Federal Court  Cour fédérale

Date: 20150119

Docket: T-348-14

Citation: 2015 FC 69

Ottawa, Ontario, January 19, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

RAPHAEL CARRERA
(A.K.A. RAFFAELE MILONE)

Applicant

and

THE MINISTER OF PUBLIC SAFETY

Respondent

JUDGMENT AND REASONS

[1] The applicant, Mr. Carrera, is currently serving a 30-year sentence in the United States of America. He has repeatedly applied pursuant to the *International Transfer of Offenders Act*, SC 2004, c 21 (the *ITOA* or the "Act") to return to Canada to serve the remainder of his sentence in Canada.

[2] Mr. Carrera now seeks judicial review of the decision made by the Minister of Public Safety on January 8, 2014 refusing his application. The decision at issue is the second refusal by

the Minister of Mr. Carrera's most recent application, following a redetermination of the matter as ordered by the Federal Court and as affirmed by the Federal Court of Appeal. Mr. Carrera submits that this latest decision, like the previous decision, is unreasonable and does not reflect the guidance of the Federal Court of Appeal.

[3] For the reasons that follow, the application is allowed.

Background

[4] Mr. Carrera is a Canadian citizen, with a criminal record dating back to 1971 for various offences, including theft under $200, possession of a prohibited weapon, and possession of a narcotic for the purpose of trafficking. In 1985, he was convicted of possession of narcotics for the purpose of trafficking and possession of a prohibited weapon and was sentenced to a term of imprisonment of four years and three months.

[5] In 1987, while on day parole at a halfway house, he absconded to the United States, changed his name from Raphael Milone to Raphael Carrera and began a new life under this assumed identity.

[6] In August 1998, Mr. Carrera was found guilty of "Conspiracy to Distribute and Possession with Intent to Distribute Cocaine" and "Attempt to Distribute and Possess with Intent to Distribute Cocaine". He was sentenced to 30 years' imprisonment, which he is currently serving in a low security penitentiary. According to the sentencing judge, the long sentence was

due to "the seriousness of the offence conduct (i.e., the magnitude of the narcotics trafficking) and the significant criminal history".

[7] On September 15, 2010, Mr. Carrera applied for the sixth time pursuant to the *ITOA* for a transfer to Canada. His first four applications were not approved by the United States and his fifth application was refused by the Minister of Public Safety in 2009.

[8] In his 2010 application, Mr. Carrera states that he accepts responsibility for his actions and acknowledges the seriousness of his offences. He also emphasizes that he has maintained strong ties over the years with his Canadian family members and notes the progress he has made while incarcerated through programs and work within the institution, particularly with respect to addressing past substance abuse problems. His application is supported by letters from friends, family members and others.

[9] On October 15, 2012, then-Minister of Public Safety, Vic Toewes, refused Mr. Carrera's application based on Mr. Carrera's abandonment of Canada pursuant to paragraph 10 (1)(*b*) of the Act, the serious, organized and sophisticated nature of his offence, the sentence received, and the significant risk that he would engage in similar activities if transferred to Canada.

Carrera #1

[10] In *Carrera v Canada (Minister of Public Safety)*, 2013 FC 798, [2013] FCJ No 861 [*Carrera #1*], Justice Hughes allowed the application for judicial review, finding that the

Minister had ignored the advice of the Correctional Service of Canada (CSC) and had either ignored or not given any weight to Mr. Carrera's changed circumstances.

[11] Justice Hughes noted that the Minister appeared to be of the view that once a person abandons Canada, "they can never change their mind or circumstances may never change such that the person no longer abandoned Canada" (*Carrera #1*, para 14).

[12] Justice Hughes also found that the Minister had erred in his approach to contrary evidence, particularly from the International Transfer Unit ("ITU") of CSC, which indicated that Mr. Carrera did not pose a threat to the security of Canada, did not have ties to any terrorist or criminal organizations, and had social and family ties to Canada. Justice Hughes noted:

> [24] While the Minister has discretion as to whether to follow such assessments it is incumbent, as found in *LeBon supra*, for the Minister to indicate that he was aware of such assessments, that he took them into account, and if there were other factors which outweighed those assessments, what those factors were and how they outweighed the assessment. Just as in *LeBon supra*, the Minister has not done this in this case.

Carrera #2

[13] The Federal Court of Appeal in *Carrera v Canada (Minister of Public Safety)*, 2013 FCA 277, [2013] FCJ No 1321, dismissed the appeal by the Minister. The Federal Court of Appeal noted (at para 6) that "a reading that exalts the abandonment factor under paragraph 10(1)(*b*) of the Act above all other section 10 factors is not a reasonable reading of the Act". The decision must be made with the statutory purposes "front of mind". In addition, in accordance with *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 SCR

157 [*Divito*] at para 49, the Minister must consider the Canadian offender's right to enter Canada under section 6 of the *Charter*.

