Federal Court  Cour fédérale

Date: 20110704

Docket: T-1486-10

Citation: 2011 FC 819

Vancouver, British Columbia, July 4, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

SUNNY YU

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Minister of Public Safety (the Minister), dated August 16, 2010, whereby the Minister denied the applicant's request under the *International Transfer of Offenders Act*, SC 2004, c 21 [*ITOA*] to have his prison sentence transferred from the United States of America (the US) to Canada.

I. Background

[2] The applicant, born January 18, 1979, is a Canadian citizen. In September of 2001, he went to the US to study finance at Hawaii Pacific University in Honolulu. While there, he became the subject of an investigation conducted by the Bureau of Immigration and Customs Enforcement and, on June 22, 2003, he was arrested for his involvement with the import of 4 kilograms of methamphetamine from Canada to Hawaii. It was alleged that he was responsible for overseeing the transportation and delivery of the drugs and for paying the couriers involved.

[3] On September 23, 2005, the applicant pled guilty and was convicted of "Conspiracy to import into the United States in excess of 500 grams of methamphetamine". He was sentenced to 14 years in prison, followed by 5 years of supervised release.

[4] In 2006, the applicant applied to have his sentence transferred to Canada. The former Minister of Public Safety and Emergency Preparedness approved the applicant's request. However, in June of 2007, the US denied it, citing the seriousness of the offence that the applicant had committed. On March 13, 2008, the applicant's accomplice, a Mr. Khai Ong, was successfully transferred from the US to Canada.

[5] The applicant applied to US officials, for a second time, to be transferred to Canada. This time, in January of 2009, officials with the US Department of Justice approved the applicant's request. On February 11, 2009, the applicant applied to the Minister. In his application, the applicant indicated, "I know I have made some wrong choices but I hope I can be given a chance to show that I have learned from my mistakes."

[6] In April of 2010, the Correctional Service of Canada's (CSC's) International Transfer Unit (ITU) prepared a report for the Minister's consideration. The report indicated, among other things, that there was no reason to regard the applicant as a threat to the security of Canada, that his social and familial ties in British Columbia remained supportive, that he would be supported by his mother and sisters upon his return, and that the applicant had no other criminal convictions or outstanding charges.

[7] The report also indicated that the likelihood of the applicant re-offending after being released was low. In terms of whether the applicant would be likely to commit a "criminal organization offence" within the meaning of section 2 of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], the report indicated that the information obtained by the CSC from its security and intelligence counterparts (including the Canadian Security Intelligence Service) did not suggest that he would. The report also stated that, "File information does not identify him as a member of an organized crime group."

II. The decision under review

[8] On August 16, 2010, the Minister rejected the applicant's request for transfer.

[9] After setting out the purposes of the *ITOA* and the facts of the applicant's case, the Minister indicated as follows:

> The Act requires that I consider whether, in my opinion, the offender will, after the transfer, commit a criminal organization offence within the meaning of section 2 of the *Criminal Code*. In considering this factor, I note that the applicant was implicated in the planning and execution of a sophisticated drug transaction involving a large amount of drugs being transported from Canada into the U.S. File

> information suggests that he was responsible for overseeing the transportation and delivery of the drugs and for paying the couriers. The applicant was involved in the commission of a serious offence that, if successfully committed, would likely have resulted in the receipt of a material or financial benefit by him and those involved in the group he assisted.
>
> The Act requires that I consider whether the offender has social or family ties in Canada. I recognize the family ties of the applicant in Canada, including the fact that the applicant's mother and siblings remain supportive.
>
> Having considered the unique facts and circumstances of this application and the factors enumerated in section 10, I do not believe that a transfer would achieve the purposes of the Act.

III. Issues

[10] In his written submissions, the applicant advanced a number of arguments based on section 6 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Essentially, the applicant argued that by rejecting the applicant's request for a transfer to Canada, the Minister was violating his mobility rights as protected by subsection 6(1) of the *Charter*. In his oral submissions, however, the applicant conceded that this issue was recently addressed by the Federal Court of Appeal in *Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 39, 413 NR 134. The Court of Appeal found that subsection 6(1) of the *Charter* is not engaged in the prisoner transfer context. I am bound by that decision.

[11] As such, the controlling issue on this application is: Did the Minister err in refusing to grant the applicant's request for a transfer?

IV. Standard of review

[12] A decision by the Minister on whether or not to consent to a prisoner transfer is discretionary in nature and, as such, is entitled to significant deference. The reasonableness standard of review applies (*Randhawa v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 625 at para 4; *Holmes v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112 at paras 45-46 [*Holmes*]; *Dudas v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 942 at para 23, 373 FTR 253). The Court will, thus, consider the existence of justification, transparency and intelligibility within the decision-making process, as well as 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).

V. Analysis

[13] Under the *ITOA*, a Canadian offender incarcerated in a foreign state (provided Canada has entered into a transfer agreement with that foreign state) may request to have their sentence transferred to Canada. Subsection 8(1) of the *ITOA* indicates that the consent of three parties is required in order for a transfer to occur: the offender, the foreign state and Canada:

Consent of three parties	Consentement des trois parties
8. (1) The consent of the three parties to a transfer — the offender, the foreign entity and Canada — is required.	**8.** (1) Le transfèrement nécessite le consentement des trois parties en cause, soit le délinquant, l'entité étrangère et le Canada.

[14] Canada's consent is provided by the Minister. Subsections 10(1) and 10(2) of the *ITOA* set out factors that the Minister is required to consider when determining whether to provide that consent:

Factors — Canadian offenders	Facteurs à prendre en compte : délinquant canadien
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 residence;	*b*) le délinquant a quitté le Canada ou est demeuré à l'étranger avec l'intention de ne plus considérer le Canada comme le lieu de sa résidence permanente;
(*c*) whether the offender has social or family ties in Canada; and	*c*) le délinquant a des liens sociaux ou familiaux au Canada;
(*d*) whether the foreign entity or its prison system presents a serious threat to the offender's security or human rights.	*d*) l'entité étrangère ou son système carcéral constitue une menace sérieuse pour la sécurité du délinquant ou ses droits de la personne.
Factors — Canadian and foreign offenders	Facteurs à prendre en compte : délinquant canadien ou étranger
(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).

[15] The factors set out in subsections 10(1) and 10(2) are not exhaustive. The Minister is free to take other factors into consideration as well, so long as they are relevant to the purpose of the Act (*Holmes*, above at para 12; *Balili v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 396 at para 3). The purpose of the *ITOA* is set out in section 3:

Purpose	Objet
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.

[16] If the Minister does not give consent, subsection 11(2) of the *ITOA* requires him to provide reasons. Justice Michael Phelan, in *Holmes*, above at paras 42-44, noted that the Minister's reasons under subsection 11(2) must satisfy the four purposes for adequate reasons set out by the Federal Court of Appeal in *Vancouver International Airport Authority v Public Service Alliance of Canada*,

2010 FCA 158 at para 16, 320 DLR (4th) 733, with particular emphasis on the “substantive” and “justification, transparency and intelligibility” purposes. In essence, it is important that the applicant be able to determine the basis for why the Minister decided the way he did, and that basis must be understandable, with a discernable rationality and logic.

[17] In the current case, the Minister’s reasons contained discussion of only two factors: 1) s 10(1)(*c*) – “whether the offender has social or family ties in Canada”, and 2) s 10(2)(*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*”.

[18] Under paragraph 10(1)(*c*), the Minister acknowledged that the applicant had a supportive family in Canada. This would presumably have militated in favour of granting the applicant’s request.

[19] Under paragraph 10(2)(*a*), the Minister focused on whether or not the applicant would, after the transfer, commit a criminal organization offence. In this regard, the Minister simply listed the following facts: the applicant was implicated in planning and executing a sophisticated drug transaction, a large amount of drugs were involved, the applicant was responsible for overseeing the transportation and delivery of the drugs, the applicant’s offence was serious and, had it been successful, would likely have resulted in the receipt of a material or financial benefit to him and to those involved in the group that he assisted.

[20] Although the Minister did not specifically say so, one is left with the impression that the facts recited by the Minister led him to conclude that the factor set out in paragraph 10(2)(*a*) had been satisfied: i.e. that the applicant would, after being transferred to Canada, commit a criminal organization offence. Moreover, since no other reasons were cited by the Minister in support of his decision to deny the applicant's request, one is left with the further impression that the Minister's finding under paragraph 10(2)(*a*) was determinative.

[21] This is problematic. No reasons were provided to explain why the facts recited by the Minister, which all related to the drug offence committed by the applicant in 2003, led the Minister to conclude that, in the future, the applicant would commit a criminal organization offence.

[22] It is true that the facts as recited by the Minister might be seen as going part of the way towards justifying a determination that the applicant had committed a "criminal organization offence" in the past. Central to the definition of "criminal organization offence" set out in section 2 of the *Criminal Code* is the definition of "criminal organization" found at subsection 467.1(1):

Definitions	Définitions
467.1 (1) The following definitions apply in this Act.	**467.1** (1) Les définitions qui suivent s'appliquent à la présente loi.
	…
"criminal organization" means a group, however organized, that	« organisation criminelle » Groupe, quel qu'en soit le mode d'organisation :
(*a*) is composed of three or more persons in or outside Canada; and	*a*) composé d'au moins trois personnes se trouvant au Canada ou à l'étranger;

(*b*) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.	*b*) dont un des objets principaux ou une des activités principales est de commettre ou de faciliter une ou plusieurs infractions graves qui, si elles étaient commises, pourraient lui procurer — ou procurer à une personne qui en fait partie — , directement ou indirectement, un avantage matériel, notamment financier.
It does not include a group of persons that forms randomly for the immediate commission of a single offence.	La présente définition ne vise pas le groupe d'individus formé au hasard pour la perpétration immédiate d'une seule infraction.

[23] The Minister found that the applicant "was involved in the commission of a serious offence that, if successfully committed, would likely have resulted in the receipt of a material or financial benefit by him and those involved in the group he assisted." However, the Minister nevertheless failed to explain how any of the other requirements for being involved in a "criminal organization" were met in the applicant's case: he did not indicate that the applicant belonged to a group composed of three or more persons, or that the group had as one of its main purposes the commission of one or more serious offences, or that the group was not formed randomly for the immediate commission of a single offence. Although counsel for the respondent suggests that these elements can all be inferred from the record, there is nothing in the Minister's reasons to suggest that they were considered by him. Furthermore, it is important to note that the CSC report specifically indicated that the applicant had not been identified as a member of an organized crime group.

[24] Even if the Minister had provided a justified, transparent and intelligible explanation as to why he believed the applicant had committed a criminal organization offence in the past, this would do nothing to address the more relevant question as to why the Minister was of the view that the applicant was going to commit a criminal organization offence in the future. In this regard, it is important to note that paragraph 10(2)(*a*) uses the word "will" as opposed to "may" with regards to the future offence and, as such, a high degree of certitude is required (*Grant v Canada (Minister of Public Safety and Emergency Preparedness)* 2010 FC 958 at paras 36-37, 373 FTR 281; *Holmes*, above at paras 13-14).

[25] An explanation was particularly important in the current case, because CSC officials had indicated to the Minister that, based on its intelligence, there was no reason to believe that the applicant would be likely to commit a criminal organization offence. This Court, on a number of occasions, has indicated that although the Minister is free to depart from the advice provided by his advisors, when he does, he has a heightened duty to explain the reason for that departure. In *Singh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 115 at paras 12-13, Justice Phelan indicated:

> 12 The Minister may reach a conclusion which is at odds with the advice he is receiving. He may weigh stipulated and other factors differently. However, it is incumbent on the Minister to explain how he could reach the conclusion or concern.
>
> 13 In this case, the Minister had to explain how he was concerned that the Applicant would continue his organized crime activities when the evidence was that the Applicant had no links to organized crime. The need for reasoned explanation is even more acute when the information from Correctional Service Canada's counterparts in Security and Intelligence areas, and in CSIS, did not lead the departmental advisors to believe that the Applicant would, after transfer, commit an act of organized crime.
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> [Emphasis added]

See also *Grant v Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] FCJ No 386 (QL) and *Vatani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 114 at paras 8-9.

[26] The Minister failed to provide adequate reasons explaining why he was of the view that the applicant would, after being transferred to Canada, commit a criminal organization offence. The evidence on file indicated that there was a very low likelihood of the applicant re-offending, let alone committing a criminal organization offence. Beyond generally indicating that the transfer would not achieve the purposes of the Act, the Minister provided no other justification for his rejecting the applicant's request for consent.

[27] The respondent seeks to rely on the recent decision of this Court in *Duarte v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 602 [*Duarte*] to argue that the decision of the Minister in the current case was reasonable. However, the decision under review in *Duarte* was different.

[28] In that case, the Minister denied an application for transfer after citing concerns under both paragraph 10(1)(*a*), that the offender's return would constitute a threat to the security of Canada, and paragraph 10(2)(*a*), that the offender would, after the transfer, commit a criminal organization offence. Not only were two negative factors considered by the Minister in that case, as opposed to just one, but the Minister's analysis under paragraph 10(2)(*a*) was also more fulsome. The Minister noted that the applicant had previous ties with a criminal organization and had a prior criminal record in Canada, including assault with a weapon charges. The Minister also indicated that the file

evidence relating to the offence in question - conspiracy to possess with intent to distribute more than five kilograms of cocaine - suggested that there were accomplices involved who had not been apprehended.

[29] While it may have been possible to find the required justification, transparency and intelligibility within the Minister's decision-making process in *Duarte*, those required elements are decidedly lacking in the current case.

[30] For the foregoing reasons, I find that the Minister's decision to deny the applicant's request for a transfer was unreasonable.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review is allowed, the Minister's decision is quashed, and the matter is returned for re-determination within 60 days of the date of judgment. The whole with costs to the applicant.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

John W. Conroy, Q.C.	FOR THE APPLICANT
Curtis Workun	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Conroy & Company Barristers & Solicitors Abbotsford, British Columbia	FOR THE APPLICANT
Myles J. Kirvan Deputy General of Canada Vancouver, British Columbia	FOR THE RESPONDENT