviewable errors?
2) Does the Minister's reconsideration decision unjustifiably violate the Applicant's rights under section 6 of the Charter?
3) In the case of an affirmative answer to 1) or 2), what is the appropriate remedy?

III. Discussion & Analysis

A. *The Statutory Framework*

[19] Pursuant to the *ITOA*, a Canadian citizen imprisoned abroad may make a request to serve the remainder of his foreign imposed prison sentence in Canada. The consent of the individual and the approval of the foreign country and Canada are required.

[20] Section 10 sets out the factors that a Minister shall consider upon granting or denying a request:

Factors — Canadian offenders	Facteurs à prendre en compte : délinquant canadien
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.
Factors — Canadian and foreign offenders	Facteurs à prendre en compte : délinquant canadien ou étranger
(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).

[21] The purpose of the *ITOA* is set out in section 3:

Purpose	Objet
3. The purpose of this Act is to contribute to the administration of justice and the rehabilitation of offenders and their	3. La présente loi a pour objet de faciliter l'administration de la justice et la réadaptation et la réinsertion sociale des

reintegration into the community by enabling offenders to serve their sentences in the country of which they are citizens or nationals.	délinquants en permettant à ceux-ci de purger leur peine dans le pays dont ils sont citoyens ou nationaux.

[22] In the present case, the Minister makes it clear in his reasons that he agrees with CSC's assessment that:

- Mr. Grant only intended to leave Canada for a week and therefore did not abandon Canada as his home;
- Mr. Grant has both family and social ties in Canada in the form of his parents, common-law spouse and two-year old daughter and that their support and his desire to continue his education in Canada indicate that a transfer would facilitate his reintegration and rehabilitation into the community;
- The Costa Rican prison system does not present a serious threat to Mr. Grant's security or human rights, although the conditions are not to the same standard as they would be in a Canadian institution;
- Mr. Grant has never been transferred under *ITOA*.

[23] The CSC report prepared for the Minister regarding this application also found that:

- The information obtained by CSC did "not lead one to believe that Mr. Grant's return to Canada would pose a threat to the security of Canada"; (Respondent's Record, page 12)

- The information obtained by CSC did "not lead one to believe that [Mr. Grant] would, after the transfer, commit a criminal organization offence within the meaning of section 2 of the *Criminal Code*." (Respondent's Record, page 13)

[24] It is with these last two findings that the Minister came to the opposite conclusion, and upon which he bases his decision to deny the application.

B. *Standard of Review*

[25] The Applicant and Respondent both submit that the appropriate standard of review of decisions of the Minister made pursuant to the *ITOA* is reasonableness. The Applicant, however, further submits that the Minister's interpretation of the *ITOA*, specifically subsections 10(2)(a) and 10(1)(a), is a question of law, reviewable on a standard of correctness. The Applicant provides no support for this assertion beyond merely stating it.

[26] Following *Dunsmuir*, above, this Court has held that decisions of the Minister made pursuant to *ITOA* are discretionary, entitled to significant deference and thus reviewable on a reasonableness standard (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, *Getake v. Minister of Public Safety and Emergency Preparedness*, 2008 FC 965, 298 D.L.R. (4th) 558 at para. 11, *DiVito v. Minister of Public Safety and Emergency Preparedness*, 2009 FC 983, at para. 19 and *Grant*, above).

[27] In *Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 866, [2008] 2 F.C.R. 377, a case involving a review of an *ITOA* decision pre-*Dunsmuir*, Justice Sean Harrington stated that, "However, on legal interpretation the standard of review is correctness. The Minister is owed no deference." (*Kozarov* at para. 15). Questions of statutory interpretation therefore are generally considered questions of law, for which the Court will undertake its own analysis of the question, without showing deference to the decision maker's reasoning process.

[28] While this is normally the case, *Dunsmuir*, above at para. 54 established a presumption that an administrative tribunal's interpretation of its "home" statute – a statute closely connected to its function, with which it will have particular familiarity – is normally reviewable on a standard of reasonableness. A discretionary ministerial decision made pursuant to legislation which engages the Minister's expertise and policy role will similarly attract a great deal of deference and point to a standard of reasonableness in some matters regarding the interpretation of the statute.

[29] In the present case, the Applicant contends that the Minister erred in law in interpreting "will" in subsection 10(2)(a) as meaning that the Minister was to determine whether or not, in his opinion, there is a "significant risk" that the Applicant will commit a criminal organization offence. The Applicant also argues that the Minister erred in law in interpreting subsection 10(1)(a) as including a criminality threat in determining whether the offender's return to Canada would constitute a threat to the security of Canada. The Minister's interpretation is different to the existing jurisprudence of this Court in *Getkate*, above, at para. 41.