[14] The Federal Court of Appeal stated, at para 7, that, while the Minister could find that the abandonment factor warrants significant weight, it was still incumbent on the Minister to consider the other factors and explain why he was reaching a decision departing from the assessments made by the ITU favouring the transfer. The Court agreed that the application should be remitted for redetermination, and provided specific guidance to the Minister:

> [9] In order to facilitate the Minister's reconsideration, we offer the following guidance in addition to the comments above:
>
> - The Minister must consider and weigh all of the factors under section 10, bearing in mind the purposes of the Act set out in section 3, namely to further "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." The values expressed in section 6 of the Charter also fall to be considered. The Minister shall apply the Act as it existed at the time of Mr. Carrera's request for transfer.
>
> - Paragraph 10(1)(*b*) of the Act directs the Minister to ascertain whether the offender "left or remained outside Canada with the intention of abandoning Canada as [his] place of permanent residence." We agree with counsel for the Minister that this paragraph mandates a backward-looking inquiry – not a forward-looking inquiry – on the issue of abandonment. However, even if abandonment is present, the Minister must still engage in the process of consideration and weighing discussed in the preceding bullet.

The Decision under Review

[15] The January 8, 2014 decision of the Minister of Public Safety, Steven Blaney, again refused Mr. Carrera's request for transfer to Canada based on the same record as the previous decision.

[16] The Minister acknowledges the Federal Court of Appeal's judgment and its guidance, noting that he has assessed the facts in the context of the purposes of the Act and the factors enumerated in section 10.

[17] With respect to the section 10 factors, the Minister notes that the CSC Executive Summary indicates the existence of several positive factors in favour of granting the transfer application: Mr. Carrera does not pose any obvious threat to the security of Canada, has no ties to organized crime, and has social and family ties to Canada. The Minister also notes the applicant's acceptance of responsibility and remorse for his actions and his progress while incarcerated, including the programs and work undertaken.

[18] The Minister states that he "paid particular attention" to the information highlighted by CSC's ITU and again notes the positive factors. However, the Minister finds that these considerations are insufficient to alleviate three concerns: (1) the applicant left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence; (2) the seriousness of both the offences committed in the USA and the applicant's criminal record in Canada; and, (3) the applicant may have difficulty obeying parole conditions and may be difficult to manage.

[19] The Minister explains why his decision differs from that of the CSC ITU:

> The CSC ITU has highlighted data which is relevant to the enumerated factors contained in the section 10 of the Act. This is helpful in guiding my decision. However, beyond those enumerated factors, I may consider others consistent with the purpose of the Act. In the present case, my consideration of the seriousness of the offence and Mr. Carrera's difficulty in obeying parole conditions stems from this residual discretion. Specifically, the seriousness of Mr. Carrera's underlying offences, his criminal record in Canada, and his history of absconding while on day parole are considerations which suggest that Mr. Carrera is not yet ready to be reintegrated in Canadian society and that his transfer would not contribute to his rehabilitation or to the proper administration of justice. This is why my ultimate conclusion regarding Mr. Carrera's suitability for transfer may appear to differ from the factors highlighted to me by the ITU.

[20] The Minister reiterates the factors supporting a transfer, but concludes that the positive factors are outweighed by the seriousness of the offence, the applicant's difficulty obeying parole conditions and his abandonment of Canada, which "deserves particular weight", and that these are serious reasons to not consent to the transfer.

[21] With respect to the applicant's abandonment of Canada, the Minister notes that the "purpose of the Act is not to be a means for those who have abandoned Canada to return to the country to take advantage of its correctional system. It seems to me this is why the section 10(1)(b) 'abandonment factor' is included as one that I must consider." The Minister again notes that "this factor weighs strongly toward not consenting to the transfer".

[22] The Minister again relies on the same factors—the seriousness of the offence in the USA, the applicant's extensive criminal record and his prior failure to obey parole conditions—to

support his finding that "it is reasonable to conclude that [Mr. Carrera] would continue to endanger public safety if returned to Canada".

[23] The Minister notes that his concern regarding Mr. Carrera's prior difficulty in obeying parole conditions also arises from his observation that Mr. Carrera would be eligible to apply for parole immediately if returned to Canada. The Minister states that he does not believe that Mr. Carrera's transfer corresponds with the purpose of the Act because he absconded "when it suited him", lived under an assumed name, now seeks to return and would be eligible for parole immediately. The Minister refers to Mr. Carrera's immediate eligibility for parole at least three times in the decision.

[24] The Minister indicates that he has reached his conclusion in consideration of the *Charter* section 6 mobility rights discussion in the recent Supreme Court of Canada case of *Divito*:

> As a Canadian citizen, Mr Carrera has a right to enter Canada. However, I believe I have reasonably assessed the impact of this decision on this right, proportionately balancing it given the nature of the transfer decision and the context within which it is made, both with respect to the Act and the particular facts relating to Mr Carrera as explained herein. The Act does not create a right for Canadian citizens to require Canada to administer their foreign sentence. It does not confer a right on Canadian citizens to serve foreign sentences in this country.

[25] In conclusion, the Minister states his opinion that Mr. Carrera is not a suitable candidate for transfer "at this time" and invites Mr. Carrera to reapply for transfer at the appropriate time.

The Standard of Review

[26] There is no dispute that the appropriate standard of review in this case is reasonableness, given the discretionary nature of the Minister's decision. In *LeBon v Canada (Attorney General)*, 2012 FCA 132, 433 NR 310 [*LeBon*], the Federal Court of Appeal confirmed that decisions of the Minister relating to requests for transfer under the *ITOA* are to be reviewed under the reasonableness standard since it is "fact-specific and discretionary in nature" (at para 15).

[27] The role of the Court is, therefore, to consider the existence of justification, transparency and intelligibility within the decision-making process, as well as to determine whether the Minister's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[28] The parties also agree that in these circumstances, the Minister's discretion must be exercised with regard to the offender's subsection 6(1) *Charter* rights and the values expressed by that provision.

[29] The relevant provisions of the *International Transfer of Offenders Act* and the *Corrections and Conditional Release Act*, SC 1992, c 20 (the *CCRA*) are set out in Annex A.

The Issues

[30] The overall issue is whether the Minister's decision to refuse the transfer is reasonable.

[31] The applicant submits that each of the three key findings or factors relied on by the Minister—his abandonment of Canada, the seriousness of his offence and his criminal record, and that he may have difficulty obeying parole conditions and may be difficult to manage—is unreasonable as is the Minister's ultimate conclusion that these factors outweigh those that support his transfer to Canada.

[32] The applicant further submits that the ultimate conclusion is not reasonable because it does not reflect a proportionate balancing of the subsection 6(1) *Charter* values with the statutory objectives, given the nature of the decision and the factual context (*Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*] at para 57).

The Applicant's Position

[33] The applicant agrees that the reference to the "administration of justice" in section 3 of the Act as it read at the time of the decision includes the promotion of public safety and submits that the entire provision promotes public safety because the reintegration and rehabilitation of offenders is in the interests of public safety.

[34] The applicant submits that the real issue is whether the Minister reasonably concluded that the refusal to transfer him promotes the objectives of the Act. The applicant argues that all three of the Minister's findings are unreasonable when assessed against these objectives. Overall, the refusal to transfer him frustrates the objectives of section 3.

Abandonment of Canada – paragraph 10 (1)(b)

[35] The applicant submits that the Minister's decision and conclusion regarding his abandonment of Canada under paragraph 10 (1)(*b*) does not follow the guidance of the Federal Court of Appeal in *Carrera #2*.

[36] The applicant submits that although the Federal Court of Appeal found that the analysis of an offender's abandonment of Canada is a backward-looking consideration, when assessed with all relevant considerations, the overall inquiry must be forward-looking. The Minister must consider the past events and also what has transpired since in the context of the offender's potential rehabilitation and reintegration. The issue is whether he is a suitable candidate for transfer today.

[37] The applicant notes that the Federal Court of Appeal rejected the notion that abandonment of Canada is a "show stopper" and held that even where there has been abandonment, all the other factors must be considered and weighed. He submits that the significant weight given to abandonment is not supported by the evidence. Moreover, it is more than offset by other factors that clearly support his transfer.

[38] The applicant argues that the Minister failed to weigh the abandonment factor in accordance with the purposes of the Act as stated in section 3 and the treaties it implements. In giving significant weight to the applicant's abandonment of Canada, the Minister precluded consideration of his current suitability for transfer. The applicant submits that the Minister should have considered: the circumstances of his decision to leave Canada influenced by his drug

abuse; whether the original reasons for leaving Canada are still operative; whether he maintained meaningful ties while residing abroad; and, whether he had changed his mind and formed the intention to return to Canada.

[39] The applicant also argues that the evidence of abandonment is equivocal. CSC did not make any finding that he abandoned Canada but simply summarized the available evidence. He points to the CSC Community Assessment in 2006 and 2007 which notes that he "appears" to have abandoned Canada but subsequently changed his mind and that information from his family indicated that he had an intention to return to Canada prior to his arrest in the USA. He also points to his application for transfer where he states that he maintained contact with his family and never intended to abandon Canada.

The seriousness of the offence and the applicant's criminal record

[40] The applicant submits that the Minister's finding that he would constitute a danger to public safety—and specifically that he poses a significant risk and is likely to engage in similar criminal activities if returned—is unreasonable. The Minister's decision is contrary to CSC's advice and does not sufficiently explain the reasons for the different conclusion as required by *Carrera #2*, above, and *LeBon*, at para 24).

[41] The applicant acknowledges that there is no "bright line" with respect to the extent of the explanation required by the Minister to justify a departure from the CSC's conclusion, but submits that the duty to justify the decision is more onerous where the factors in favour of relief

are strong. In this case, given the support of CSC, the Minister's reasons for departing from CSC's support are not sufficient.

Risk of parole breaches and management difficulties

[42] The applicant submits that the finding that he would pose a risk of breaching his parole and that he would be difficult to manage is based on a flawed analysis and is, therefore, unreasonable.

[43] The applicant again submits that the Minister failed to explain why he reached a different conclusion than CSC. Although CSC did not make a specific recommendation or finding, it would not have found him to be suitable for a transfer if it was of the opinion that he would have difficulty adhering to parole conditions.

[44] The applicant notes that to support the conclusion that he would not adhere to parole conditions, the Minister referred to the applicant's fleeing the country and his immediate eligibility to apply for parole upon his return.

[45] The applicant submits that in reaching the conclusion that he would not adhere to parole conditions and would be difficult to manage, the Minister misapprehended the facts. Although he may be eligible to *apply* for parole after his return, there is no certainty that parole would be granted. There would be an assessment, a Correctional Plan, a risk assessment and at least 6 months of incarceration before any application for parole could even be made. The applicant also

argues that the Minister ignored the role of the Parole Board in determining whether the applicant posed a risk of violating parole conditions or would be difficult to manage.

