Date: 20070704

Docket: T-1570-06

Citation: 2007 FC 693

Ottawa, Ontario, July 4, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

JOHN CHAIF

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Chaif, was convicted on May 28, 1983 of the first degree murder of his spouse and sentenced to life imprisonment without the possibility of parole for 25 years. Now 52 years old, the applicant would have ordinarily been eligible for parole as of May 1, 2008. However, on June 13, 1988, the applicant escaped from custody at the Collins Bay Institution and remained at large until he was arrested in Tennessee on July 6, 1989. He was subsequently convicted by the United States District Court for the Western District of Tennessee of armed bank robbery and sentenced to imprisonment for 168 months.

[2] On March 22, 1994, while serving his sentence at the United States Penitentiary at Leavenworth, Kansas, the applicant applied under the *Transfer of Offenders Act*, R.S.C. 1985, c. T-15 (the Transfer Act), to transfer to Canada the remainder of his sentence in the United States. On July 27, 1995, his transfer application was approved, and the applicant was transferred to Canada on September 21, 1995.

[3] In accordance with subsection 139(1) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the Corrections Act), the unexpired portion of the applicant's United States sentence was merged with his previous life sentence in Canada. At the time of his escape in 1988, the applicant had 7262 days remaining in his sentence before being eligible for parole. The parties agree that, when the applicant escaped from custody on June 13, 1988, the "sentencing clock" on the applicant's Canadian sentence stopped running.

[4] At issue in this application for judicial review is when the sentencing clock restarted. According to Correctional Services Canada (CSC), the sentencing clock resumed only upon the applicant's transfer to Canada on September 21, 1995. The applicant's parole eligibility date, as the Commissioner determined in the decision under review, is therefore changed from May 1, 2008 to August 9, 2015. The applicant originally argued that he was entitled to credit for the time he served in custody in the United States or after applying to be transferred to Canada on March 22, 1994. At the hearing, the applicant conceded that he was not entitled to credit for the time he served in custody in the United States or the time served in the United States after applying to be transferred to Canada. Rather, the applicant submitted that the only issue is whether the applicant is entitled to

credit for the time he served in custody in the United States for the 57 days between the time his transfer application was approved by CSC and the time he physically returned to a prison in Canada.

DECISION UNDER REVIEW

[5] When the applicant returned to Canada, CSC re-calculated the applicant's parole eligibility date from May 1, 2008 to August 9, 2015. The applicant filed a third level grievance challenging CSC's calculation of his eligibility date. In a decision dated August 16, 2006, the Commissioner denied the applicant's grievance:

> Mr. Chaif, your third-level grievance which you submitted through your lawyer Mr. Hill regarding your sentence calculation has been reviewed. Considered in this response were your OMS files, relevant policy, and legislation. Consultation occurred with Ms. Millbury from Ontario Sentence Administration, your Parole Officer Ms. Lazette, Mr. Hill and yourself.
>
> You indicate that there is a concern with your sentence calculation as a result of application of the *Transfer of Offenders Act*. You were serving a life sentence at Collins Bay Institution when you absconded to the United States and were re-arrested 387 days later. While in the United States you incurred new convictions adding approximately 168 months to your sentence.
>
> You are grieving that the "sentencing clock" stopped for the entire period of time you were in the United States. You contend that the "sentencing clock" should have commenced again from the time you made application to return to Canada and not from your actual return to the country. Mr. Hill notes prior legal precedent in a similar case to yours, in which the time spent in foreign custody was not counted towards the sentence. He states that you made efforts to return to Canada but were prevented from doing so.
>
> A review of the information available indicates that your application form 614 was received on 1994-05-06, and was incomplete; however, the processing of your transfer commenced on that date. A

subsequent application form 308 was received on 1995-06-09 and your transfer was completed on 1995-09-21.

The *Criminal Code of Canada* section 719 subsection 2 states:

> Any time during which a convicted person is unlawfully at large or is lawfully at large on interim release granted pursuant to any provision of this Act does not count as part of any term of imprisonment imposed on the person.