[30] With respect, I disagree with the Applicant's submission that the Minister's interpretation of section 10 is a question of law. Parliament appointed the Minister to be the gate-keeper of the international transfer of offender's regime. In this role, the Minister of Public Safety and Emergency Preparedness is particularly well suited to consider the evidence before him and appropriately balance the reintegration interests of the Applicant and concerns about the administration of justice in Canada. In this case, the Minister did not interpret provisions that are of central importance to the legal system as a whole, but rather gave context to a fact-laden reasoning process in an effort to produce transparent, intelligible reasons in accordance with Justice Barnes' March 4, 2010 decision.

[31] The courts should not readily interfere with a discretionary ministerial decision which is owed the highest deference (*Kozarov*, above, at para. 14) and following the jurisprudence of this court in *Getkate*, *Kozarov* and *DiVito*, above, I will apply a standard of review of reasonableness.

[32] The reasonableness standard concerns itself with, "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above). In the present case therefore, I cannot ask whether it would have been reasonable for the Minister to agree to the transfer of Mr. Grant, but rather as Justice Harrington stated in *DiVito*, above at para. 22 "The question, however, is whether it was unreasonable to refuse the transfer."

IV. Issue 1

A. *The Minister's Section 10(2)(a) Finding is Reasonable*

(1) The Minister Used a Proper Legal Standard

[33] Under subsection 10(2)(a) the Minister must consider, whether in his 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." (Emphasis added)

[34] In the redetermination decision, the Minister explains that he interprets this provision, "as requiring me to determine whether there is a significant risk that Mr. Grant will commit a criminal organization offence, which is something other than whether there is certainty in the future that the individual will do something," (emphasis added). The Applicant contends that this is the incorrect legal standard.

[35] I am unconvinced by the Applicant's submission that using a "significant risk" standard unreasonably dilutes the degree of certainty indicated by Parliament by lowering the threshold to something less than a determination on a balance of probabilities. While the Applicant illustrates his argument with a discussion turning on the phrase a "substantial risk," I note that the exact phrase used by the Minister is a "significant risk".

[36] A significant risk must represent something much more than a mere possibility – in criminal law a "significant threat" must be both real and serious (*Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, 175 D.L.R. (4th) 193 at para. 57). In a Saskatchewan drug case, labour law jurisprudence was used to help define something significant as something "consequential, notable, considerable, eventful, important, material, meaningful, profound, or substantial." (*R. v. Dupuis* (1998), 174 Sask.R. 17, 130 C.C.C. (3d) 426 (QB) at para. 17). Clearly, a "significant" risk is a much higher standard than the "may commit" standard that Justice Barnes pointed out as being deficient on the first judicial review.

[37] In any case, while Parliament could not have intended the Minister to be clairvoyant, the term "will" is tempered by the preceding, "in the opinion of the Minister." In my opinion, the phrase "in the opinion of the minister" trumps the need for any continued academic debate on the exact meaning of "will", whether it be a significant or substantial risk of future action, in the provision. A more helpful formulation of the issue at hand is whether, in the opinion of the Minister, there is evidence that leads him to reasonably conclude that an organized criminal offence will be committed by the Applicant after the transfer.

(2) <u>There is a Sufficient Evidentiary Basis for the Minister to Reasonably Invoke Subsection 10(2)(a)</u>

[38] The real issue to deal with then is whether there was sufficient evidence to allow the Minister to make a good-faith finding that the Applicant presents a significant risk of committing a

criminal organization offence once transferred to Canada. In my view, the Minister acted reasonably in concluding that such evidence exists.

[39] The Minister admits on page 5 of his reasons that:

> I have not received any record that would support the conclusion that Mr. Grant will carry out terrorism or criminal organization offences, as those terms are defined in the Criminal Code, or that he is a threat to the security of Canada.

[40] The Minister, however, concluded that there was a significant risk that the Applicant would commit a criminal organization offence contrary to section 2 of the *Criminal Code*, R.S. 1985, c. C-46 if transferred to Canada because: 1) the offence was of a very serious nature; 2) the offence was premeditated, as it was of a nature that would have required significant pre-planning and significant financing; 3) the Applicant has refused to admit responsibility by continuing to assert that he was in Costa Rica on a holiday; 4) there is no evidence that the Applicant cooperated with authorities with respect to the identification or prosecution of other individuals potentially involved with his offence; and 5) there is no evidence that any ties the Applicant might have had with conspirators has been severed.

[41] Using the listed criteria, the Minister explained why he disagreed with the CSC report, taking into account factors relevant to determining whether the purposes of the *ITOA* would be fulfilled by allowing the transfer. The Applicant consequently knows, based on the written decision, what the Minister considered, what the Minister concluded regarding each factor, and why his application was finally denied. I have had the benefit of reading *Dudas v. Canada (Minister of*

Public Safety and Emergency Preparedness), 2010 FC 942 and *Curtis v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 943 and although each case is distinguishable on the facts, I agree that it is incumbent on the Minister when making a decision of such importance to the Applicant in question to give a complete explanation for the decision. In the present case the Minister clearly expresses that due to the listed conclusions he finds that Mr. Grant's return to Canada would not contribute to the administration of justice.

[42] The conclusions are not merely extrapolations based solely on the fact of the Applicant's conviction, but are, however, supported by evidence in the record. The Community Assessment prepared by CSC (Applicant's Record, page 137) noted:

> The offender's parents presented as positive, pro-social individuals who have the offender's best interests in mind. It must be noted that the contacts do not appear to be fully informed in regards to the circumstances of Mr. Grant's offence. The offender greatly understated the amount of cocaine in his possession and they have no knowledge as to how such a significant amount of drugs came into his possession. The fact that 5 of Mr. Grant's co-convicted were found with similarly significant amounts of drugs is indicative of their involvement in a large scale international drug ring. From the information provided by the contacts it would appear that the offender was ignorant of his involvement and that he was an unwitting participant. It is this author's assessment that given the involvement of 7 individuals and 34 kilograms and 495 grams of cocaine, it is extremely unlikely that Mr. Grant had no knowledge of his involvement in criminal activity. However, given the information that Mr. Grant was a last minute addition to his Aunt's group traveling to Costa Rica, it is also just as unlikely that Mr. Grant was a major party in the larger conspiracy to traffic in cocaine.

[43] The reasonableness standard only requires that the Minister, having regard to all the evidence before him, make an intelligible, coherent, defensible decision. He is free to weigh the

evidence as he sees fit and, as the Respondent submits, the Minister is not bound to adopt the advice or recommendations of the CSC officials.

[44] Both parties cite *DiVito*, above, as supporting their respective positions. *DiVito* upholds a Ministerial decision not to approve an offender's transfer in spite of a CSC summary indicating that the offender did not constitute a threat to Canada's security. The facts of *DiVito* are distinguishable from the present, yet, in *DiVito* the Court recognizes that the Minister must consider and weigh evidence from various sources and take various factors into consideration, such as the objective of preventing members of criminal organizations from exercising influence in the community, when making his decision.

[45] Furthermore, as Justice Harrington stated in *Kozarov*, above, at para. 22, "Section 10 is neither all inclusive, nor does it require the Minister to either give or refuse consent depending on whether the factors set out therein are met."

[46] The Applicant plead guilty to international drug trafficking – a very serious crime that one could reasonably conclude required financing, planning and other logistics often associated with organized crime. Considering the entirety of the evidence and the discretion allowed to the Minister in making this decision, his conclusion that the Applicant will commit an organized crime offence falls within the range of possible, acceptable outcomes defensible in respect of the facts and the law.

B. *No Legal Basis to Require the Minister to Explain Other Decisions*

[47] Counsel for the Applicant acknowledged during the hearing that had Mr. Grant's co-accused been denied their transfer application, it would be improper to conclude that Mr. Grant's application be similarly denied. Counsel agreed that each case must be determined by the Minister individually on its merits and record of evidence.

[48] As an anecdote, the fact that two of Mr. Grant's co-accused transfer requests have been approved may be compelling, but as a matter of law, the doctrine of legitimate expectations is limited to procedural fairness. In *Mount Sinai Hospital v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 200 D.L.R. (4th) 193, Justice Ian Binnie affirms that the doctrine of legitimate expectation is limited to procedural relief. Furthermore, at para. 35 Justice Binnie emphasizes that although in some situations it might be difficult to distinguish between substance and procedure, "The inquiry is better framed in terms of the underlying principle mentioned earlier, namely that broad public policy is pre-eminently for the Minister to determine, not the courts." We have no idea what conditions the co-accused faced in Costa Rican prisons or what their personal circumstances were, and it is unreasonable and unnecessary to expect the Minister to list these as a justification for the outcome of the present application.

C. *Subsection 10(1)(a) Finding Not Needed to Support the Minister's Decision*

[49] While I would tend to agree with this Court's observation with respect to the meaning of "threat to the security of Canada" in *Getkate*, above, as the Respondent submits, this is not fatal to the decision of the Minister as a whole.

[50] The Minister's decision to deny the transfer remains justified based on his conclusion regarding subsection 10(2)(a).

V. Issue 2

A. *The Minister Did Not Unjustifiably Infringe the Applicant's Rights under Section 6 of the Charter*

[51] Since I have determined that the Minister's decision constitutes a reasonable exercise of discretion under *ITOA*, I need not canvass the Charter Issue.

[52] In the case at bar, the reasons articulated by the Minister are consistent with an appreciation of the totality if the evidence and an understanding of the purpose of the *ITOA*. The Minister explains the evidence he assessed and how he assessed it. The decision is justified by facts and law, and intelligible. Accordingly, the application for judicial review is denied.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	**OTTAWA**
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APPEARANCES:

Yavar Hameed	FOR THE APPLICANT
Catherine Lawrence	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Yavar Hameed Hameed & Farrokhzad Ottawa, Ontario	FOR THE APPLICANT
Myles Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT