Federal Court  Cour fédérale

Date: 20110530

Docket: T-1299-10

Citation: 2011 FC 602

Ottawa, Ontario, this 30th day of May 2011

Present: The Honourable Mr. Justice Pinard

BETWEEN:

NELSON DUARTE

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Minister of Public Safety and Emergency Preparedness, brought pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, by Nelson Duarte (the "applicant"). The decision was in respect of the applicant's application

to transfer to Canada from the United States pursuant to section 10 of the *International Transfer of Offenders Act*, S.C. 2004, c. 21 (the "Act").

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[2] The applicant was born on March 17, 1974 in Mozambique, and immigrated to Canada in 1986. He became a citizen in 2001. He has three sisters who live in Ontario.

[3] The applicant resided in Canada prior to his arrest and incarceration. He is a licensed mechanic, and was employed from 2000 to 2008 with Nabet 700 Film Union in Toronto, setting up lighting. He has a common-law wife in Georgetown, Ontario, and helped to care for her son from a previous relationship. He allegedly traveled to Fort Worth, Texas, on the day of his arrest for the purpose of committing the offence.

[4] The applicant is serving a sentence of imprisonment of six years in Big Spring Correctional Institution in Big Spring, Texas, for the offences of conspiracy to possess with intent to distribute more than five kilograms of cocaine, and criminal forfeiture. On May 1, 2008 the applicant was apprehended in Fort Worth, Texas, along with an accomplice, while attempting to purchase a large quantity of cocaine valued at $960,000. He pled guilty to the charges and was sentenced to 72 months' imprisonment, 3 years of supervised release and a $100 special assessment fee. His request for transfer was approved by the United States on March 23, 2009.

[5] The applicant is presently being held in a minimum security facility. His application to transfer to Canada was refused on July 19, 2010.

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[6] In his decision, the Minister noted that the purposes of the Act are 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, thereby enhancing public safety in Canada.

[7] The Minister noted that the Act required him to consider whether, in his opinion, after the transfer, the applicant will commit a criminal organization offence within the meaning of section 2 of the *Criminal Code*, R.S.C. 1985, c. C-46. The Minister noted that the applicant worked with an accomplice and that the file and the nature of their activity suggested that other accomplices were involved who were not arrested. The applicant had ties with a since disbanded Canadian criminal organization, and has a Canadian criminal record (theft under $1,000, possession of property obtained by crime under $1,000, assault, and assault with a weapon). In the present case he was involved in the commission of a serious offence that would likely have resulted in the receipt of a material or financial benefit by the group he assisted.

[8] In considering whether the applicant's return to Canada would constitute a threat to the security of Canada, the Minister noted the applicant's role in a drug trafficking offence, the serious nature of the offence and the amount of drugs involved. It was a premeditated criminal enterprise

involving multiple actors and could have had long-term implications on society. While the applicant's family and friends remain supportive, the Minister concluded that a transfer would not achieve the purposes of the Act.

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[9] The following provisions of the *International Transfer of Offenders Act* are relevant:

Purpose

3. The purpose of this Act is 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.

Factors — Canadian offenders

10. (1) In determining whether to consent to the transfer of a Canadian offender, the Minister shall consider the following factors:

(*a*) whether the offender's return to Canada would constitute a threat to the security of Canada;

(*b*) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;

(*c*) whether the offender has social or family ties in Canada; and

(*d*) whether the foreign entity or its prison system presents a serious threat to the offender's security or human rights.

Objet

3. La présente loi a pour objet de faciliter l'administration de la justice et la réadaptation et la réinsertion sociale des délinquants en permettant à ceux-ci de purger leur peine dans le pays dont ils sont citoyens ou nationaux.

Facteurs à prendre en compte : délinquant canadien

10. (1) Le ministre tient compte des facteurs ci-après pour décider s'il consent au transfèrement du délinquant canadien :

a) le retour au Canada du délinquant peut constituer une menace pour la sécurité du Canada;

b) le délinquant a quitté le Canada ou est demeuré à l'étranger avec l'intention de ne plus considérer le Canada comme le lieu de sa résidence permanente;

c) le délinquant a des liens sociaux ou familiaux au Canada;

d) l'entité étrangère ou son système carcéral constitue une menace sérieuse pour la sécurité du délinquant ou ses droits de la personne.

Factors — Canadian and foreign offenders

(2) In determining whether to consent to the transfer of a Canadian or foreign offender, the Minister shall consider the following factors:

(*a*) whether, in the Minister's opinion, the offender will, after the transfer, commit a terrorism offence or criminal organization offence within the meaning of section 2 of the *Criminal Code*; and

(*b*) whether the offender was previously transferred under this Act or the *Transfer of Offenders Act*, chapter T-15 of the Revised Statutes of Canada, 1985.

Facteurs à prendre en compte : délinquant canadien ou étranger

(2) Il tient compte des facteurs ci-après pour décider s'il consent au transfèrement du délinquant canadien ou étranger :

a) à son avis, le délinquant commettra, après son transfèrement, une infraction de terrorisme ou une infraction d'organisation criminelle, au sens de l'article 2 du *Code criminel*;

b) le délinquant a déjà été transféré en vertu de la présente loi ou de la *Loi sur le transfèrement des délinquants*, chapitre T-15 des Lois révisées du Canada (1985).

[10] The following provision of the *Criminal Code* is also relevant:

Definitions

2. In this Act,

"criminal organization offence" means

(*a*) an offence under section 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization, or

(*b*) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (*a*);

Définitions

2. Les définitions qui suivent s'appliquent à la présente loi.

« infraction d'organisation criminelle »

a) Soit une infraction prévue aux articles 467.11, 467.12 ou 467.13 ou une infraction grave commise au profit ou sous la direction d'une organisation criminelle, ou en association avec elle;

b) soit le complot ou la tentative en vue de commettre une telle infraction ou le fait d'en être complice après le fait ou d'en conseiller la perpétration.

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[11] The only issue in this application is whether the Minister's decision is reasonable.

[12] In *Curtis v. Minister of Public Safety and Emergency Preparedness*, 2010 FC 943 at para 28, Justice John O'Keefe canvassed the jurisprudence on this issue and found that the standard of review applicable to a decision taken by the Minister pursuant to section 10 of the Act is that of reasonableness. The Minister's decision is afforded a high degree of discretion (*Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 866, [2008] 2 F.C.R. 377 (F.C.) at para 14; *Getkate v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 965, [2009] 3 F.C.R. 26 (F.C.) at para 11; both citing *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

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[13] At the hearing before me, counsel for the applicant indicated that the constitutional issues originally intended to be argued in this case have been decided upon by the Federal Court of Appeal in *Divito v. Minister of Public Safety and Emergency Preparedness*, 2011 FCA 39, and are therefore no longer in question. The Court of Appeal determined that while the Act does infringe an offender's constitutional rights under section 6 of the *Canadian Charter of Rights and Freedoms*, this infringement is justified under section 1.

[14] The applicant submits that the Minister erred in coming to the conclusion that the applicant "will" commit a criminal organization offence within the meaning of section 2 of the *Criminal Code*

if he is returned to Canada. The applicant essentially argues that the information or evidence before the Minister did not reasonably support this conclusion.

[15] The applicant contends that his previous criminal record is dated and unrelated to the present offences: two convictions were as a young offender and the assault convictions were in 1993. He has never previously been charged or convicted of a criminal organization offence. The applicant notes that he pled guilty to the current offence and has accepted responsibility for it; he submits that he is remorseful and has the strong support of his family and friends.

[16] The applicant further notes that the Correctional Service of Canada's (CSC) report on its verification with security and intelligence agencies advised that the information obtained did not lead them to believe that the applicant posed a threat to the security of Canada, nor that he would, after transfer, commit an act of terrorism or organized crime. The CSC report, signed by the Director of Institutional Reintegration Operations (found at page 15 of the Tribunal Record) specifically states that "the information obtained to date does not lead one to believe that [the applicant] would, after the transfer, commit an act of terrorism or organized crime" (page 18). It also states that "the information obtained to date does not lead one to believe that Mr. Duarte's return to Canada would pose a threat to the security of Canada" (page 17). The report does make mention of the applicant's membership at the time in the Red Line Crew in Barrie, Ontario, "a criminal organization that has since dismantled". The report assigns the applicant a score of +8 on the Revised Statistical Information on Recidivism Scale, a result that "suggests that 4 out of 5 offenders will not commit an indictable offence after release".

[17] The respondent submits that regardless of whether the circumstances of this case fall neatly within the factor specified in paragraph 10(2)(*a*) of the Act, the Minister's discretion is not circumscribed by any of the section 10 factors, and the Minister retains the discretion to refuse or approve a transfer request based on any other relevant consideration. The respondent contends that in the present case the Minister was sufficiently concerned by the circumstances as a whole as well as by the question of paragraph 10(2)(*a*), which accordingly tipped the balance in favour of refusing the applicant's application.

[18] In *Holmes v. Minister of Public Safety and Emergency Preparedness*, 2011 FC 112, Justice Michael L. Phelan held that:

> [61] With respect to the reasonableness of the decision, it is evident that the Minister weighed the aspects of administration of justice, such as the nature of the offence, its circumstances and consequences, more heavily than the other purposes of the Act – rehabilitation and reintegration. However, he did not ignore these other purposes. The Applicant's challenge to the Minister's decision is a challenge to the relative weight the Minister gave.
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> [62] While it is arguable that Holmes appears to be a perfect candidate for transfer given the strong facts of rehabilitation and reintegration, the very essence of deference in this case is to acknowledge that having addressed the relevant considerations, the actual weighing or balancing is for the Minister to conduct. Absent unreasonableness or bad faith or similar such grounds, it is not for the Court to supervise the Minister.
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> [63] There is nothing unreasonable in the Minister's decision; it takes into consideration the relevant factors and imports no new and unknown factors, and it is intelligible and transparent as to how the Minister came to his conclusion. It therefore meets the requirements of law and should not be disturbed.

[19] In my view, Justice Phelan's reasoning applies to the case at bar.

[20] In view of the jurisprudence establishing the importance of the Minister's discretion in making such a decision, the Minister, in the present case, was not bound by the CSC report's conclusions, and was entitled to come to a contradictory conclusion. While, as the applicant points out, there was considerable evidence pointing in favour of him being transferred to Canada, such as the clear support of his community and the CSC report, I find that the Minister clearly set out the evidence upon which he chose to rely in coming to a different conclusion. I do not see any factual error in the factors listed by the Minister: the applicant's ties to a criminal organization, the existence of a criminal record in Canada, the likelihood that a criminal organization would have benefited from the successful commission of the offence, the amount of drugs involved, the premeditation of the enterprise involving multiple actors, and the potential long-term implications on society. In my view these are all relevant considerations and the Minister was entitled to come to a different view than CSC.

[21] I also consider that the meaning of the term "will" in paragraph 10(2)(*a*) is not necessarily that it is certain that the applicant will commit a criminal organization offence, and that the Minister can interpret this factor as being that there is a "significant risk" that the applicant will do so. As held by Justice David Near in *Grant v. Minister of Public Safety and Emergency Preparedness*, 2010 FC 958, 373 F.T.R. 281, at paragraph 37:

> In any case, while Parliament could not have intended the Minister to be clairvoyant, the term "will" is tempered by the preceding, "in the opinion of the Minister." In my opinion, the phrase "in the opinion of the Minister" trumps the need for any continued academic debate on the exact meaning of "will", whether it be a significant or substantial risk of future action, in the provision. A more helpful formulation of the issue at hand is whether, in the opinion of the Minister, there is evidence that leads him to

> reasonably conclude that an organized criminal offence will be committed by the Applicant after the transfer.

[22] Considering, therefore, that there were significant elements of evidence before the Minister which support his conclusions, including the Certified U.S. Case Summary of the applicant, I find that the impugned decision is reasonable and that it meets the requirements for transparency, intelligibility and acceptability required under *Dunsmuir*, *supra.*

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[23] For the above-mentioned reasons, the application for judicial review is dismissed, with costs.

JUDGMENT

The application for judicial review is dismissed, with costs.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1299-10
STYLE OF CAUSE:	NELSON DUARTE v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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