T-817-07
2008 FC 965

Arend Hendrik Getkate (*Applicant*)

v.

The Minister of Public Safety and Emergency Preparedness (*Respondent*)

INDEXED AS: GETKATE V. CANADA (MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS) (F.C.)

Federal Court, Kelen J.—Vancouver, August 6; Ottawa, August 25, 2008.

Penitentiaries — Judicial review of decisions of Minister refusing request by applicant, Canadian citizen incarcerated in United States, to serve prison sentence in Canada, pursuant to International Transfer of Offenders Act, s. 10(1)(a), (b) — Act, s. 8 requiring consent of offender, foreign entity and Canada before transfer occurs — Consent to transfer by United States, but not Canada — Reasons articulated by Minister contrary to evidence and to assessment, recommendations by own Department — Evidence applicant undergoing, accepting therapy well, having strong social, family ties in Canada — No evidence applicant constituting potential threat to safety of Canadians, security of Canada — Application allowed.

Construction of Statutes — International Transfer of Offenders Act, s. 10(1)(a) — "Threat to the security of Canada" — Traditionally limited in other legislation to threats of general terrorism and warfare against Canada or threats to security of Canadians en masse — General threat to re-offend herein not "threat to the security of Canada".

Constitutional Law — Charter of Rights — Mobility Rights — In context of transfer under International Transfer of Offenders Act, applicant's Charter mobility rights not engaged and, if engaged, provisions of Act constituting reasonable limitation on rights — Applicant's mobility already restricted by U.S. prison sentence due to own illegal activity — No automatic consent to transfer by Canada without considering object of international treaty agreement for better rehabilitation of prisoner.

This was an application for judicial review of two decisions in which the Minister refused a request by the applicant, a Canadian citizen incarcerated in the United States for aggravated child molestation, to serve his prison sentence in Canada, pursuant to paragraphs 10(1)(*a*) and (*b*) of the *International Transfer of Offenders Act* (the Act).

Under section 8 of the Act, a transfer can only occur with the consent of the offender, the foreign (in this case American) entity and Canada. The applicant's request was approved by the United States in 2006. However, consent was twice denied by Canada through the Minister, for the following reasons: (1) the nature of the offences indicated the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada (paragraph 10(1)(*a*)), (2) there was no evidence to suggest the offender's risk had been mitigated through treatment, and (3) there was evidence the offender abandoned Canada as his place of permanent residence (paragraph 10(1)(*b*)).

The issues were: (1) whether the applicant had a constitutional right by virtue of subsection 6(1) of the *Canadian Charter of Rights and Freedoms* (the Charter), to have his prison sentence transferred to Canada upon consent being obtained from the American authorities, and (2) whether the Minister erred under section 10 of the Act in refusing to grant the applicant's request that he be able to serve the remainder of his prison sentence in Canada.

Held, the application should be allowed.

(1) The applicant's mobility rights under section 6 of the Charter to enter and leave Canada were temporarily restricted by the applicant's U.S. prison sentence. In the context of a transfer under the Act, an applicant's Charter mobility rights are not engaged and, if they were, the provisions contained in the Act are a reasonable limitation on those rights given that the applicant has already had his mobility restricted due to his own illegal

activity. Moreover, Canada cannot automatically consent to the transfer without considering if it will serve the object of the international treaty agreement for the better rehabilitation of the prisoner.

(2) The reasons articulated by the Minister were contrary to the evidence and to the assessment and recommendations by his own Department. There was evidence demonstrating that the applicant had undergone a full year of intensive therapy and psychosexual education at his own expense and that the treatment had been well received. There was evidence that the applicant continued to have strong social and family ties in Canada and that he never abandoned the country as his place of permanent residence. There was no evidence on the record demonstrating that the applicant constituted a potential threat to the safety of Canadians or the security of Canada. Use of the phrase "threat to the security of Canada" has traditionally been limited in other legislation to threats of general terrorism and warfare against Canada or threats to the security of Canadians *en masse*. If the threat to Canada was the mere risk that the offender would re-offend, then such a consideration could be applied to every inmate seeking a transfer.