Commissioner's Directive 704 *International Transfers* paragraph 14(c) states:

> Upon receipt of an application for transfer to Canada, the International Transfer unit will ensure that: the sentence is one that can be administered under the laws and procedures of Canada, including the application of any provision for reduction of the term of confinement by parole, statutory release or otherwise;

CD 704 paragraph 16 states:

> The Assistant Deputy Commissioner, Operations will ensure that sentence calculations requested for international transfers are provided to the International Transfer Unit within 30 days of reception of the calculation request.

As was discussed with you during your interview, the case you presented represents the basis for determining sentence calculation for offenders who illegally leave the country and are apprehended and serve a sentence in foreign custody. There is currently no provision in the law for altering sentence calculation based on your intention to return to Canada. The issue that has been addressed in the case you referenced clearly identifies that a Canadian Sentence is to be served in a Canadian Penitentiary. While you raise, other cases where the "sentencing clock" continues to count while a person serving a Canadian sentence is in foreign custody, the situations you describe differ significantly from your case, in that these individuals did not abscond from the country, but were rather demanded to be present in foreign custody and the Canadian authorities made them available.

Your grievance is denied.

ISSUE

[6] The issue in this application for judicial review is whether the Commissioner erred in denying the applicant's third level grievance by refusing to grant him credit towards his period of parole ineligibility for the 57 days he spent in custody in the United States after being approved for transfer to a Canadian prison and physically being transferred.

RELEVANT LEGISLATION

[7] The legislation relevant to this application for judicial review is:

1. the *Transfer of Offenders Act*, R.S.C. 1985, c. T-15;
2. the *Corrections and Conditional Release Act*, S.C. 1992, c. 20; and
3. the *Criminal Code*, R.S.C. 1985, c. C-46.

STANDARD OF REVIEW

[8] In determining the appropriate standard of review, the Supreme Court of Canada held in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at paragraph 26 that the Court must undertake a pragmatic and functional approach:

> [...] In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors -- the presence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question -- law, fact, or mixed law and fact [...]

As stated by Linden J.A. in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404:

> ¶ 46 …[T]he pragmatic and functional analysis must be undertaken anew by the reviewing Court with respect to each decision of an

> administrative decision-maker, not merely each general type of decision of a particular decision-maker under a particular provision.

[9] As I stated in *Macdonald v. Canada (Attorney General)*, 2005 FC 1326 at paragraph 38:

> The first factor the Court must consider is the presence or absence of a privative clause or statutory right of appeal. The Act does not contain a privative clause insulating the Commissioner's decisions made pursuant to the grievance process, nor does the Act provide a route of appeal for the Commissioner's decision. Accordingly, this factor is neutral.

[10] The second factor to consider is the expertise of the decision-maker relative to the Court. It is well established that the Commissioner has specialized expertise in matters related to prison administration: see, e.g., *Tehrankari v. Canada (Correctional Service)*, [2000] F.C.J. No. 495, 188 F.T.R. 206, 38 C.R. (5th) 43; *MacDonald*, above. With respect to the subject matter of this particular grievance, however, the Commissioner is not called upon to apply expertise in prison management. Rather, the decision under review concerns a question of statutory interpretation in respect of which the Court enjoys relative expertise. Accordingly, this factor suggests less deference.

[11] The third factor to consider is the purpose of the applicable legislation. As I stated in *MacDonald*, above, at paragraph 40:

> The overall objective of the Act is set out in section 3:
>
> > 3. The purpose of the federal correction system is to contribute to the maintenance of the just, peaceful and safe society

> a) carrying out sentences imposed by the Courts through the safe and humane custody and the supervision of offenders and
> (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.
>
> The Act recognizes the necessity of the CSC to oversee its own internal administrative matters, as evidenced by the three-level grievance procedure set out in sections 90-91 of the Act and sections 72-84 of the Regulations pursuant to which inmates may seek redress.
>
> [Emphasis added]

The objective of the Corrections Act to carry out the sentence imposed on the applicant by the Courts is, in the context of this grievance, satisfied only through the proper interpretation of the extent of the applicant's period of parole ineligibility. Insofar as giving effect to the purpose of the Act engages the Courts' relative expertise with respect to issues of statutory interpretation, this factor suggests a less deferential approach.

[12] The fourth factor to be addressed is the nature of the question: whether it is one of law, fact, or mixed law and fact. To the extent that the issue raised in the grievance involved factual elements, those facts were not in dispute. What remains is a pure question of law, namely namely whether the applicant was "unlawfully at large" within the meaning of subsection 719(2) of the *Criminal Code* when he was serving his sentence in the United States. The Court is well suited to determine issues of statutory interpretation and owes no deference to the Commissioner's decision in this regard.

[13] Having regard to the four factors, the Commissioner's decision to deny the applicant's grievance on the basis that he is not entitled to credit for time served abroad should be assessed on the correctness standard.

ANALYSIS

[14] The computation of the applicant's sentence is governed by subsections 719(1) and (2) of the *Criminal Code*:

Commencement of sentence	**Début de la peine**
719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.	**719.** (1) La peine commence au moment où elle est infligée, sauf lorsque le texte législatif applicable y pourvoit de façon différente.
Time at large excluded from term of imprisonment	**Exclusion de certaines périodes**
(2) Any time during which a convicted person is unlawfully at large or is lawfully at large on interim release granted pursuant to any provision of this Act does not count as part of any term of imprisonment imposed on the person.	(2) Les périodes durant lesquelles une personne déclarée coupable est illégalement en liberté ou est légalement en liberté à la suite d'une mise en liberté provisoire accordée en vertu de la présente loi ne sont pas prises en compte dans le calcul de la période d'emprisonnement infligée à cette personne.

[15] The respondent argues that the applicant was "unlawfully at large" from June 13, 1988, when the applicant escaped custody from Collins Bay Institution, to September 21, 1995, when he was transferred to Canada from the United States.

[16] The facts in this case are similar to those considered by the Federal Court of Appeal in *Leschenko v. Canada (Attorney General)*, [1983] 1 F.C. 625:

> 1. On December 20, 1975, the appellant escaped from a Canadian penitentiary where he was serving a term of imprisonment for crimes committed in Canada. At the time of his escape, he had an unserved balance of imprisonment of approximately 20 years.
>
> 2. On February 18, 1976, the appellant was arrested in the United States and taken into custody. On June 11, 1976, he was sentenced by an American court to 15 years of imprisonment for crimes committed in the United States.
>
> 3. Subsequent to his conviction and sentence in the United States, the appellant was returned to Canada pursuant to the *Transfer of Offenders Act*, S.C. 1977-78, c. 9. He had then spent nearly three years in custody in the United States.
>
> 4. Following the appellant's return to penitentiary confinement in Canada, the authorities responsible for the interpretation and computation of sentences determined that the appellant still had to serve concurrently the unserved portion, at the time of his escape, of sentences pronounced against him in Canada (some 20 years) and the unserved portion of his American sentence (some 12 years). They refused to give credit to the appellant against the time remaining to be served on his Canadian sentences for the period of nearly three years that he had spent in custody in the United States.

[17] In *Leschenko*, above, Justice Pratte stated on behalf of a unanimous Court at page 629:

> When the appellant was in custody in the United States, he was illegally outside of the Canadian penitentiary where he was to serve the sentences that had been pronounced against him. <u>At common law, the time during which a prisoner is unlawfully at large does not count as part of his term of imprisonment.</u> [*Re MacDonald and Deputy Attorney-General of Canada* (1981), 59 C.C.C.(2d) 202 (Ont. C.A.); *R. v. Dozois* (1981), 61 C.C.C. (2d) 171, 22 C.R. (3d) 213 (Ont. C.A.); *R. v. Law* (1981), 63 C.C.C. (2d) 412, 24 C.R. (3d) 332 (Ont. C.A.)] <u>This is so, in my view, even if part of that time was spent in custody in a foreign state, since a Canadian sentence to imprisonment must be served in a Canadian prison.</u>
>
> [Emphasis added]

[18] The Federal Court of Appeal in *Leschekno,* above, also considered sections 4 and 11 of the *Transfer of Offenders Act* and subsection 14(1) of the *Parole Act.* After reviewing these provisions as they read at the time of Leschenko's escape, Justice Pratte rejected at page 631 the appellant's argument that the period of imprisonment abroad should be considered time spent in a Canadian institution:

