

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130225

Docket: A-39-13

Citation: 2013 FCA 55

**CORAM: SHARLOW J.A.
STRATAS J.A.
WEBB J.A.**

BETWEEN:

**MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Appellant

and

YVES LEBON

Respondent

Heard at Toronto, Ontario, on February 25, 2013.

Judgment delivered from the Bench at Toronto, Ontario, on February 25, 2013.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on February 25, 2013)

STRATAS J.A.

[1] Over four years ago, Mr. LeBon, a Canadian citizen presently in a low security jail in the United States, applied to be transferred to a Canadian facility. The *International Transfer of Offenders Act*, S.C. 2004, c. 21, permits and governs such applications.

[2] Under this Act, the Minister is to determine each application using a fixed set of factors set out in section 10 of the Act, guided by the Act's purpose, namely "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] The Minister refused Mr. LeBon's application. He found that one of the section 10 factors against transfer – the risk of commission of a "criminal organization offence" in the future – was present. All other factors raised by the evidence were in favour of transfer.

[4] This Court quashed the Minister's refusal because in his reasons he did not demonstrate a weighing of the section 10 factors, as he was required to do. In particular, he did not explain why the factors favouring transfer should not prevail. Accordingly, this Court found that the Minister did not give reasons as he was supposed to do under subsection 11(2) of the Act. Further, his reasons were not "transparent" and "intelligible," as they are supposed to be. This Court remitted the matter to the Minister for re-decision. See *LeBon v. Canada (Attorney General)*, 2012 FCA 132, rev'g 2011 FC 1018.

[5] In his re-decision, the Minister again refused Mr. LeBon's application for transfer.

[6] The Federal Court quashed the Minister's re-decision: 2012 FC 1500. The Federal Court found that the Minister "only paid lip service" to this Court's reasons, "basically reassert[ing] his previous reasoning," showing a "closed mind" and "intransigency" (at paragraphs 13 and 15). The

Federal Court also found that the refusal was substantively unreasonable: not only had the Minister failed to articulate an acceptable basis for finding there was a significant risk that Mr. LeBon would commit a “criminal organization offence,” there was no rational support in the record to support such a finding (at paragraphs 18-23).

[7] Rather than sending the matter back to the Minister, the Federal Court issued a mandatory order. It required the Minister within 45 days to accept Mr. Le Bon’s transfer request and confirm in writing to Mr. LeBon that all reasonable steps had been taken for his prompt transfer to a correctional facility in Canada.

[8] The Minister appeals to this Court. Just after the Minister launched his appeal, he sought a stay of the Federal Court’s judgment pending appeal. Although this Court noted the harm suffered by Mr. LeBon over the last four years, it granted the stay: 2013 FCA 18.

[9] In this Court, the Minister contests the Federal Court’s findings that the Minister displayed a “closed mind” and “intransigency” in his re-decision and paid “lip service” to this Court’s earlier decision. We consider these factual findings supportable on the basis of the record.

[10] In this Court, the Minister does not contest the Federal Court’s finding that his re-decision is substantively unreasonable. The only live issue placed before us is whether, as a matter of law, it was open to the Federal Court to make a mandatory order, rather than sending the matter back for another re-decision.

[11] In effect, the Minister submits that the Federal Court was constrained: all the Federal Court could do is send the matter back to the Minister, giving him a third chance to make a decision that would follow Parliament's law and the Courts' decisions.

[12] For the reasons that follow, and despite the able and professional submissions of Ms. Lawrence, counsel for the Minister, we do not accept that the Federal Court was so constrained.

[13] In their memoranda in this Court, the parties drew upon a narrow line of cases where the Federal Courts had issued "directed verdicts" to administrative tribunals: see, e.g., *Canada (Minister of Human Resources Development) v. Rafuse*, 2002 FCA 31; *Simmons v. Canada (Minister of National Revenue)*, 2006 FC 130. By direction issued in advance of the hearing of this appeal, this Court noted that this line of cases is part of the general law of *mandamus* and invited the parties to make wider submissions at the hearing concerning the availability of *mandamus* in these circumstances. We have received and considered those submissions.

[14] In our view, in these circumstances, the Federal Court had at least two sources of power to exercise its discretion in favour of making a mandatory order (*mandamus*):

- As mentioned above, the Federal Court found the Minister's conclusion that there was a significant risk that Mr. LeBon would commit a "criminal organization offence" to be unsupported by the evidence, and the Crown does not contest this. With that factor off the table, all that remained were factors supporting the transfer. In these circumstances, it was open to the Federal Court to conclude on this evidence

that the only lawful exercise of discretion is the granting of transfer. In such circumstances, *mandamus* lies: *Apotex v. Canada (Attorney General)*, [1994] 3 S.C.R. 1100, aff'g [1994] 1 F.C. 742 at pages 767-768 (C.A.) (principles 3, 4(d) and 4(e)), approved on this point in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 at paragraph 41.

- In the unusual circumstances of this case, *mandamus* is also available to prevent the further delay and harm that would be caused to Mr. LeBon if the Minister were given a third chance to decide this matter in accordance with law, in circumstances where the Minister did not follow this Court's earlier decision, paid "lip service" to it, and displayed a "closed mind" and "intransigency": see *Pointon v. British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516 at paragraph 27 (there is a jurisdiction to grant *mandamus* in exceptional circumstances where delay would result in harm); see also the authorities cited in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at paragraph 148 (there is a jurisdiction, centuries-old, to grant *mandamus* in exceptional cases of maladministration) (*per* LeBel J., dissenting, the majority not disagreeing with the existence of the jurisdiction).

[15] We also find that the Federal Court's exercise of discretion in favour of making a mandatory order against the Minister (*mandamus*) had a foundation in the evidentiary record. Thus, there is no basis for this Court to interfere with the Federal Court's exercise of discretion: *Trinity Western*, *supra* at paragraph 40.

[16] In paragraph 2 of its judgment, the Federal Court set a 45-day period for the Minister to comply with the judgment it made. This 45-day period has elapsed. In the circumstances, the Federal Court's judgment will be varied as follows:

- (a) in paragraph 2, the words "within 45 days" shall be replaced with "forthwith"; and
- (b) in paragraph 3, the words "to confirm in writing to the applicant that all reasonable steps have been taken for his prompt transfer to a correctional facility in Canada" shall be replaced by the words "the Minister is directed to do everything in his power to effect the transfer of the applicant to a correctional facility in Canada in March 2013 or, if not possible, at the earliest possible time thereafter."

[17] The appeal will otherwise be dismissed, with costs fixed at \$8,900, inclusive of disbursements and taxes.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-39-13

**APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE MARTINEAU
DATED DECEMBER 20, 2012, DOCKET NO. T-1414-12**

STYLE OF CAUSE: Minister of Public Safety and
Emergency Preparedness v. Yves
LeBon

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 25, 2013

REASONS FOR JUDGMENT OF THE COURT BY: Sharlow, Stratas and Webb JJ.A.

DELIVERED FROM THE BENCH BY: Stratas J.A.

APPEARANCES:

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