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 6.
Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23.
Extradition Act, R.S.C. 1970, c. E-21.
Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 57 (as am. by S.C. 1990, c. 8, s. 19; 2002, c. 8, s. 54).
Immigration and Refugee Protection Act, S.C 2001, c. 27.
International Transfer of Offenders Act, S.C. 2004, c. 21, ss. 2 "Canadian offender", 6(1), 8(1), 10.
Transfer of Offenders Act, R.S.C., 1985, c. T-15.
Treaty between Canada and the United States of America on the Execution of Penal Sentences, March 2, 1977, [1978] Can. T.S. No. 12.

CASES JUDICIALLY CONSIDERED

APPLIED:

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190; (2008), 329 N.B.R. (2d) 1; 291 D.L.R. (4th) 577; 2008 SCC 9; *Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2008] 2 F.C.R. 377; 333 F.T.R. 27; 2007 FC 866.

DISTINGUISHED:

Van Vlymen v. Canada (Solicitor General), [2005] 1 F.C.R. 617; (2004), 189 C.C.C. (3d) 538; 123 C.R.R. (2d) 101; 2004 FC 1054.

REFERRED TO:

United States of America v. Cotroni; United States of America v. El Zein, [1989] 1 S.C.R. 1469; (1989), 48 C.C.C. (3d) 193; 42 C.R.R. 101.

APPLICATION for judicial review of two decisions in which the Minister refused a request by the applicant, a Canadian citizen incarcerated in the United States, to serve his prison sentence in Canada. Application allowed.

APPEARANCES:

John W. Conroy, Q.C. for applicant.
Curtis S. Workun for respondent.

SOLICITORS OF RECORD:

Conroy & Company, Abbotsford, B.C., for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

[1] KELEN J.: This application for judicial review concerns two decisions of the Minister of Public Safety and Emergency Preparedness (the Minister) dated March 20, 2007 and October 23, 2007, respectively. In the decisions the Minister refuses a request by the applicant, a Canadian citizen incarcerated in the United States, to serve his prison sentence in Canada under the terms of the *International Transfer of Offenders Act*, S.C. 2004, c. 21 (the Act). The applicant challenges both the merits of the Minister's decisions and the constitutionality of the Act. Specifically, the applicant argues that paragraphs 10(1)(*a*) and (*b*) of the Act unconstitutionally violate his mobility rights under section 6 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]] (the Charter).

FACTS

Background

[2] The applicant, Arend Hendrik Getkate, is a 24-year-old Canadian citizen born in Belleville, Ontario. In February 1996, the applicant moved with his mother to Hampton, Georgia, where she was married later that year. The applicant continued to reside in Georgia with his mother and step-father until he graduated from high school in May 2000. In August 2000, the applicant returned to Canada for approximately six months, during which time he lived with his aunt and uncle in Plainfield, Ontario. In February 2001, the applicant moved back to Georgia, attending post-secondary studies at Clayton State College and University.

[3] On August 19, 2002, the applicant was arrested and charged in Georgia with three counts of aggravated child molestation and one count of child molestation. On June 2, 2003, the applicant was convicted and sentenced to 30 years' imprisonment on the three counts of aggravated child molestation and 10 years consecutive on the remaining count. The sentence provided that upon serving 10 years in prison with respect to the three counts of aggravated child molestation, the remainder of the applicant's sentence would be served on probation. An appeal of the applicant's conviction and sentence was dismissed on September 13, 2004.

The applicant's request and the Minister's denial

[4] By application dated March 1, 2005, the applicant requested, pursuant to the provisions of the Act, that he be transferred to Canada to serve the remainder of his prison sentence. Under the terms of the Act, a transfer can only occur with the consent of the offender; the foreign (in this case American) entity; and Canada. The applicant's request for a transfer was approved by the Georgia Department of Corrections on January 19, 2006, and by the United States Department of Justice on June 22, 2006.

[5] However, consent has been denied by Canada through the Minister. As part of the applicant's request, a report was produced by the Correctional Service of Canada (CSC) to determine whether the applicant satisfied the provisions of the Act. The relevant portion of the report states:

> The probation of 30 years, to be served upon completion of the sentence of imprisonment, cannot be administered in Canada as it follows a period of incarceration of more than two years.
>
> Mr. Getkate's citizenship has been verified and confirmed by the Canadian Consulate General in Atlanta, Georgia.

His request to transfer was approved by the state of Georgia on January 19, 2006 and by the Department of Justice on June 22, 2006.

Mr. Getkate has never been transferred under the [Act].

Mr. Getkate did not leave or remain outside Canada with the intention of abandoning Canada as his place of residence. Community assessments completed with his grandparents, aunts, uncles and family friends between April and May 2005 and again on August 6, 2006, confirm that he still has strong social and family ties to Canada. His grandparents will offer him emotional and financial support as well as accommodation upon his release. All others are prepared to offer varying levels of support for the purpose of a transfer.

Furthermore, while incarcerated, Mr. Getkate was involved in intensive therapy and psychosexual education for a full year at his own expense.

The information obtained to date does not lead us to believe that, he would after the transfer, commit an act of terrorism or a criminal organization offence within the meaning of section 2 of the *Criminal Code*, nor that he would constitute a threat to the security of Canada.

According to Section 3 of the *International Transfer of Offenders Act*, "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 them to serve their sentences in the country of which they are citizens or nationals.

The transfer of Mr. Getkate will facilitate and enhance his eventual reintegration into the community through appropriate programming, including gradual and supervised release under the jurisdiction of the Correctional Service of Canada. Should a transfer not be granted, Mr. Getkate will be deported to Canada as early as April 18, 2013, and will not be under the jurisdiction of the Correctional Service of Canada and will not be subject to any supervision requirements or restrictions. [Emphasis added]

The report was approved on November 22, 2006 by Julie Keravel, Director, Institutional Reintegration Operations, CSC.

[6] Despite the recommendation contained in CSC's report, on March 20, 2007, the Minister denied the applicant's request for a transfer. The reasons provided by the Minister, which are included in the report under the heading "Ministerial decision", are as follows:

- The nature of the offences indicates the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada.
- There is no evidence to suggest the offender's risk has been mitigated through treatment.

The Minister's decision was communicated to the applicant by letter dated March 30, 2007, from Ms. Keravel at CSC. The applicant was also told that should he wish to submit further information in support of a new application, he was entitled to do so at any time.

The applicant's second request and the Minister's denial

[7] Subsequently, the applicant submitted a second request that he be allowed to serve the remainder of his prison sentence in Canada. Accordingly, a second report and recommendation were produced by CSC to determine whether the applicant satisfied the conditions of the Act. That report, which is virtually identical to the first report, was approved by Ms. Keravel at CSC on May 14, 2007. On May 15, 2007, the report was forwarded to the Minister for consideration.

[8] On October 23, 2007, the Minister again denied the applicant's request. The reasons provided include the same two reasons contained within the first denial, as well as a finding that the applicant "abandoned Canada as his place of permanent residence." The reasons read as follows:

- The nature of the offences indicates the offender's return to Canada would constitute a potential threat to the safety of Canadians and the security of Canada.

- There is no evidence to suggest the offender's risk has been mitigated through treatment.

- There is evidence the offender abandoned Canada as his place of permanent residence. [Emphasis added.]

The Minister's decision was communicated to the applicant by letter dated November 1, 2007.

ISSUES

[9] The applicant challenges both the merits of the Minister's decision as well as the underlying constitutionality of paragraphs 10(1)(*a*) and (*b*) of the Act. Accordingly, there are two issues to be addressed by the Court:

1. Does the applicant, as a Canadian citizen, have a constitutional right by virtue of subsection 6(1) of the Charter, to have his prison sentence transferred to Canada upon consent being obtained from the American authorities; and

2. On the circumstances of this case, did the Minister err under section 10 of the Act in refusing to grant the applicant's request that he be able to serve the remainder of his prison sentence in Canada?

STANDARD OF REVIEW

[10] In assessing the appropriate standard of review to apply to the Minister's denial of the applicant's request, I am guided by the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In that case, the Supreme Court reconsidered the number and definitions to be given to the various standards of review, as well as the analytical process to be employed to determine the appropriate standard in a given situation. As a result of the Court's decision, it is clear that the standard of patent unreasonableness has been eliminated, and that reviewing courts must focus on only two standards, those of correctness and reasonableness.

