Federal Court Cour fédérale

Date: 20110202

Docket: T-1540-09

Citation: 2011 FC 115

Ottawa, Ontario, February 2, 2011

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DAVINDER SINGH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

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] Singh was a 35 year old Canadian citizen serving a sentence of 8 years and 1 month in a U.S. prison plus 3 years of supervised release. He was caught entering the U.S.A. with 3.45 kgs of marijuana and 316 pounds of ecstasy hidden in the trunk of his car.

[3] The Minister's 1st decision denied the transfer request. That decision was based, at least in part, on the departmental 1st assessment. That 1st assessment concluded that after verification from counterparts in the Security and Intelligence areas:

> … the information obtained to date does not lead one to believe that he would, after the transfer, commit an act of terrorism or criminal organization offence …. However, given the nature of the offence, it appears to be an organized crime in nature.

[4] In the 1st assessment, in dealing with the severity of the offence, the Department concluded that the Applicant may have links to a criminal organization.

[5] The Minister rejected the transfer application. The decision contained a paragraph describing the offence, a paragraph describing the purpose of the Act and the requirement to examine each application on its merits. The decision then gave the reason for rejection – the possibility of committing an organized crime offence:

> Drug trafficking is deemed to have a significant impact on the community given the possibility of an extensive victim pool of both users and non-drug users. In light of the amount of drugs, the use of accomplices and the applicant's file assessment that the applicant may have links to a criminal organization, I believe that he may, after the transfer, commit a criminal organization offence.

[Emphasis added by Court]

[6] The use of the phrase "may commit" is not consistent with s. 10(2)*(a)* of the Act. The Minister's 1st decision was issued prior to Justice Barnes' decision in *Grant v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] F.C.J. No. 386, where Justice Barnes emphasized the legal requirement to determine whether an applicant will commit a criminal organization offence.

[7] Although judicial review proceedings were commenced, as requested, the Minister undertook a reconsideration of this 1st decision.

[8] The 2nd departmental assessment concluded, with respect to the likelihood of committing a terrorism offence or criminal organization offence, that it was unlikely. On this issue the 2nd assessment concluded:

> the information obtained to date does not lead one to believe that he would, after the transfer, commit an act of terrorism or criminal organization offence, within the meaning of section 2 of the *Criminal Code*.

[9] On the matter of organized crime, the 2nd assessment dropped the reference to the offence appearing to be an organized crime offence and it concluded:

> … Intelligence information does not identify Mr. Singh as a key player or as having links to an organized crime group …

[10] In the face of the 2nd assessment, the Minister rejected the transfer application. In the 2nd decision, similar in structure to the 1st decision, the Minister identified his duty under s. 2 to

consider whether the offender will, after the transfer, commit a criminal organization offence. Whether the change in wording is more a matter of form rather than substance need not be decided. In assessing that factor, the Minister recited the facts of the offence.

[11] In the penultimate paragraph which sets out the rationale for rejection, the Minister expressed concerns for the Applicant's continuation of organized crime activities:

> I also note that the applicant was knowingly transporting a large amount of drugs. The applicant was involved in the commission of a serious offence that, if committed, would likely result in the receipt of a material, including financial, benefit by the group he assisted or any person constituting that group. This evidence leads me to have concern over the applicant's continuation of organized crime activities.

[12] The Minister may reach a conclusion which is at odds with the advice he is receiving. He may weigh stipulated and other factors differently. However, it is incumbent on the Minister to explain how he could reach the conclusion or concern.

[13] In this case, the Minister had to explain how he was concerned that the Applicant would continue his organized crime activities when the evidence was that the Applicant had no links to organized crime. The need for reasoned explanation is even more acute when the information from Correctional Service Canada's counterparts in Security and Intelligence areas, and in CSIS, did not lead the departmental advisors to believe that the Applicant would, after transfer, commit an act of organized crime.

[14] The Minister's decision does not meet the requirements for transparency, intelligibility and acceptability required under *Dunsmuir v. New Brunswick*, 2008 SCC 9. The reasons are wholly

inadequate as they leave one guessing as to how the Applicant could continue criminal organization activities when he had no links to such organizations and where there is no finding that his drug importation offence was a criminal organization offence. In these circumstances and against the background of the advice received, there is a requirement for an articulation of how the Minister reached his conclusion.

[15] The Respondent relied on a quote from *Dunsmuir* to suggest that if, in some fashion, the Minister might have been justified in rejecting the transfer application even though the reasons did not provide such justification, the Court must uphold the decision.

[16] The quote in question arises in the context of the discussion of "deference". At paragraph 48 of *Dunsmuir*, above, the Supreme Court said:

> … We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": …

[17] The reliance on "could be offered" could not mean that the Court is required to determine what the reasons should be, given the evidence. To do so would seriously undermine the standard of reasonableness based upon the existence of justification, transparency and intelligibility referred to in the previous paragraph of the *Dunsmuir* judgment.

[18] In this case, the Court must take the reasons as the Minister gave them and assess their reasonableness against the above criteria.

[19] Absent an explanation of how the Minister arrived at his conclusion in the face of the evidence set forth in the departmental assessment, the Court cannot find the Minister's decision to be reasonable. It would be pure speculation to divine how the Minister arrived at his conclusion. The Minister had a duty to explain, which duty was not met. Therefore, this Court finds the decision to be unreasonable.

III. CONCLUSION

[20] This judicial review will be granted, the decision quashed, and the matter redetermined on its merits within 60 days of the date of this judgment. The Applicant shall have his costs.

JUDGMENT

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

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. John Conroy, Q.C.	FOR THE APPLICANT
Mr. Curtis Workun	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CONROY & COMPANY Barristers & Solicitors Abbotsford, British Columbia	FOR THE APPLICANT
MR. MYLES J. KIRVAN Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT