Federal Court  Cour fédérale

**Date: 20121122**

**Docket: T-1385-11**

**Citation: 2012 FC 1351**

**Ottawa, Ontario, November 22, 2012**

**PRESENT: The Honourable Mr. Justice Rennie**

**BETWEEN:**

**JOHN McLEOD**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The combined effect of subsection 50(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) and subsections 99(1) and 128(3) the *Corrections and Conditional Release Act*, SC 1992, c 20 (*CCRA*), is that foreign nationals, incarcerated for having committed a criminal offence, are subject to removal from Canada immediately upon being granted any form of conditional release. The applicant asks this Court to find these provisions unconstitutional.

[2] A foreign national convicted of serious criminality is deported from Canada when their sentence is complete. Subsection 128(3) of the *CCRA* provides that in the case of foreign nationals convicted prior to the coming into force of the *IRPA* on June 28, 2002, the sentence is deemed complete immediately upon being granted any form of conditional release or parole. In contrast, the sentence of a Canadian prisoner continues until it is fully discharged. The applicant contends that this divergent treatment offends sections 7, 9 and 15 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*) (*Charter*).

[3] Alternatively, he seeks an order rendering these provisions inoperative in relation to him, so that if he is granted day parole (DP) or an unescorted temporary absence (UTA) statutory release or full parole, he will not be removed from Canada by virtue of the removal order issued against him pursuant to subsection 44(2) of the *IRPA*.

[4] For the reasons that follow the application is dismissed.

***Background***

[5] The applicant, John McLeod, is a citizen of Jamaica. On December 17, 2001 he was convicted of second degree murder in the killing of his girlfriend. He was sentenced to life imprisonment with no eligibility for parole for 10 years. On October 9, 2003, the Ontario Court of Appeal allowed a Crown sentence appeal and increased the period of parole ineligibility to 12 years. That same day, the Minister of Citizenship and Immigration issued a removal order against the applicant under subsection 44(2) of the *IRPA*, consequent upon a finding by the Immigration

Division that he was inadmissible on grounds of serious criminality pursuant to paragraph 36(1)(a) of the *IRPA*.

[6] On June 13, 2008 the National Parole Board (NPB) denied his application for UTA and DP. This decision was upheld by the Appeal Division of the NPB on December 1, 2008. On August 31, 2011 the applicant became eligible for full parole. He postponed the automatic full parole hearing until March 2012. The hearing did not take place and he waived his right to it. He remains in custody in a federal penitentiary.

[7] Under the *CCRA*, offenders become eligible for different kinds of conditional release over the course of their sentence. DP and UTA are part of a regime of graduated release intended to assist offenders with rehabilitation and reintegration into society. Pursuant to sections 115 and 119 of the *CCRA*, the applicant was eligible for UTA or DP three years before his full parole eligibility date (August 31, 2008) and for full parole 12 years from the date of his arrest (August 31, 2011). The applicant argues that he is deprived of the benefit of these forms of conditional release because, if granted, they result in his immediate deportation to Jamaica.

[8] The applicant is subject to deportation by reason of his serious criminal conduct. Pursuant to paragraph 50(b) of the *IRPA*, however, a removal order is stayed, *inter alia*, "in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed". However, subsection 128(3) deems the sentence of a foreign national to be completed for the purposes of paragraph 50(b) of the *IRPA* as soon as any form of conditional release is granted,

including DP and UTA. As noted, under the *CCRA*, a Canadian offender's sentence continues while he or she is on conditional release.

[9] Subsection 128(4) of the *CCRA* provides that foreign nationals convicted subsequent to the coming into force of the *IRPA* are not eligible for conditional release until eligible for full parole. The constitutionality of this provision was considered and sustained in *Capra v Canada (Attorney General)*, 2008 FC 1212. This provision does not apply to the applicant:

| | |
|---|---|
| Sentence deemed to be completed | Cas particulier |
| 128. (3) Despite subsection (1), for the purposes of paragraph 50(b) of the *Immigration and Refugee Protection Act* and section 64 of the *Extradition Act*, the sentence of an offender who has been released on parole, statutory release or an unescorted temporary absence is deemed to be completed unless the parole or statutory release has been suspended, terminated or revoked, the unescorted temporary absence is suspended or cancelled or the offender has returned to Canada before the expiration of the sentence according to law. | 128. (3) Pour l'application de l'alinéa 50b) de la *Loi sur l'immigration et la protection des réfugiés* et de l'article 64 de la *Loi sur l'extradition*, la peine d'emprisonnement du délinquant qui bénéficie d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte est, par dérogation au paragraphe (1), réputée être purgée sauf s'il y a eu révocation, suspension ou cessation de la libération ou de la permission de sortir sans escorte ou si le délinquant est revenu au Canada avant son expiration légale. |
| Removal Order | Mesure de renvoi |
| (4) Despite this Act, the *Prisons and Reformatories Act* and the *Criminal Code*, an offender against whom a removal order has been made under the *Immigration and Refugee Protection Act* is not eligible for day parole or an unescorted temporary absence until they are eligible for full parole. | (4) Malgré la présente loi, la *Loi sur les prisons et les maisons de correction* et le *Code criminel*, le délinquant qui est visé par une mesure de renvoi au titre de la *Loi sur l'immigration et la protection des réfugiés* n'est admissible à la semi-liberté ou à la permission de sortir sans escorte qu'à compter de son admissibilité à la libération conditionnelle totale. |

[10] To conclude, I adopt the summary of the legislative scheme as described by counsel for the Attorney General:

> (a) Paragraph 50(b) of *IRPA* stays the execution of a removal order until the offender's sentence is completed;
>
> (b) *CCRA* subsection 128(3) deems the sentence completed, for removal order purposes, as early as the grant of DP or UTA;
>
> (c) Offenders sentenced prior to the *IRPA* retain their original DP and UTA eligibility dates which are not delayed until their full parole eligibility date; they are also subject to removal under subsection 128(3) upon being granted DP or UTA;
>
> (d) For offenders sentenced after the coming into force of the *IRPA* in 2002, *CCRA* subsection 128(4) postpones DP and UTA eligibility for offenders subject to removal until full parole eligibility;
>
> (e) *CCRA* subsection 128(6) limits the operation of subsection 128(4), such that it does not apply where a removal order cannot be enforced due to a statutory stay arising for reasons other that the offender's existing criminal sentence.

[11] The consequence of subsection 128(4) is that foreign offenders subject to a removal order are not eligible for DP or UTA until they are eligible for full parole. The applicant was sentenced prior to the coming into force of the *IRPA* and so he is exempt from this consequence. He remained eligible for DP or UTA prior to his full parole eligibility. However, he is still subject to removal from Canada following any form of release. This remains the *gravamen* for the constitutional challenge.

[12] The applicant asserts that this scheme violates his rights under the *Charter*. The thrust of the argument is that the NPB refuses to grant any form of conditional release unless it considers the offender a candidate for full parole. The applicant contends that, without the provision deeming his sentence to be complete, the NPB would be inclined to grant some form of conditional release, for which he would be entitled to apply, before he was eligible for full parole. The result, according to

the applicant, is that foreign nationals are denied the benefits of gradual release and reintegration into society. This, in turn, heightens the risk of recidivism, thus triggering his interests under section 7 and section 9. He argues that this scheme violates sections 7, 9, and 15 of the *Charter*.

***No Factual Foundation for Charter Claim***

[13] The applicant's *Charter* arguments cannot be considered on their merits because the applicant has not established the factual foundation on which his arguments are premised. In the Notice of Constitutional Question, the applicant challenges the constitutional validity or applicability of subsections 128(3) and 99(1) of the *CCRA*, on the grounds that "the current legislative regime prevents a deportable person from experiencing certain rehabilitative measures, namely unescorted temporary absence, and day parole."

[14] In order for the applicant's *Charter* arguments to be considered he would first need to prove that he was denied DP or UTA because of those provisions. In other words, he needs to establish that he has been denied those forms of conditional release and that the reason for that denial was that he would be immediately removable to Jamaica. Without that factual foundation any argument the applicant makes about the unconstitutional effect of subsections 128(3) or 99(1) is hypothetical.

[15] The applicant was refused DP and UTA by the NPB in June 2008, not because it would, in effect, result in his removal to Jamaica and *de facto* liberty from the balance of his sentence, but because he was not a suitable candidate for any form of release. If he seeks to challenge that decision he is clearly out of time. If, on the other hand, he seeks to prevent the NPB from making

the same decision in the future, the application is premature. Either way, there is no factual basis on which to consider his arguments.

[16] The NPB found the applicant not to be a suitable candidate for any form of conditional release for multiple reasons, including his continued denial of culpability and lack of remorse, his history of violent offences against intimate partners, the assessment by Corrections Canada that he required considerable intervention and was at high risk for future domestic violence, his failure to complete a family violence program and his lack of cooperation with his Case Management Team (CMT). In sum, his motivation and reintegration potential were assessed as low, and his release would present an undue risk.

[17] The NPB decision was upheld on appeal by the NPB Appeal Division. As the respondent notes, the applicant has postponed or withdrawn all further applications for DP or UTA. Furthermore, he has made successive requests to postpone his automatic full parole review hearing, for which he became eligible on August 31, 2011.

[18] The evidence before this Court is that the applicant remains an unsuitable candidate for any form of conditional release. In preparation for the automatic full parole review hearing the applicant's CMT completed an updated Correctional Plan in February 2011. The CMT stated that the applicant had not accepted responsibility for the offence for which he was convicted, nor had he participated in risk assessments or rehabilitative programs. The CMT noted there had been no progress regarding his motivation or reintegration potential. The CMT concluded the Correctional

Plan by stating that it was "not in support of a release, on [unescorted temporary absence,] day parole, or full parole."

[19] A psychological assessment found that the applicant's "risk for recidivism is likely too high to be considered for pre-release before he addresses his risk factors through programs." The most recent evidence regarding those programs was that the applicant refused to discuss, or even acknowledge, any past incidents of family violence, which was a precondition for entering the programs.

[20] Thus, the applicant has not presented any evidence that he has been denied conditional release because it would result in his removal from Canada. Rather, the evidence, unequivocally, is that he has been denied conditional release because of his refusal to accept responsibility for the murder he was found to have committed and for his failure to participate in the recommended rehabilitative programs. In other words, he has not been denied the benefit of graduated release because of the legislation, but rather by his own conduct.

[21] To conclude, there is no factual foundation on which the *Charter* argument can be advanced. There is no nexus between the applicant's continued detention and the provisions of the *CCRA* which he seeks to impugn. The facts therefore do not support a constitutional challenge to subsections 128(3) or 99(1) of the *CCRA*, and the application is dismissed.

[22] I will nonetheless, lest this finding be incorrect, address the *Charter* arguments in the alternative.

***The Legislation is Charter Compliant***

[23] The applicant contends that his sections 7, 9 and 15 *Charter* rights are violated by the provisions of the *CCRA*, subsections 99(1) and 128(3). The effect of the legislation is to deny, to a foreign national convicted of an offence and who is also subject to an inadmissibility finding, access to Canadian society for the purposes of rehabilitation.

[24] It is clear that these provisions form a complete scheme which seeks to address the policy considerations arising from the interaction between the *IRPA* and the *CCRA*, and, more particularly, the parole eligibility of foreign nationals serving sentences of imprisonment and who are subject to a removal order. They seek to balance, as the Attorney General argues, the question as to when, having regard to the parole eligibility of Canadian offenders, it would be fair to release foreign nationals, against the objectives of paragraph 3(1)(h) of the *IRPA*, namely, protecting the safety of Canadians and paragraph 3(1)(i), the promotion of international justice and security.

[25] The legislative scheme also reflects the reality that a foreign national, once removed from Canada, is no longer subject to any form of Canadian supervision. The objective of promoting international justice and security prescribed by Parliament in paragraph 3(1)(i) of the *IRPA* would not be furthered by removing foreign nationals immediately upon conviction. In balancing these considerations, Parliament chose eligibility for UTA, DP or statutory release, or in post 2002 cases, the date of eligibility for full parole, as the time at which the foreign national's sentence would be

considered complete. This avoids the incongruity arising from a foreign offender having no ongoing supervision on return to the home country, while a Canadian would remain subject to control and supervision.

[26] The applicant's claim under sections 7, 9 and 15 of the *Charter* assumes a lawful entitlement to remain in Canada and access Canadian society. It thus proceeds on a legal premise that has been roundly rejected by the Supreme Court of Canada (SCC). Only citizens have the right to enter, remain in and leave Canada: *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711. Parliament has the right to prescribe the conditions under which foreign nationals who are convicted in Canada will be removed from Canada.

[27] Although incorporated in corrections legislation, subsection 128(3) of the *CCRA* is directed to the interface between immigration and corrections policy, specifically when a convicted foreign national will be removed from Canada. As the applicant has no right to remain in Canada, he has no right to access Canadian society under terms and conditions that are available to Canadian citizens; hence no *Charter* issue arises from the decision by Parliament to link the removal to the completion of sentence, namely the first date of some form of parole eligibility. Similarly, the objectives of promoting international security are furthered by maintaining the offender in custody until the parole eligibility date. Were offenders removed immediately after conviction, they would serve shorter sentences than a Canadian convicted for the same crime. The objectives of sentencing, both specific and general deterrence, would be undermined. Coherence and consistency is achieved as it avoids the situation where a Canadian offender could remain under supervision, but a foreign national once removed would not.

***Section 7***

[28] The applicant asserts that he is effectively denied the benefits of DP or UTA because he is subject to deportation should he be granted either form of release. This argument wrongly presumes an entitlement to those benefits. The applicant is detained by reason of his conviction and sentence for second degree murder. His continued detention is a consequence of the decision of the NPB to deny DP and UTA. There is no suggestion that either of these decisions were reached in a manner contrary to the principles of fundamental justice.

[29] As was the case in *Chiarelli*, the applicant has violated an essential condition under which he was permitted to remain in Canada. This applicant is a convicted murderer and therefore inadmissible to Canada for serious criminality. Deportation merely gives practical effect to this legal reality. It does not deprive him of anything he has not, by his own conduct, already lost. In *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539 the SCC held that the deportation of non-citizens does not itself implicate liberty and security interests protected by section 7. The section 7 argument fails.

***Section 9***

[30] The applicant contends that the denial of UTA and DP is an arbitrary detention as it prevents him from "proving himself through gradual release" and so he must stay incarcerated "indefinitely" until the NPB determines that he is eligible for full parole.

[31] Reintegration is a continuing process that begins immediately upon incarceration and continues until full release. UTA and DP are only one aspect of the process. The applicant has access to institutional programming aimed at his rehabilitation – programming which he has declined.

[32] Moreover, the applicant is not being detained by subsections 99(1) and 128(3) of the *CCRA*. The applicant remains in detention by reason of the decision of the NPB to deny DP or UTA. He was eligible for those forms of conditional release, but was not a suitable candidate. There is nothing arbitrary about that process, and the decisions of the NPB were taken on a solid evidentiary foundation.

[33] Finally, insofar as subsection 128(3) is concerned, Parliament has determined that foreign offenders must serve a certain minimum amount of their sentence. As noted, there is nothing arbitrary about the denial of conditional release to foreign nationals; rather, it is rationally connected to the objectives of sentencing in an over-arching legal context wherein the offender has no right to remain in Canada. The section 9 argument fails.

***Section 15***

[34] The crux of the applicant's argument under section 15 of the *Charter* is that he, unlike Canadian citizens convicted of serious *Criminal Code* offences, is denied the benefit under the *CCRA* of a gradual reintegration into society, thus increasing the chance of recidivism and re-incarceration. He argues that subsections 99(1) and 128(3) of the *CCRA* are directed, in their

purpose and object, to correctional policy, and not to his status as a foreign national. This characterization of subsection 128(3) is necessary to circumvent *Chiarelli* and *Medovarski*.

[35] Characterization of legislation or of specific provisions within a statute as being directed to a single policy objective, while informative, is not determinative of constitutionality. Policy challenges, in today's complex society, are rarely uni-dimensional or fit neatly into a single frame of analysis. This observation is evident here, where elements of corrections policy, immigration policy, coherence between the parole treatment of Canadians and foreign nationals, and Canada's foreign policy objective of promoting international security all intersect.

[36] It is, rather than pigeon-holing the legislation as being one "type" or another, more helpful to proceed from the scope and nature of the constitutional protection in question, in this case, section 15.