[11] In *Dunsmuir*, the Supreme Court held, at paragraph 62, that the first step in a standard of review analysis is to ascertain whether previous jurisprudence has determined adequately the appropriate standard to apply in a given situation. In *Kozarov v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2008] 2 F.C.R. 377 (F.C.), Mr. Justice Harrington was faced with a similar issue under paragraph 10(1)(*b*) of the Act. In that case, Justice Harrington held that a discretionary decision of the Minister, such as the one currently before the Court, is entitled to the "highest standard of deference," and should only be set aside if found to be patently unreasonable. Accordingly, while the standard of patent unreasonableness has been eliminated by the Supreme Court in *Dunsmuir*, the Minister's decision is entitled to significant deference and will be reviewed on a reasonableness standard.

[12] With respect to the constitutionality of the Act, this is a question of law to be reviewed on a correctness standard.

LEGISLATIVE FRAMEWORK

[13] The legislation relevant to this application is the *International Transfer of Offenders Act*. Under the Act [at section 2], a "Canadian offender"—defined as a Canadian citizen who has been found guilty of an offence and whose conviction and sentence is no longer subject to appeal—may request to have his or her sentence transferred to Canada. Subsection 8(1) provides that the consent of the three parties to the transfer is required before a transfer can occur:

8. (1) The consent of the three parties to a transfer — the offender, the foreign entity and Canada — is required.

[14] Consent by Canada is to be granted or denied by the Minister, who under subsection 6(1) is responsible for the Act's administration. In deciding whether to consent to a transfer, the Minister must consider a number of factors, which are outlined in subsections 10(1) and (2) of the Act:

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.

(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.

[15] Also relevant to this application is subsection 6(1) of the *Canadian Charter of Rights and Freedoms*, which provides all Canadian citizens with a right to enter, remain in, and leave Canada:

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

ANALYSIS

Issue No. 1: Does the applicant, as a Canadian citizen, have a constitutional right by virtue of subsection 6(1) of the Charter, to have his prison sentence transferred to Canada upon consent being obtained from the American authorities?

[16] As noted above, the applicant challenges both the merits of the Minister's decision, as well as the underlying constitutionality of paragraphs 10(1)(*a*) and (*b*) of the Act, which state that in determining whether to consent to a transfer, the Minister must consider whether the offender's return would constitute a threat to the security of Canada, and whether the offender left the country with the intention of abandoning Canada as his or her place of residence.

[17] As required by section 57 [as am. by S.C. 1990, c. 8, s. 19; 2002, c. 8, s. 54] of the *Federal Courts Act* [R.S.C., 1985, c. F-7, s. 1 (as am. *idem*, s. 14)], the applicant served notice on the Attorney General of Canada and the attorney general of each province, of the constitutional question raised in this application.

[18] In regard to the applicant's constitutional challenge, he submits that as a Canadian citizen, he has a constitutional right to enter Canada by virtue of subsection 6(1) of the Charter, and that right is violated by the impugned provisions. Specifically, the applicant submits that as a result of his constitutional right to enter Canada, once his transfer was approved by the American authorities in accordance with the provisions of the Act and the Transfer of Offenders Treaty between Canada and

the United States of America [*Treaty between Canada and the United States of America on the Execution of Penal Sentences*, March 2, 1977, [1978] Can. T.S. No. 12], then his constitutional right should have been given effect to promptly and he should have been given the opportunity to return to Canada at the next available reasonable time. On this basis, the applicant submits that the Minister's denial of his transfer request violated his right to enter Canada and that, accordingly, the provisions engaged by the Minister in blocking the transfer are unconstitutional and cannot be saved under section 1 of the Charter as reasonable limits on the applicant's section 6 right.

[19] In support, the applicant relies on the decision of this Court in *Van Vlymen v. Canada (Solicitor General)*, [2005] 1 F.C.R. 617 (F.C.). In that case, Mr. Justice Russell was faced with a similar situation wherein a Canadian offender requested a transfer to Canada under the terms of the now repealed *Transfer of Offenders Act*, R.S.C., 1985, c. T-15 (the former Act). In considering whether the applicant's section 6 mobility rights were engaged, Justice Russell stated at paragraphs 97 and 100:

> As a Canadian citizen, and notwithstanding his conviction in the United States, the applicant retained his constitutional rights under subsection 6(1) of the Charter. Those rights were subject to the practical limitations imposed by the U.S. authorities and the need for their approval before he could return. They were also subject to whatever limitations section 1 of the Charter may allow Parliament to impose by way of "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
>
> …
>
> While he remained incarcerated in the U.S., the applicant's section 6 rights remained unenforceable until such time as the U.S. approved his transfer. But they did not cease to exist and, once a transfer was possible and the applicant decided to exercise them in the limited fashion available to him, they came to the fore and the Minister was required to recognize them in whatever action or inaction, he engaged in concerning the applicant's transfer. In my opinion, the international regime for the transfer of prisoners back to Canada does not displace mobility rights under the Charter. The regime exists to allow those Charter rights to be exercised, albeit in the limited context of continuing incarceration.

[20] While Justice Russell concluded that the transfer process engaged the applicant's section 6 Charter right to enter Canada, the factual circumstances of the case must also be considered. In *Van Vlymen*, Justice Russell was faced with a situation wherein the Minister (at that time the Solicitor General) failed to make a decision on the applicant's transfer request for roughly 10 years. As Justice Russell stated, at paragraph 80, when addressing the context of the matter before the Court:

> The real "matter" that is the focus of this application is not, in my opinion, the March 1, 2000, decision by the respondent approving the applicant's return to Canada to serve out his prison sentence; it is, rather, the roughly 10 years of procrastination, evasiveness, obfuscation and general bad faith by the respondent that ensured the applicant remained in the U.S. prison system as long as possible, and that postponed the transfer decision in favour of the applicant until formal legal proceedings were commenced against the respondent on February 3, 2000. [Emphasis added.]

[21] Accordingly, while Justice Russell found that the applicant's section 6 mobility rights were engaged by the process, no consideration was given to whether the provisions of the former Act could be seen as reasonable limits, prescribed by law, demonstrably justified in a free and democratic society, and therefore saved under section 1 of the Charter. The fact that Justice Russell's decision is primarily focussed on the lack of consideration by the Minister is readily apparent in his analysis of the applicant's Charter argument, at paragraphs 106-109:

> My review of the record leads me to the conclusion that the impugned Regulations were never used to refuse the applicant a transfer back to Canada. What happened, rather, was that the respondent never told the applicant why a decision had not been made and kept him in the dark concerning the objections that had been raised about his transfer.
>
> Hence, it is difficult to characterize the role that the impugned Regulations played in this matter. On the one hand, it might be said that such a long delay was, in effect, a decision to refuse the transfer request.…

On the other hand, we could say that the respondent's conduct was, in effect, a refusal to apply the Regulations and make a decision. The respondent made a decision and applied the Regulations in March 2000, at which time the Regulations did not stand in the way of the applicant's transfer.

On the whole, I am inclined to think that the respondent's conduct under review was a refusal to make a decision in accordance with the Regulations and the applicant's Charter rights. Hence, I do not believe that the constitutionality of the Regulations arises on these facts. [Emphasis added.]

[22] In arguing that the applicant's reliance on *Van Vlymen* is misplaced, the respondent relies on the recent decision of this Court in *Kozarov*, above, wherein Justice Harrington addressed the applicability of *Van Vlymen* to a situation similar to the one currently before the Court. As Justice Harrington stated, at paragraph 34 of *Kozarov*:

I do not think that the decision of Mr. Justice Russell in *Van Vlymen*, above, assists Mr. Kozarov. Although he held that Mr. Van Vlymen, as a Canadian citizen, had the constitutional right by virtue of section 6 of the Charter to enter Canada provided he remained incarcerated, subject only to his securing the approval of the U.S. authorities, and such reasonable limits as Parliament might prescribe by law, and can be demonstratively justified in a free and democratic society as per section 1 of the Charter, the facts of that case have to be carefully considered. The Minister was found to have neglected or to have deliberately failed to consider Mr. Van Vlymen's request for transfer for close to ten years. In [addition] to breaching the Charter, it was held that the Minister breached his common-law duty to act fairly in processing Mr. Van Vlymen's application. [Emphasis added.]

[23] Accordingly, the respondent argues that when considering the factual circumstances arising in *Van Vlymen*, above, it is clear that the case is distinguishable on its facts and that the decision in *Kozarov* provides better guidance with respect to the interplay between section 6 of the Charter and the provisions of the Act. I agree.

[24] In *Kozarov*, the applicant's request for a transfer was denied by the Minister under paragraphs 10(1)(*b*) and (*c*) of the Act, which relate to whether the offender left Canada with the intention of abandoning the country as his place of permanent residence and whether the offender has social or family ties in Canada. On the basis of the evidence, the Minister concluded that the offender had, in fact, abandoned Canada as his place of permanent residence and did not have sufficient family ties in Canada to justify a transfer. In reviewing the impact of the decision on the applicant's Charter mobility rights, Justice Harrington held, at paragraphs 27-28, that neither paragraphs 10(1)(*b*) and (*c*), nor section 8 of the Act, offended the applicant's mobility rights:

Mr. Kozarov's current restrictions on his mobility arise from his own actions, his own criminal activities. A natural and foreseeable consequence of a criminal conviction is that the state in which the offence is committed and in which the offender may be found may incarcerate him. Once Mr. Kozarov serves his sentence, he has the absolute right, as a citizen, to return here. The same holds true if his current sentence were commuted, or if he were pardoned. All citizens, unlike foreigners and permanent residents, have that constitutional mobility right (see *Catenacci v. Canada (Attorney General)* (2006), 144 C.R.R. (2d) 128 (F.C.)).

However the American authorities have put a condition on his transfer. The condition is that he serve his sentence here. Upon his transfer he could not immediately invoke his constitutional right as a citizen to leave Canada. His freedom would properly be restricted in accordance with the *Corrections and Conditional Release Act*. I have come to the conclusion that neither section 8 of the *International Transfer of Offenders Act* which requires the consent of the offender, the foreign entity and Canada nor subsections 10(1)(*b*) and (*c*) which call upon the Minister to consider whether Mr. Kozarov has social or family ties here or whether he left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence offends his mobility rights under the Charter.

[25] Justice Harrington went on to consider the differences between a transfer under the Act and an extradition to the United States under the terms of the *Extradition Act*, R.S.C. 1970, c. E-21. In comparing the two processes, Justice Harrington relied on the decision of the Supreme Court of Canada in *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469, concluding that while matters of extradition clearly affect a citizen's mobility rights, the

transfer of a prison sentence does not engage an offender's mobility rights at all. He held at paragraphs 30-32:

> Extradition affects a citizen's right to remain in Canada, and so brings section 6 of the Charter into play. The State is active in such cases, not passive as in this. In *United States of America v. Cotroni; United States of America v. El Zein*, [1989] 1 S.C.R. 1469, the constitutional questions were whether the surrender of a Canadian citizen to a foreign state constituted an infringement of his right to remain in Canada, and if so, would a surrender in the circumstances of that case constitute a reasonable limit under section 1. The United States requested Mr. Cotroni's extradition on a charge of conspiracy to possess and distribute heroin. However, all his personal actions relating to the alleged conspiracy took place while he was in Canada.
>
> The Court held that Mr. Cotroni's mobility rights were affected, but the relevant provisions of the *Extradition Act* [R.S.C. 1970, c. E-21] were saved by section 1. To my way of thinking, the key to that case is at page 1480 where Mr. Justice La Forest said:
>
> > The right to remain in one's country is of such a character that if it is to be interfered with, such interference must be justified as being required to meet a reasonable state purpose.
>
> However, he went on to say at page 1482:
>
> > An accused may return to Canada following his trial and acquittal or, if he has been convicted, after he has served his sentence. The impact of extradition on the rights of a citizen to remain in Canada appears to me to be of secondary importance. In fact, so far as Canada and the United States are concerned, a person convicted may, in some cases, be permitted to serve his sentence in Canada, see *Transfer of Offenders Act*, S.C. 1977-78, c. 9.…
>
> That Act was replaced by the current *International Transfer of Offenders Act*.
>
> In this case, it was Mr. Kozarov who chose to leave Canada and to commit a crime in the United States. He has the absolute mobility right, as a Canadian citizen, to return to Canada once his sentence is served. At the present time, we are not really speaking of mobility rights at all. We are rather speaking of the transfer of supervision of a prison sentence. Had the Minister given his consent, Mr. Kozarov could not on his arrival here have immediately asserted his mobility right to leave the country.

Mobility rights

[26] The mobility rights of the applicant to enter and leave Canada are temporarily restricted by the applicant's U.S. prison sentence. The *International Transfer of Offenders Act* is to assist rehabilitation and reintegration in appropriate situations, not to allow all Canadians serving sentences outside of Canada an automatic right to return to Canada to serve their sentence. As Justice Harrington held in *Kozarov*, above, at paragraph 32.

> At the present time, we are not really speaking of mobility rights at all. We are rather speaking of the transfer of supervision of a prison sentence. Had the Minister given his consent, Mr. Kozarov could not on his arrival here have immediately asserted his mobility right to leave the country.

Accordingly, I agree with Justice Harrington that the Act does not affect the applicant's mobility rights under the Charter.

[27] I agree with Justice Harrington's conclusion that in the context of a transfer under the Act, an applicant's Charter mobility rights under section 6 are not engaged and, if they were, the provisions contained in the Act are a reasonable limitation on those rights given that the applicant has already had his mobility restricted due to his own illegal activity.

[28] The applicant's mobility rights under section 6 of the Charter include entering Canada, remaining in Canada and leaving Canada. Obviously these Charter rights are restricted while the applicant is incarcerated either in the United States or Canada.

[29] Moreover, Canada's consent to the transfer under the Act must respect the international treaty agreements which only allow transfers to provide for the better rehabilitation of the prisoner. Therefore Canada cannot automatically consent to the transfer without considering if it will serve the object of the international agreement for the better rehabilitation of the prisoner.

Issue No. 2: Did the Minister err under section 10 of the Act in refusing to grant the applicant's request that he be able to serve the remainder of his prison sentence in Canada?

[30] Turning to the merits of the Minister's decision, the issue before the Court is whether that decision was reasonably based on the evidence before the Minister, or whether the decision to deny the applicant's transfer was made without regard to that evidence, thereby making it unreasonable.

[31] As noted at the outset, the Minister rendered two decisions regarding the applicant's request for a transfer; the first on March 20, 2007 and the second, following a further request by the applicant, on October 23, 2007. In considering the two decisions together, the decisive factors leading to the Minister's denial were that:

1. the applicant's return threatens the safety of Canadians and the security of Canada;

2. there is no evidence the applicant's risk has been mitigated through treatment; and

3. the applicant abandoned Canada as his place of permanent residence.

[32] In addition to the applicant's personal statement and accompanying letters of support, the following evidence was before the Minister when he made the above-mentioned decisions:

1. the reports from CSC approved by Ms. Kravel on November 22, 2006 and May 14, 2007, respectively;

2. a memorandum from "Roy & Sharif" classified as "Confidential" and dated January 16, 2007, which provides an overview of the applicant's case and the considerations to be made by the Minister; and

3. a memorandum from "Sharif" (*sic*) classified as "Confidential" and dated March 15, 2007, which outlines the nature of the applicant's offences and advises the Minister that a denial on the basis that the applicant poses a risk to the security of Canada "would be consistent with public statements [the Minister] made on similar issues."

[33] Having reviewed this evidence, as well as the evidence proffered by the applicant and his family, the Court concludes that while the Minister's decision to not consent to the transfer is discretionary in nature and is entitled to the highest level of curial deference, the record clearly establishes that the impugned decisions disregard the evidentiary record before the Minister and, for the following reasons, must be set aside.

[34] In both decisions rendered by the Minister, it was concluded that there was "no evidence" to suggest that the risk posed by the applicant has been mitigated through treatment. The record clearly demonstrates, however, that the applicant underwent a full year of intensive therapy and psychosexual education at his own expense and that he is extremely remorseful for the crimes he committed. If anything, this implies that the applicant was willing to voluntarily undertake intensive treatment because of a desire to be rehabilitated.

[35] Further, the record demonstrates that applicant has accepted his sentence and has "taken accountability" for his actions. This was recognized and noted in the memorandum to the Minister from "Roy & Sharif" dated January 16, 2007, wherein it states: "In the case of Getkate, the offender

is relatively young and it appears, excepting his 'not guilty' plea, that he has taken accountability for his crimes."

[36] In light of the foregoing evidence, which demonstrates that the applicant has both undergone treatment and that the treatment has been well received, it is wholly unreasonable for the Minister to have premised his decision on the view that there was "no evidence" demonstrating the applicant's risk had not been mitigated during his time in custody.

[37] Another serious problem with the Minister's decision relates to his conclusion that the applicant's transfer be denied because he "abandoned Canada as his place of permanent residence." This basis, while not present in the Minister's first decision, formed part of the reasons for the Minister's denial in the second decision, dated October 23, 2007. However, upon reviewing the evidence, that evidence points in a wholly opposite direction.

[38] First, the CSC reports which recommended the Minister consent to the applicant's transfer, clearly state that the applicant continues to have strong social and family ties in Canada and that he never abandoned the country as his place of permanent residence:

> Mr. Getkate did not leave or remain outside Canada with the intention of abandoning Canada as his place of residence. Community assessments completed with his grandparents, aunts, uncles and family friends between April and May 2005 and again on August 6, 2006, confirm that he still has strong social and family ties to Canada. His grandparents will offer him emotional and financial support as well as accommodation upon his release. All others are prepared to offer varying levels of support for the purpose of a transfer.

[39] Second, there is also no suggestion of abandonment in the memorandum from "Roy & Sharif" dated January 16, 2007. In fact, the memorandum, which was presumably produced by members of the Minister's staff, notes in its overview that the applicant has a number of friends and family members in Canada willing to offer their support should the transfer be approved. As well, in addressing the factors for consideration under section 10 of the Act, the memorandum states that outside paragraph 10(1)(*a*), which relates to the security of Canada, there are no other grounds contained in the section that would result in a denial of the applicant's transfer:

> In considering this case, you are guided by the International Transfer of Offenders Act, the relevant portion of which is attached for your convenience. With the possible exception of section 10(1)(a), it does not appear that your consideration of the criteria in section 10 would result in a denial of this transfer.

On this basis, it is difficult to see what "evidence" the Minister is referring to.

[40] Furthermore, a simple consideration of the factual circumstances demonstrates that the applicant never abandoned or intended to abandon Canada as his place of permanent residence. As noted at the outset, the applicant first left Canada in 1996 when he moved with his mother to Georgia. During this time the applicant was a minor and cannot be said to have voluntarily left Canada. Upon gaining the age of majority, the applicant returned to Canada in 2000, albeit for only a protracted period of time. When he returned to the United States in February 2001, it was for the intended purpose of furthering his education at Clayton State College and University, where he attended on a "full HOPE scholarship." Given such clear and unambiguous evidence to the contrary, the Minister's conclusion that the applicant abandoned Canada as his place of permanent residence is unreasonable on its face and must be set aside.

[41] Finally, the Court also finds that there is no evidence on the record demonstrating that the applicant constitutes a potential threat to the safety of Canadians or the security of Canada. While the Minister attempts to invoke the section as a means of demonstrating that the applicant poses a general threat to Canadians should he be returned to Canada, use of the phrase "threat to the security of Canada" has traditionally been limited in other legislation to threats of general terrorism and warfare against Canada or threats to the security of Canadians *en masse*. In the case at bar, while the applicant

may pose a general threat to specific pockets of Canadian society should he re-offend, he clearly poses no "threat to the security of Canada" as the term has been interpreted in other legislation, such as the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 or the *Canadian Security Intelligence Services Act*, R.S.C., 1985, c. C-23. If the threat to Canada was the mere risk that the offender would re-offend, then such a consideration could be applied to every inmate seeking a transfer.

[42] While the Court recognizes the gravity of the applicant's crimes and the harm that they have caused, the issue here is whether approval of the applicant's transfer request would facilitate and enhance his eventual rehabilitation and reintegration into Canadian society. As demonstrated by the evidence, such a transfer would be in accordance with the purpose and provisions of the Act and the decision of the Minister unreasonably disregarded this evidence.

[43] The Supreme Court stated in *Dunsmuir*, at paragraph 47:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[44] In the case at bar, the reasons articulated by the Minister are contrary to the evidence and to the assessment and recommendations by his own Department. The Court must conclude that the decision cannot be justified or made intelligible within the decision-making process.

[45] Accordingly, for the reasons provided, the application for judicial review will be granted, the decision of the Minister set aside, and the matter referred back to the Minister for redetermination in accordance with these reasons.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed with costs; and

2. The two decisions of the Minister are set aside and the matter is referred back to the Minister for redetermination as soon as reasonably practicable.