> Counsel for the appellant argued, as I understood him, that since the sentence pronounced against the appellant in the United States is deemed by section 4 of the *Transfer of Offenders Act* to be a sentence of a Canadian court, it follows that the time during which the appellant was in confinement in the United States pursuant to the sentence of the American court must be deemed to have been spent in a Canadian penal institution pursuant to the sentence of a Canadian court. I do not agree. That submission was, in my view, correctly dismissed by the Associate Chief Justice whose judgment on this point was approved by the Court of Appeal of Ontario in *The Queen v. Dozois* [above]. The *Transfer of Offenders Act* provides that a Canadian offender may serve in Canada a sentence imposed by a court of a foreign country; the purpose of sections 4 and 11 is to determine the time that a Canadian offender who is transferred to Canada will have to spend in confinement in Canada as a result of the sentence imposed by the foreign court. <u>These provisions have no incidence, in my opinion, on the computation of sentences previously pronounced by Canadian courts.</u>
>
> [Emphasis added]

[19] Sections 4 and 11 of the *Transfer of Offenders Act,* as they read on the date of the applicant's transfer, state:

Effect of transfer	**Conséquence du transfèrement**
4. Where a Canadian offender is transferred to Canada, his finding of guilt and sentence, if any, by a court of the foreign state from which he is transferred is deemed to be a finding of guilt and a sentence imposed by a court of competent jurisdiction in Canada for	**4.** Lorsqu'un délinquant canadien est transféré au Canada, sa déclaration de culpabilité et sa sentence, le cas échéant, par un tribunal de l'État étranger d'où il est transféré sont présumées être celles qu'un tribunal canadien compétent lui aurait

a criminal offence. [....]

imposées pour une infraction criminelle. […]

Remission

11. (1) A Canadian offender transferred to Canada

(a) shall be credited with any time toward completion of his sentence that was credited to him at the date of his transfer by the foreign state in which he was convicted and sentenced; and

(b) is eligible to earn remission as if he had been committed to custody on the date of his transfer pursuant to a sentence imposed by a court in Canada.

Forfeiture

(2) Any time referred to in paragraph (1)(a) credited to a Canadian offender who is subject to the *Prisons and Reformatories Act*, except time actually spent in confinement pursuant to the sentence imposed by the foreign court, is subject to forfeiture for a disciplinary offence as if it were remission credited under that Act.

Réduction de peine

11. (1) Un délinquant canadien transféré au Canada :

a) bénéficie des remises de peine que lui a accordées l'État étranger ou il fut déclaré coupable et condamné calculées au jour de son transfèrement;

b) peut bénéficier d'une réduction de peine comme s'il était incarcéré le jour de son transfèrement conformément à une condamnation prononcée par un tribunal canadien.

Déchéance

(2) Les remises de peines mentionnées à l'alinéa (1)a) acquises par un délinquant canadien assujetti à la *Loi sur les prisons et les maisons de correction*, sauf celles accordées pour le temps véritablement passe en détention conformément à la sentence que lui a imposée le tribunal étranger, sont sujettes à déchéance pour une infraction disciplinaire comme s'il s'agissait de réductions de peine acquises en vertu de cette loi.

[20] It is well established in the jurisprudence that no credit is to be given towards an unexpired sentence in Canada for time served in custody abroad: see, e.g., *Leschenko*, above; *Dozois*, above; *Re McClarty* (1990), 58 C.C.C. (3d) 211 at 213; *Charron v. Canada (Attorney General)*, 2005 FCA 442 at paragraph 34; *Jolivet v. Canada (Attorney General)*, 2006 FC 811 at paragraphs 14-16. Moreover, the credit contemplated in section 11 of the *Transfer of Offenders Act* is a credit toward

the completion of a U.S. sentence at the date of transfer from the U.S. to a Canadian prison. The *Transfer of Offenders Act* as Justice Pratte stated in *Leschenko*, above, has no effect on the computation of the unexpired Canadian sentence.

[21] For the reasons above, I conclude that the Commissioner did not err in denying the applicant's third level grievance by refusing to grant him credit towards his period of parole ineligibility for the time he spent in custody in the United States after his application for transfer had been approved. Accordingly, this application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1570-06
STYLE OF CAUSE:	JOHN CHAIF and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 25, 2007
REASONS FOR JUDGMENT:	KELEN J.
DATED:	July 4, 2007

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