[37] The SCC held in *Chiarelli*, that section 6 permitted Parliament to discriminate between citizens and non-citizens by determining the terms and conditions of their right to enter and remain in Canada. Given this legal foundation, Parliament does not discriminate within the meaning of section 15 when it imposes a minimum time to be served in custody prior to removal. There is a distinction, true, but it is not a discriminatory distinction. The reasoning of Pratte JA in *Chiarelli v Canada (Minister of Employment and Immigration*) (FCA) [1990] FCJ No 157 was adopted by the SCC in *Chiarelli* and is apt:

> Thus, the Charter impliedly recognizes the power of Parliament to differentiate between Canadian citizens and permanent residents by imposing limits on the right of the permanent residents to remain in Canada. In exercising that power, Parliament is not guilty of

> discrimination prohibited by section 15. The situation would be different if Parliament or a Legislature were to differentiate between permanent residents and citizens otherwise than by determining the limits of the residents' right to remain in the country.

[38] In this case, subsection 128(3) is directed to when a foreign national will be removed from Canada. While that objective is situated in, and implemented through the vehicle of corrections policy, this does not mean that the underlying legal principle, articulated in *Chiarelli*, is vitiated or negated. As noted, policy choices are rarely categorized so neatly, nor does *Charter* jurisprudence require the stark characterization of legislation as having a single purpose as contended by the applicant.

[39] In any event, no infringement is established. Not all distinctions are discriminatory. In *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396, para 31, McLachlin, CJC, wrote:

> Equality is not about sameness and s. 15(1) does not protect a right to identical treatment. Rather, it protects every person's equal right to be free from discrimination. Accordingly, in order to establish a violation of s. 15(1), a person "must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory" (*Andrews*, at p. 182; *Ermineskin Indian Band*, at para. 188; *Kapp*, at para. 28).

[40] The search is for substantive inequity and the analysis is contextual, not formalistic. It is grounded in the actual situation of the group and the potential of the impugned law to worsen their situation; *Withler*, para 37. The question, therefore, is whether subsections 99(1) and 128(3) violate the guarantee of substantive equality; *Withler*, para 39:

> Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

[41] In sum, the mere identification of distinction does not equate to discrimination. Since the applicant has no right to remain in Canada there can be no differential treatment. A Canadian citizen has a right to remain in Canada. Therefore, a foreign national and a national are not, for the purposes of section 15 of the *Charter*, comparators. More is required beyond the formal comparison between a mirror comparator group, in this case between a Canadian and a foreign national serving life sentences. What is required is a contextual analysis that has as its target, the determination whether the measure perpetuates a negative stereotype or disadvantage. The provisions in question fall short of that test. As between immediate removal from Canada or parity of treatment with Canadians, the provisions do not create a substantive inequity.

[42] The question of equality is necessarily contextual, and part of the context is the legal status of a foreign national. The applicant's section 15 argument, in essence, urges the Court to take a de-contextualized approach, and to ignore this legal position. To examine the applicant's section 15 interests in pristine isolation, divorced from the legal attributes of a foreign national, would be contrary to the analytical framework governing section 15.

[43] Moreover, the applicant is not denied the benefits of UTA and DP because of his citizenship, but rather because of his citizenship combined with his conviction for second degree murder. Serious criminality is not an immutable personal characteristic.

[44] In any event, even if the threshold question of a discriminatory distinction were established, the provisions are saved by section 1. Subsection 128(3) of the *CCRA* is part of the architecture of a scheme that addresses the question of when foreign nationals should be deported. It links the removal to the time sentence is complete and deems the sentence to be complete when the prisoner is granted any form of parole. He could be removed immediately on conviction, but Parliament has, in balancing the policy considerations, deferred that removal to the granting of parole. The objectives of specific and general deterrence are furthered, and reinforce the *IRPA* objective of promotion of international security.

[45] The section 15 argument fails.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

Costs to the respondent.

"Donald J. Rennie"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1385-11 |
| **STYLE OF CAUSE:** | JOHN McLEOD v THE ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | June 19, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | RENNIE J. |
| **DATED:** | November 22, 2012 |

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| Jeffrey G. Johnston | FOR THE RESPONDENT |

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