

Federal Court



Cour fédérale

Date: 20110202

Docket: T-1876-09

Citation: 2011 FC 116

Ottawa, Ontario, February 2, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JAMES DOWNEY

Applicant

and

THE MINISTER OF PUBLIC SAFETY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This judicial review is another of the series of judicial reviews of reconsiderations by the Minister of initial decisions not to approve requests for transfer from U.S. prisons to Canadian prisons pursuant to the *International Transfer of Offenders Act*, S.C. 2004, c. 21. The overarching principles, to the extent relevant to consideration of this and related judicial reviews, are set forth in *Holmes v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112.

II. FACTUAL BACKGROUND

[2] Downey was convicted of conspiracy to import and distribute 100 kgs or more of marijuana and hash oil and sentenced to 14 years in U.S. prisons and 4 years of supervised release. Downey's primary role in the importation scheme was to recruit other participants into the scheme.

[3] The Applicant's initial application for transfer was rejected by the then Minister on August 6, 2009. In that 1st decision, the Minister described the offence and the purpose of the *International Transfer of Offenders Act*, and the requirement to examine each application on its merits. The operative part of the Minister's decision was a statement of the significant adverse impact of drugs on society and a conclusion that given the Applicant's actions, "he may, after the transfer, commit a criminal organization offence".

[4] In this regard, the Minister's conclusions were consistent with the departmental assessment.

[5] As with other cases under review, the current Minister conducted a new examination of this Applicant's request and it is that new decision which is the basis of this judicial review.

[6] In the Department's 2nd assessment provided to the Minister on the reconsideration, the Department advised that the information obtained did not lead one to believe that Downey posed a threat to Canada nor that he would, after the transfer, commit an act of terrorism or organized crime.

[7] In the Minister's 2nd decision, the Minister focused primarily on the seriousness of the crime and concluded that had it been completed successfully, it would have had long-term implications on society. Without further explanation and having noted the positive effect of family support, the Minister denied the transfer request.

III. ANALYSIS

[8] As held in related cases, the Minister's decision is subject to the reasonableness standard of review with deference to the discretion in the Minister's hands.

[9] However, in this case, it is difficult, if not impossible, to discern what the true basis of the Minister's decision is. The Minister "notes" a number of facts but does not tie these notations into relevant conclusions. The description of the crime and its possible impact on society tells one nothing about why a transfer to a Canadian prison is not warranted. This decision lacks logical reasons and does not adhere to the *Dunsmuir v. New Brunswick*, 2008 SCC 9, principles of transparency, intelligibility and acceptability.

[10] The best that the Court can divine from this recitation of facts is that the Minister believed, as did the previous Minister, that Downey might commit a criminal organization offence because of his involvement with others, his criminal record and the nature of the offence. Neither the Applicant nor the Court should be forced to speculate on the Minister's reasons to give them some legitimacy.

[11] The departmental assessment is directly to the contrary of the Minister's conclusions with respect to the likelihood of committing a criminal organization offence. While the Minister is not

bound by his Department's advice, it is incumbent on the Minister to advance his reasons for coming to a different conclusion.

[12] The difficulty with the approach taken in this case is that a series of Ministerial "notations" does not necessarily explain the reasons for the decision. In response to the Respondent's request for guidance, a more helpful approach to these notations would have been to then state what conclusion the Minister drew from them.

IV. CONCLUSION

[13] For these reasons, this judicial review will be granted, the Minister's decision quashed and the matter re-determined on its merits within 60 days of the date of judgment. The Applicant shall have his costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review is granted, the Minister's decision is quashed and the matter is to be re-determined on its merits within 60 days of the date of judgment. The Applicant is to have his costs.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1876-09

STYLE OF CAUSE: JAMES DOWNEY

and

THE MINISTER OF PUBLIC SAFETY

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 27 and 28, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** Phelan J.

DATED: February 2, 2011

APPEARANCES:

Mr. John Conroy, Q.C. FOR THE APPLICANT

Mr. Curtis Workun FOR THE RESPONDENT

SOLICITORS OF RECORD:

CONROY & COMPANY FOR THE APPLICANT
Barristers & Solicitors
Abbotsford, British Columbia

MR. MYLES J. KIRVAN FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, British Columbia