[46] The applicant further submits that the Minister is relying on his past conduct—particularly his absconding, which he cannot change and which is long in the past—to determine that he would be difficult to manage now, without the benefit of any current assessment. Events of 30 years ago are not indicative of the applicant's current behaviour. His institutional record in the USA does not disclose any poor conduct. The 2010 CSC assessment confirms his progress in the institution, his improved supervision history, his sobriety and his motivation. It also states that his reintegration potential is high if these developments continue. Therefore, the finding that he would be difficult to manage is contradicted by the evidence.

[47] The applicant challenges the Minister's finding that the purpose of the Act is not to permit the offender to return in order to take advantage of Canada's corrections system. Even if the Canadian system is more advantageous, the objective of the Act is rehabilitation and reintegration which benefits society, not only the offender.

[48] The applicant also submits that the Minister did not take into account the outstanding Canadian sentence that he would be required to complete upon his return. The information from CSC indicates that 1020 days of that sentence remain.

Doré/Divito Charter proportionality analysis

[49] The applicant argues that the decision to deny his transfer has a significant adverse impact on the values engaged by subsection 6 (1) of the *Charter*. Therefore, for the statutory objectives to prevail over the *Charter* value at issue, the statutory objectives must be as or more significant than the impact on the applicant. He submits that no proportionate balancing occurred, as required and guided by the Supreme Court of Canada in *Doré* and *Divito*, and the Minister simply stating that the analysis was done does not make it so.

[50] The applicant further submits that the Minister's final comments that he could reapply is not a reasonable conclusion given that the determinative factor in refusing his transfer is that he absconded from Canada and he cannot change the past.

[51] With respect to the remedy, the applicant argues that the only reasonable outcome is for the Court to direct that the Minister consent to his transfer. The applicant predicts that remitting his application for re-determination will again lead to the same result and, like *LeBon*, the decision will be appealed to the Federal Court of Appeal only to be sent back to the Minister for reconsideration.

The Respondent's Position

[52] The respondent submits that the Minister weighed the competing factors and considered the statutory purpose. The decision to grant or refuse a transfer is discretionary and the role of the Court on judicial review is not to reweigh the evidence considered in the exercise of that

discretion. The respondent argues that the applicant is effectively challenging the relative weight given to the factors and the evidence.

[53] The respondent highlights the facts which are not in dispute: in 1987, the applicant absconded to the USA while on day parole, assumed an alias to avoid detection and remained in the USA for 10 years before he was arrested and convicted for drug offences and sentenced to 30 years in prison.

[54] The Minister acknowledges the purpose of the Act and sets out each factor considered and the facts that were relied on with respect to each. The Minister notes the factors in support of a transfer and those against and clearly identifies his concerns following the balancing of the factors for and against.

[55] The respondent notes that the objectives of the Act, as section 3 read at the time of the application and decision, do not specifically refer to public safety. However, the case law has established that public safety is an aspect of the administration of justice (see *Holmes v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112, 383 FTR 185 at para 9). The Minister may also consider other aspects of the administration of justice which may indicate that a transfer would have negative implications for the administration of justice.

Abandonment of Canada – paragraph 10 (1)(b)

[56] The respondent submits that the Minister reasonably concluded that the applicant had left or remained outside Canada with the intention of abandoning the country as his permanent residence. The facts which support the finding of abandonment are clearly set out in the decision.

[57] The respondent argues that the Minister's decision complies with guidance provided by the Federal Court of Appeal in *Carrera #2*; although abandonment of Canada was a significant factor, abandonment is only one of the three reasons for the Minister's decision and was considered along with all the other relevant factors. Abandonment is a backward-looking inquiry which is then weighed alongside other factors.

[58] The respondent submits that the Minister properly focused on the 10-year period following the applicant's absconding to the USA. The evidence supports that he intended to remain in the USA and had established himself there: he lived under an alias to avoid detection, had various jobs, operated a business, had a long-term relationship and owned a home.

[59] Moreover, the respondent contends that the applicant's occasional social visits to Canada do not negate abandonment. As stated in *Kozarov v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 866, 333 FTR 27 at para 24, the Act does not require that an offender sever all ties with Canada before he is deemed to have abandoned the country. The respondent also notes that the decision is consistent with CSC's 2006 Community Assessment, which determined that the applicant left with the intention of abandoning Canada, although he

later changed his mind. The respondent acknowledges that the applicant has family ties to Canada, but points out that this factor is a separate consideration.

[60] The respondent contests the applicant's position that the weight the Minister placed on paragraph 10 (1)(*b*) frustrates the Act's purpose and the treaties it implements. The significant weight placed on abandonment reflects the purpose of the provision, the statutory objectives and the specific facts including that the applicant admitted that he intended to leave Canada to avoid prison. The respondent submits that fleeing the country while on day parole and assuming a new identity were reasonably found to be "serious undertakings" by the Minister.

[61] The respondent also disputes the applicant's assumption that the rehabilitation and reintegration purposes trump the administration of justice purpose of section 3. In this case, it was within the Minister's discretion, in considering the relevant factors, to attach more weight to the administration of justice purpose, including the promotion of public safety (*Holmes*, above, at para 61).

[62] The respondent submits that the Minister did not ignore the applicant's substance abuse and progress in his correctional programs, including treatment for addiction. The decision reflects that the Minister was not convinced that the applicant's addiction affected the voluntariness of his actions.

Seriousness of the offence and criminal record

[63] The respondent submits that the Minister's conclusions regarding the seriousness of the applicant's offences and his criminal record are supported by the evidence and are reasonable. The facts before the Minister were not disputed by the applicant; the applicant is a career criminal with a long and consistent history of involvement in drug trafficking in both Canada and the USA.

[64] The respondent also submits that the Minister's conclusions that the applicant posed a risk to public safety and was likely to commit similar offences were reasonable. In predicting the risk to public safety, it was reasonable for the Minister to consider Mr. Carrera's criminal record in Canada dating back to 1971, and his absconding and remaining in that status for 10 years before being arrested for other serious drug offences.

[65] The respondent acknowledges that although the CSC assessment did not make a specific recommendation, some comments indicate its view that Mr. Carrera would not commit further offences if returned. However, the Minister's decision does not contradict any specific recommendation. Moreover, the Minister is entitled to disagree with the assessment and, in accordance with *LeBon*, the Minister explained why he reached a different conclusion.

[66] In *Carrera #1*, Justice Hughes indicated that the decision must show that there was an awareness of CSC's assessment and how the factors considered by the Minister outweigh that assessment. The respondent submits that this decision does so; the Minister refers to the CSC

ITU's assessment and notes that he considered other factors, i.e., the seriousness of the offences and the applicant's past difficulty obeying parole conditions, to reach a different conclusion.

[67] The respondent disputes the applicant's submission that the current decision replicates the earlier decision which this Court and the Federal Court of Appeal found to be unreasonable. The facts are the same and some of the considerations remain the same, but the decision is comprehensive and reflects the direction of the Federal Court of Appeal and the balancing exercise required by *Divito*.

Risk of parole breaches and management difficulties

[68] The respondent submits that the applicant's absconding from day parole while serving part of a 4-year sentence in Canada, the ten years spent at large in the USA, and his failure to turn himself in provide a basis for the Minister to conclude that the applicant could not be managed under the Canadian parole regime.

[69] The respondent disputes the applicant's argument that the Minister's finding usurps the role of the Parole Board or signals that the Parole Board is not capable of managing offenders or assessing risk. Section 3 of the Act requires the Minister to consider whether a transfer would further an offender's rehabilitation and reintegration in the community. This involves considering whether an offender is capable of complying with the terms of structured release into the community. The Minister is entitled to take into account that the applicant could apply for parole immediately as this is relevant to whether the applicant poses a risk of future parole breaches.

[70] The respondent also submits that the applicant's immediate eligibility for parole was not the determinative consideration. This comment was made in the context of the Minister's consideration of the paragraph 10(1)(*b*) factor—that the applicant absconded and abandoned Canada. The Minister noted that "[f]leeing the country and assuming a new identity are serious undertakings" which led the Minister to conclude that the applicant would have difficulty adhering to parole conditions and would be difficult to manage.

[71] The respondent submits that the significant factor in the decision is Mr. Carrera's absconding, which reflects a pattern regarding his conduct while under the jurisdiction of the Canadian justice system.

Doré/Divito Charter proportionality analysis

[72] The respondent notes that Canadian citizens do not have a right under subsection 6(1) of the *Charter* to serve a foreign sentence in Canada and agrees that the Minister's discretion pursuant to the *ITOA* must be exercised in compliance with *Charter* values (*Divito*, above, at paras 45 and 49). The respondent also agrees that the decision should reflect a proportionate balancing of the *Charter* protection and statutory objectives, given the nature of the decision and the factual context and submits that the decision demonstrates that the Minister conducted the appropriate balancing.

[73] The respondent disputes that there is a greater onus on the Minister to counterbalance the impact of the refusal to transfer the applicant with the statutory objectives of the Act.

[74] The Supreme Court of Canada acknowledged in *Doré*, at para 56, that Courts must accord some leeway to the legislator in the balancing and that the proportionality test will be satisfied if the outcome "falls within a range of reasonable alternatives". In the present case, the respondent argues that the Minister's findings and the overall decision reflect the objectives of the Act and are reasonable.

[75] With respect to the remedy sought by the applicant, the respondent submits that the Minister's decision is responsive to the Federal Court of Appeal and Federal Court's decisions in *Carrera #1* and *#2*, but in the event that the Court finds the decision to be unreasonable, the Court should remit the application for transfer to the Minister for re-determination. Directing the outcome is an exceptional remedy which is not warranted in this case.

Is the Decision Reasonable?

[76] The Minister relied on the applicant's abandonment of Canada plus additional factors—the applicant's criminal history and his risk of breaching parole conditions and potential management difficulties—in deciding to refuse the applicant's transfer to Canada. The Minister focused on the applicant's abandonment of Canada and his criminal history, past conduct which cannot be changed, and failed to consider all the evidence regarding the applicant's conduct and circumstances including that which has changed or may change. In particular, the Minister either failed to consider all of the evidence or misapprehended the evidence with respect to the applicant's parole eligibility and the outstanding sentence the applicant would be required to complete which the Minister relied on in concluding that the applicant posed a risk to public

safety and a risk of not obeying parole conditions and posing management difficulties should he be returned to Canada.

The Minister's finding that the applicant abandoned Canada (paragraph 10 (1)(b)) is reasonable

[77] The Minister did not err in concluding that the applicant abandoned Canada. As is evident from the record, the applicant fled Canada to avoid his sentence and he lived under an alias to facilitate his new life in the USA with new jobs, business ventures, a long-term relationship and a home. Despite his short clandestine visits to his Canadian family, there is no indication that he would have left his American life behind or returned to Canada had he not been arrested and imprisoned.

[78] The issue is whether other factors could possibly balance or outweigh the finding that the applicant abandoned Canada. If they cannot, then abandonment is the "show stopper" the Federal Court of Appeal cautioned against in *Carrera #2*.

Abandonment of Canada remains the "show stopper"

[79] The Minister's emphasis on the backward-looking paragraph 10 (1)(*b*) and his assessment of public risk and future criminality which also was guided by past events make it almost inevitable that Mr. Carrera will never be granted a transfer. Although the Minister comments that "Mr. Carrera is not yet ready to be reintegrated into Canadian society", it appears that he could never be ready. His criminal record and history and his abandonment of Canada are facts that the Minister has determined militate overwhelmingly against a transfer. In my view,

this predetermines the outcome of any future applications and is contrary to the purpose of the Act.

[80] The Minister's decision focuses on past events that will remain forever unchangeable; the applicant's abandonment and his criminal history. Based on the Minister's analysis, these factors cannot be outweighed by the positive factors. The positive factors will not likely get any better than they are now: Mr. Carrera has a good record as an inmate in the USA jail; he has taken a wide range of programs for his substance abuse and work related programs; he has strong family support in Canada; the CSC assessment did not raise any concerns about a transfer; and, the USA has agreed to his transfer, so there is no concern regarding lack of respect for that sentence.

[81] Despite the Minister's lengthy decision and articulation of additional concerns and the reasons provided for reaching his decision, the outcome is that abandonment of Canada remains the "show stopper".

[82] In *Carrera #2*, the Federal Court of Appeal made it clear that while significant weight can be placed on abandonment which involves a backward inquiry, because the past cannot be changed, all the other section 10 factors must be considered. In *Carrera # 2*, the Minister relied on only the factors enumerated in section 10 and the Federal Court of Appeal, therefore, referred to the section 10 factors. However, the Federal Court of Appeal's guidance extends to the other relevant factors considered by the Minister that are not set specifically set out in section 10. If it is impossible for an offender to ever overcome the abandonment factor, despite the consideration

of the relevant section 10 factors and other relevant factors, abandonment remains a "show stopper", contrary to *Carrera # 2*.

The seriousness of the offences and his criminal record cannot be changed

[83] The CSC assessment does not include any comments regarding the likelihood of the applicant to commit similar offences if returned to Canada nor does it make a specific recommendation to refuse the transfer of the applicant. The Minister's decision acknowledges the CSC assessment and clearly indicates that the Minister has residual concerns. Contrary to the applicant's submission, it cannot be said that the Minister did not sufficiently explain why he reached a different conclusion. The Minister clearly indicated that he disagreed due to the seriousness of the applicant's offence, his criminal history in Canada and his absconding—again, all factors that the applicant cannot change.

The other applicable section 10 factors could support the transfer

[84] In the present case, with the exception of the applicant's abandonment of Canada, all the other applicable section 10 factors were positive. The Minister acknowledged that the applicant changed his mind regarding his abandonment of Canada, has strong family ties, no longer has criminal links in Canada and has made good progress in prison with respect to his addictions and other programs after many years of institutionalization. There is nothing more the applicant could do to ensure that the positives outweigh the negatives. Although the Minister states that the applicant's progress "will continue if he continues to serve" his sentence, it is not evident how this would result in a different outcome given that the Minister places more significant weight on unchangeable negative factors.

Risk of parole breaches and "Management Difficulties" are based on a failure to consider all the relevant evidence

[85] The Minister has the discretion to grant or refuse the transfer and may consider relevant factors beyond those set out in section 10. The Court's role on judicial review is not to reweigh or rebalance the factors; however, the Minister's findings regarding the applicant's risk of not obeying parole conditions and of being difficult to manage are based on a failure to consider all the relevant evidence or a misapprehension of that evidence which would have a bearing on the findings and on the overall weighing of all the factors considered. In particular, the Minister failed to consider: that eligibility for parole does not mean that parole will be granted; that the Parole Board would conduct a full assessment of the relevant factors and be guided by the paramount consideration of public safety; and, that the applicant will be required to serve all or part of his outstanding Canadian sentence. The Minister's conclusion that the applicant poses a risk to public safety and of breaching parole conditions and would be difficult to manage could have been different had the Minister considered all of the evidence.

[86] The Minister's concern about Mr. Carrera's difficulty obeying parole conditions was based on the finding that he ran away from "Canadian justice" while on day parole and on the Minister's repeated observation that Mr. Carrera will be eligible to apply for parole immediately if returned to Canada.

[87] The Minister is entitled to consider that Mr. Carrera would be eligible for parole, but the Minister must fully consider what parole eligibility entails, when it would arise, the principles of the *CCRA* and the role of the Parole Board. The reality is that Mr. Carrera would not be immediately eligible for parole. Once he is eligible, there is no guarantee that he will be granted

parole. The Parole Board would consider all the same conduct the Minister is concerned about in assessing whether and on what conditions Mr. Carrera should be granted parole. Mr. Carrera could continue to serve his sentence in custody if the Parole Board determines that this is in the interests of public safety.

[88] Moreover, he would be required to serve at least part of his outstanding Canadian sentence.

[89] The CSC indicated that 1060 days remain to be served (almost 3 years) on this sentence and that it would be adjusted. While it is not clear whether all or part of that sentence would be required to be served, this would have a significant impact on the applicant's eligibility for parole. The Minister's emphasis on Mr. Carrera's immediate eligibility for parole stemmed from the conversion of the USA sentence of 30 years, of which he has now served 16 years, and the calculations that would occur upon transfer, but did not reflect the outstanding Canadian sentence. The inclusion of the remaining Canadian sentence would affect the Minister's conclusion that the applicant would be immediately eligible for parole and that this eligibility poses a risk to public safety and a risk of parole breaches and management difficulties.

[90] The *CCRA* provides in section 100 that the purpose of conditional release is to contribute to a just, peaceful and safe society by making decisions regarding when and how offenders are released that will best facilitate their rehabilitation and reintegration. The more recent addition of section 100.1 clarifies that the paramount consideration in all determinations with respect to release is the protection of society.

[91] Although the risk the applicant poses to the administration of justice, which includes public safety, permits the Minister to consider a wide range of factors, including eligibility for parole, the Minister does not explain why or how this would negatively affect public safety.

[92] While the Minister has not usurped the role of the Parole Board, the Minister appears to have not taken into account the important role it would play in the event that the applicant applied for parole. The Parole Board is required to consider a wide range of facts and factors when determining whether conditional release should be granted and on what conditions, including the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process, information from victims and other components of the criminal justice system and assessments provided by correctional authorities. The decision of the Parole Board must be consistent with the protection of society and the Board is guided by the paramount consideration of public safety.

[93] The respondent's submission that the Minister focused primarily on the abandonment factor and did not place much emphasis on the applicant's immediate eligibility for parole is not borne out by the decision. The Minister mentions that the applicant would be immediately eligible for parole at least three times. Clearly, the Minister placed significant weight on his misunderstanding that the applicant would be immediately eligible.

[94] Moreover, the respondent's argument that abandonment was the significant factor is problematic because that cannot be changed and the Federal Court of Appeal made it clear that all the other factors must also be considered.

[95] More generally, the Minister does not appear to have considered whether the Canadian corrections system could provide a better alternative for the applicant's reintegration and rehabilitation than remaining incarcerated in the USA until the conclusion of his sentence and then returning to Canada, perhaps without any preparation for reintegration and without further programs for rehabilitation.

[96] The Minister also emphasized that the applicant would receive an advantage in transferring to Canadian custody: his immediate eligibility to apply for parole. The Minister's observation that the applicant seeks to gain an advantage by applying for a transfer is at odds with the overall purpose of the *ITOA* which 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 sentence in their home country. Many offenders will gain an advantage if returned to serve the remainder of their sentences in Canada because the Canadian correctional system has much to commend it in terms of balancing the primary objective of protecting society with the promotion of offenders' rehabilitation and reintegration into society. If the advantage of being eligible for parole in Canada earlier than would be the case in the foreign jurisdiction is a mark against the applicant, it would be a mark against many offenders seeking transfer.

[97] The Minister's conclusion is not reasonable because the analysis of the applicant's risk to public safety and risk of not obeying parole conditions and management difficulties failed to consider all of the evidence or misapprehended the evidence regarding the applicant's outstanding sentence and his parole eligibility, which would not be immediate.

Doré/Divito Charter proportionality analysis

[98] The *Charter* value at issue is the offender's right to return to Canada upon release and the possibility of returning to Canada earlier, limited by the provisions of the *ITOA* and the requirement for both the foreign jurisdiction to consent and the Minister to consent.

[99] Although the applicant disputes that the Minister conducted a proportionate balancing of the *Charter* protection and statutory objectives as guided by the Supreme Court of Canada, it is not possible to conclude that this balancing was not done. The Court has established the principles and the steps of the required analysis but the application of the principles will vary depending on the facts and may require some adaptation, particularly where the balancing involves *Charter* values as opposed to *Charter* rights.

[100] In *Divito*, the Supreme Court of Canada noted at para 45 that, "although the ITOA contemplates a mechanism by which a citizen may return to Canada in the limited context of continuing incarceration for the purpose of serving their foreign sentence, s. 6(1) does not confer a right on Canadian citizens to serve their foreign sentences in Canada".

[101] The Court noted, at para 48, that although Canadians have a right to enter Canada, Canadians who are incarcerated may only return pursuant to the *ITOA*. The Court clarified that the *ITOA* does not create a constitutionally protected right to enter Canada even when the foreign jurisdiction consents, nor does it create an obligation on Canada to permit the offender to return to serve their sentence. The Court added, at para 49, that once the foreign jurisdiction consents to

the transfer, the discretion of the Minister is engaged and must be exercised reasonably and in compliance with relevant *Charter values*. The Court noted:

> As this Court explained in *Doré*, "[o]n judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (para 57).

[102] In *Doré,* at paras 55-58, the Supreme Court of Canada explained how to conduct the balancing exercise. First, the decision-maker should consider the statutory objectives. Second, the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. Proportionality will be satisfied if the measure "falls within a range of reasonable alternatives". Overall, "the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play".

[103] The Court added that deference is owed to administrative and legislative bodies in balancing *Charter* values against broader objectives. The ultimate consideration is whether in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives. If so, the decision will be found to be reasonable.

[104] In the present case, the statutory objectives include contributing to the administration of justice, of which public safety is an element, and the rehabilitation and reintegration of offenders

by enabling them to serve their sentences in their home country. These objectives may at times compete with each other, as in the present case.

[105] The consideration of how the *Charter* value at issue will best be protected in view of the statutory objectives could lead to allowing the transfer if the statutory objectives of rehabilitation and reintegration are given more weight and alternatively, could lead to refusing the transfer if the statutory objectives of public safety are given more weight.

[106] In the present case, the decision is not unreasonable due to a failure to balance the *Charter* value at stake with the statutory objectives. Rather, the decision is unreasonable because the Minister has placed almost insurmountable weight on the abandonment factor, knowing that this cannot be changed. Moreover, the Minister did not consider all the facts regarding the applicant's possible eligibility for parole and the requirement for the applicant to serve all or part of his outstanding Canadian sentence. The Minister relied on a mistaken view that the applicant would be immediately eligible for parole, which formed the basis for the finding that the applicant poses a risk to public safety, could not be managed on parole and would pose management difficulties.

[107] Although I have found that the decision is not reasonable and the application for transfer must again be reconsidered, I do not agree with the applicant's position that this is an appropriate case to direct that the Minister consent to the transfer.

[108] The current decision is not a replica of the earlier decision. Unlike *LeBon*, this is not a situation where "although the second decision is longer, it is essentially a rewording of the Minister's first decision" (para 13). The Minister identified additional concerns not raised in the previous refusal decision. As noted above, some of these concerns are based on misapprehension of the evidence or failure to consider all of the evidence regarding the applicant's parole eligibility and his outstanding Canadian sentence. The Minister should have the opportunity to again consider the relevant factors based on all the evidence, the principles and provisions of the *CCRA* regarding conditional release and the impact of the applicant's outstanding Canadian sentence.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The decision is quashed and the applicant's request for transfer shall be reconsidered by the Minister.

2. The applicant shall have his costs of the application in the amount of $2500.

"Catherine M. Kane"

Judge

Annex A

The Relevant Provisions of the *International Transfer of Offenders Act* and the *Corrections and Conditional Release Act*

International Transfer of Offenders Act

The purpose of the legislation is set out in Section 3 of the Act, as it read at the time of the application:

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.	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.

Section 10 sets out the factors that the Minister is required to consider in deciding whether to approve a transfer request. The provision below reflects the section as it read at the time of the application:

10. (1) In determining whether to consent to the transfer of a Canadian offender, the Minister shall consider the following factors:	10. (1) Le ministre tient compte des facteurs ci-après pour décider s'il consent au transfèrement du délinquant canadien :
(*a*) whether the offender's return to Canada would constitute a threat to the security of Canada;	*a*) le retour au Canada du délinquant peut constituer une menace pour la sécurité du Canada;
(*b*) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent	*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

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.

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.

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

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

(*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

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*) 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.

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).

Corrections and Conditional Release Act

Section 100 sets out the purpose of conditional release and section 100.1 highlights that the paramount consideration is public safety. Section 101 sets out the governing principles.

100. The purpose of conditional release is to contribute to the maintenance of a just,

100. La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en

peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

100.1 The protection of society is the paramount consideration for the Board and the provincial parole boards in the determination of all cases.

100.1 Dans tous les cas, la protection de la société est le critère prépondérant appliqué par la Commission et les commissions provinciales.

101. The principles that guide the Board and the provincial parole boards in achieving the purpose of conditional release are as follows:

101. La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes suivants :

(*a*) parole boards take into consideration all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process and information obtained from victims, offenders and other components of the criminal justice system, including assessments provided by correctional authorities;

a) elles doivent tenir compte de toute l'information pertinente dont elles disposent, notamment les motifs et les recommandations du juge qui a infligé la peine, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine et ceux qui ont été obtenus des victimes, des délinquants ou d'autres éléments du système de justice pénale, y compris les évaluations fournies par les autorités correctionnelles;

(*b*) parole boards enhance

b) elles accroissent leur

their effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about their policies and programs to victims, offenders and the general public;

efficacité et leur transparence par l'échange, au moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale et par la communication de leurs directives d'orientation générale et programmes tant aux victimes et aux délinquants qu'au grand public;

(*c*) parole boards make decisions that are consistent with the protection of society and that are limited to only what is necessary and proportionate to the purpose of conditional release;

c) elles prennent les décisions qui, compte tenu de la protection de la société, ne vont pas au-delà de ce qui est nécessaire et proportionnel aux objectifs de la mise en liberté sous condition;

(*d*) parole boards adopt and are guided by appropriate policies and their members are provided with the training necessary to implement those policies; and

d) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en œuvre de ces directives;

(*e*) offenders are provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

e) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-348-14
STYLE OF CAUSE:	RAPHAEL CARRERA, (A.K.A. RAFFAELE MILONE) v THE MINISTER OF PUBLIC SAFETY
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 23, 2014
JUDGMENT AND REASONS:	KANE J.
DATED:	JANUARY 19, 2015

APPEARANCES:

John Norris Meara Conway	FOR THE APPLICANT
Ayesha Laldin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Simcoe Chambers Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT