Federal Court		Cour fédérale

Date: 20100312

Docket: T-1568-09

Citation: 2010 FC 290

Ottawa, Ontario, March 12, 2010

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

DAVID R. JOLIVET

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision rendered August 11, 2009, by Marc-Arthur Hyppolite, Senior Deputy Commissioner for the Correctional Service of Canada ("CSC") dismissing the third level grievance of the Applicant with respect to the calculation of his statutory release date ("SRD") pursuant to section 11.1(2)(b) of the *Transfer of Offenders Act*, R.S.C. 2004, c. 21 ("TOA").

I. The Facts

[2] On March 20, 1979, the Applicant began serving a Canadian federal penitentiary term of nine (9) years, nine (9) months pursuant to his conviction for two counts of robbery.

[3] On November 11, 1984, the Applicant escaped from the Matsqui Institution in Abbotsford, British Columbia, while on an authorized unescorted absence.

[4] On December 6, 1984, the Applicant was arrested in the United States and on April 16, 1985, he was sentenced by the Utah authorities to an indeterminate sentence of life imprisonment for aggravated kidnapping, sexual assault, rape, aggravated robbery and forcible sodomy. He was subsequently convicted of two federal offences on December 5, 1994 and January 5, 1995, for which he received additional sentences of 41 and 36 months, respectively, to be served consecutively to the indeterminate sentence.

[5] The Applicant subsequently applied for transfer to Canada to serve the remainder of his sentences. This was approved and took effect on July 23, 2003. On May 21, 2004, the Utah Board of Pardons changed the Applicant's sentence from an indeterminate to a determinate sentence of 29 years with a warrant expiry on February 12, 2009.

[6] In order to determine the amount of time the Applicant would be required to serve in Canada, CSC calculated the total number of days left to serve on the Applicant's American sentence. Pursuant to section 127(3) of the *Correctional and Conditional Release Act*, S.C. 1992,

Chap. 20 (“CCRA”), the Applicant must serve the equivalent of two-thirds of his American sentence in Canada, which added up to April 20, 2011.

[7] The Applicant challenged this calculation of his SRD by commencing five (5) grievances, the last one being the subject of the present judicial review (V80A00023125). The Applicant previously commenced a judicial review pursuant to the first grievance. On June 26, 2006, the Justice Blais of the Federal Court (as he then was) dismissed the Applicant’s judicial review. The Applicant commenced an appeal of Justice Blais’ decision, which was dismissed by the Federal Court of Appeal on May 11, 2007. The Federal Court of Appeal confirmed that CSC correctly calculated the Applicant’s SRD.

II. Point in Issue

[8] The principal issue raised by the Applicant is the fact that he would be entitled to the maximum amount of earned remission under section 11 of the TOA in order to calculate his SRD. He also raises the applicability of subsection 127(2)(b) of the CCRA, an argument that was not part of the fifth grievance, but that was dealt with as part of the fourth grievance procedure for which no judicial review of the final decision was sought.

[9] The Respondent, the Attorney General of Canada, objects to this judicial review and submits that the Applicant’s issue in relation to his SRD calculation is *res judicata.* As such, the Applicant should be barred from proceeding with this judicial review and the issue should not be considered by this Court.

[10] For the reasons that follow, this Court finds that the application for judicial review is *res judicata* as the requirements of issue estoppel are met in this case. This Court finds that the application for judicial review is dismissed. Despite the finding of *res judicata*, the multiplicity of the proceedings dealing solely with the calculation of the SRD is also commented upon.

III. Analysis

[11] The Applicant has consistently questioned the calculation of his SRD since it was calculated on July 14, 2005.

[12] The Applicant has filed five (5) grievances on the SRD calculation which considers remission time, if any. He has also sought, without success, judicial review of the SRD calculation. The Federal Court and the Federal Court of Appeal have both dismissed his requests.

[13] Through his multiplicity of grievances and legal challenges of the calculation of his SRD, the Applicant relies on different legal arguments to attain his goal, which is to shorten his sentence. Applicable to all of the grievances is a requirement to bring the entire case forward. The Applicant cannot bring different parts of his case at different times since this opens the door to numerous litigious proceedings. As stated by the Federal Court of Appeal in *Rosenstein v Atlantic Engraving Ltd.*, 2002 FCA 503, "[a] party must put its best case forward at the first opportunity" (see at para. 9).

[14] After reviewing both the Federal Court and the Federal Court of Appeal judgments referred to above in relation to the calculation of the SRD and to some extent remission time, I conclude that the Applicant has already had the issue dealt with by the Federal Courts. To now state that he had not fully uncovered all of the issues when the first judicial review was dealt with is not acceptable.

[15] There are no new material facts; the calculation of the SRD was known to him then. To now justify another judicial review on the basis that there may be a new way to do the SRD calculation including remission time is not acceptable. There are no special circumstances to justify such an argument. Finally, there are good and valid facts to argue that the issue is *res judicata*.

[16] It is trite law that when an issue has been decided in a previous proceeding, estoppel applies. The requirements are as follows: (1) the same question has been decided; (2) the decision was final; and (3) the parties are the same (see *Angle v. Minister of National revenue* [1975] 2 S.C.R. 248 at page 254).

[17] In *Grandview v. Doering*, [1976] 2 S.C.R. 621 at page 634, Richie J. quotes a passage from Vice-Chancellor Wigram where he explains that *res judicata* applies:

> "not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time".

In not bringing the mere existence of remission to the attention of the trial judge, the Applicant has missed the opportunity to put his best case forward. The question is therefore the same as the one

previously decided upon, which is the CSC's determination of the Applicant's SRD. I therefore find that the first requirement of issue estoppel has been met.

[18] The two last requirements of issue estoppel are clearly met: the judgment of the Federal Court of Appeal is final and the present litigation deals with the same parties.

[19] Furthermore, one of the issues dealt with by the Federal Courts was whether CSC erred in calculating the SRD and the question of federal credits with regard to remission time. Both Courts dismissed the judicial review.

[20] This makes it clear that the present litigation is *res judicata*.

Multiplicity of proceedings

[21] Regardless of the fact that the present judicial review is *res judicata*, the Applicant argues that his SRD should be earlier than April 20, 2011, because he considers that he is entitled to remission on his Canadian sentence. He argues that CSC did not take into account that he had served five (5) years of his nine (9) year sentence, which would have begun in March 1979.

[22] It is to be noted that through the fifth grievance leading to the present judicial review, the Applicant argued entitlement to remission based on section 11.1(2) of the TOA. In his Memorandum of Fact and Law, he relies on section 127(2)(b) of the CCRA.

[23] The Applicant cannot, after a final decision on a grievance has been rendered, seek a judicial review of this decision on a different legal ground. The judicial review of this decision has to deal with the matters as they were presented before the decision-maker.

[24] In its decision of August 11, 2009, CSC explained that:

- the Federal Court reviewed the Applicant's SRD calculation;
- the Federal Court reviewed the application of the TOA, including ss. 11.1 and 12;
- after the Court proceedings, CSC reviewed the Applicant's SRD calculation in grievance #V80A00015687, which was denied on the basis that the Federal Court and the Federal Court of Appeal confirmed that CSC accurately calculated the Applicant's SRD;
- the Applicant had already grieved earned remission in grievance #V80A00015687;
- although the Applicant claims he is raising a new issue with regard to the application of s. 11.1(2) of the TOA, the Federal Court reviewed the application of the TOA to his sentence calculation;
- grievance #V80A00015687 reviewed the SRD calculation and determined that it was done correctly;
- the second level grievance decision appropriately denied the grievance since the issues surrounding his sentence calculation have been fully reviewed at all levels of redress; and,

- the second level grievance was rejected in accordance with the *Offender Complaint and Grievance Procedure Manual*, which states that a complaint/grievance can be rejected when the issue has already been responded to in a previous complaint/grievance.

[25] As it appears clearly from that decision, CSC dealt with all the matters brought up by this fifth grievance and clearly concluded that the SRD calculation had been dealt with and had been the subject of judicial review by the Federal Court and by the Federal Court of Appeal. It is noteworthy that both courts approved the calculation of the SRD and the question of remission time was referred to (see para. 16 of the Federal Court reasons for judgment and paras. 9, 10, 16 and 18 of the Federal Court of Appeal judgment).

[26] This is sufficient to terminate the matter and dismiss the judicial review of the decision dated August 11, 2009.

IV. Conclusion

[27] The August 11, 2009 CSC decision stands. The CSC's calculation of the Applicant's SRD has been previously determined to be April 20, 2011. The Applicant should have presented his case fully and in any event the application for judicial review, as it clearly meets the requirements of issue estoppel, is *res judicata.*

V. Costs

[28] The Applicant has asked not to grant costs against him if such an award could be granted. He pleaded to the Court that no other procedures would take place after this judgment, that there would be no appeal, and that therefore no costs should be granted. On that basis, and in accordance with subsection 400(1) of the *Federal Courts Rules* (SOR/98-106), I will not award costs against the Applicant.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT:

This application for judicial review is dismissed and no costs are awarded.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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