Federal Court  Cour fédérale

Date: 20110826

Docket: T-1539-10

Citation: 2011 FC 1018

Ottawa, Ontario, August 26, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

YVES LEBON

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The Applicant, Mr. Yves LeBon, was stopped by a State Trooper in respect of a minor traffic violation on August 22, 2007 on an Illinois highway in the United States. The Applicant consented to the trooper's request to search his vehicle, which revealed 119 packages each containing 1 kilogram of cocaine for a total of 119 kilograms of cocaine (Certified U.S. Case Summary of Canadian Citizen, dated November 19, 2008, Certified Tribunal Record [CTR]; Exhibit "A" to the Affidavit of Johanne Lavigne, sworn November 7, 2010 [Lavigne Affidavit]).

[2] The Applicant pled guilty to possession with intent to distribute cocaine and improper entry by an alien and was sentenced on July 18, 2008 to 120 months of imprisonment and 5 years of supervised release, upon his release from imprisonment (Judgment in a Criminal Case, *United States of America v Yves Le Bon*, dated July 18, 2008, CTR). The term of supervised release cannot be administered in Canada (Correctional Service of Canada [CSC] Executive Summary Report and cover letter, dated April 14, 2010, CTR).

[3] On November 25, 2008, the Applicant requested, pursuant to the *International Transfer of Offenders Act*, SC 2004, c 21 [*ITOA*], that the Minister of Public Safety and Emergency Preparedness approve his request to be transferred to Canada in order to serve the remainder of his prison sentence ([Request], CTR)

II. Introduction

[4] The *ITOA* creates a framework for enabling Canadian offenders to serve their foreign sentences in Canada in cases where the Minister is satisfied that a transfer would advance the objectives of the Act having regard to the particular facts and circumstances of each individual case, an applicant's reasons submitted in support of his/her request, and the factors the Minister is mandated to consider in determining whether to consent to a transfer.

[5] Section 3 of the *ITOA* provides for the Act's layered purpose: to contribute to the administration of justice, the rehabilitation of offenders and the reintegration of offenders into the community. The *ITOA*'s purpose of contributing to the administration of justice includes public safety and security considerations. The layered purpose of the Act is at the core of the legislative

framework and is addressed and balanced in the Act through factors which the Minister is required to consider and through the opportunity for offenders to provide reasons in support of their transfer requests with regard to any or all pertinent factors and circumstances.

[6] In exercising his discretion under the *ITOA*, the Minister may base his decision on his assessment of the factors outlined in section 10 of the *ITOA*; however, he is not required to limit his consideration to these factors, nor is he required to make findings in respect of the mandated factors. The Minister's role in determining whether to consent to a transfer is to consider the enumerated factors and weigh them in a reasonable and transparent way as he sees relevant in making a global assessment of whether a given transfer meets the stated objectives of the Act.

[7] Based on his examination of the unique facts and circumstances of the Applicant's transfer request – as presented to him – in the context of the purposes of the Act and the specific factors enumerated in section 10, the Court accepts the position of the Respondent in that the "Minister reasonably" demonstrated his discretion in denying the Applicant's request. The Minister's decision has been shown to be "transparent and intelligible". As a result, the Court cannot do otherwise but to accept the position of the three counsel of the Respondent as the position which reflects the Minister's decision can be said to be "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" of the case (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[8] In *Grant v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 958, 373 FTR 281, Justice David Near found that the Minister's interpretation and application of the *ITOA* in

exercising his discretion to grant or deny transfer requests under that statute will similarly attract the post-*Dunsmuir* presumption that his decisions be reviewable on a standard of reasonableness (*Dunsmuir*, above, at para 54; *Grant*, above, at para 28).

[9] Justice Near's reasons for this finding are apposite to the present case:

> [28] … A discretionary ministerial decision made pursuant to legislation which engages the Minister's expertise and policy role will similarly attract a great deal of deference and point to a standard of reasonableness in some matters regarding the interpretation of the statute.
>
> …
>
> [30] … Parliament appointed the Minister to be the gate-keeper of the international transfer of offender's regime. In this role, the Minister of Public Safety and Emergency Preparedness is particularly well suited to consider the evidence before him and appropriately balance the reintegration interests of the Applicant and concerns about the administration of justice in Canada. In this case, the Minister did not interpret provisions that are of central importance to the legal system as a whole, but rather gave context to a fact-laden reasoning process in an effort to produce transparent, intelligible reasons …

[10] The Minister identified a number of concerns upon his examination of the unique facts and circumstances of the Applicant's Request – as presented to him – in respect of his mandated consideration of "whether, in [his] opinion, the offender will, after the transfer, commit a criminal organization offence within the meaning of section 2 of the *Criminal Code*" and noted:

- the nature of the criminal activity "suggests that other accomplices were involved who were not apprehended";
- the nature of the criminal activity "is indicative of a serious criminal organization activity";
- "the applicant did not provide a statement to the police after his arrest";

- "it appears from the file that the applicant did not cooperate with the police in identifying other participants in the crime";
- "the offence involved a large quantity of cocaine, which is destructive to society"; and,
- "[t]he applicant was involved in the commission of a serious offence involving a significant quantity of drugs that, if successfully committed, would likely result in the receipt of a material or financial benefit by the group he assisted".

It is noted as significant to the Minister's decision that the offence involved a large quantity of cocaine which could have had serious repercussions for society; and, furthermore, the Applicant did not identify other participants in the crime; thus, no one else was apprehended in regard to the crime in question.

[11] In *Holmes v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112, Justice Michael Phelan held:

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

III. Background

[12] The CSC Request Forms for Canadian Citizens incarcerated abroad expressly provide that the Applicant is to provide reasons in support of his Request (The first page of the CSC Request Forms (CSC/SCC 308) and "Information form in support of a request for transfer to Canada" (CSC/SCC 614) require the Applicant (and a witness) to sign, attesting that "I hereby request a transfer to Canada to complete my sentence for the following reasons". For the purposes of this application, reference will be made to the "CSC Request Forms" when addressing the forms specifically and the "Request" when addressing the Applicant's Request). The Forms provide several opportunities for the Applicant to make written representations to the Minister addressing all pertinent factors and circumstances of his individual Request in respect of the pressing and substantial objectives of the *ITOA*. The Forms invite the Applicant to provide information regarding a number of factors, including:

> SUPPORT:
> - List persons or agencies who might be willing to give you support following your transfer.
>
> OTHER INFORMATION:
> - Set out any other information that you think Canadian officials should know about you or your case.
>
> PERSONAL DATA:
> - Synopsis of personal and family history
>
> RESIDENCE ABROAD:
> - How long have you resided abroad?
> - Briefly state your reasons for being abroad.
>
> CURRENT OFFENCE(S):
> - Name of accomplice(s)
> - Offender's version of offence(s)
>
> PROGRAM FACTORS:
> - Offender's occupational and program interests

(Under this heading, the Request form invites the Applicant to "specify activities" of interest in respect of the following types of programs: "Education/Vocational", "Industrial/Forestry", "Agricultural", "Individual/Group Counselling", and "Other").

- Drug/Alcohol involvement

  (Under this heading, the Request form invites the Applicant to provide information regarding: his drug/alcohol usage, whether the current offence related to drug or alcohol involvement; and any past and/or present participation in drug/alcohol treatment).

- General health

  (Under this heading, the Request form invites the Applicant to identify and provide information regarding any claimed medical ailments and/or medication required).

- Offender's immediate needs

  (Under this heading, the Request form invites the Applicant to identify and provide information regarding any treatment, protection or other identified needs).

[13] In completing the CSC Request Forms in support of his Request, the Applicant:

- listed persons willing to provide him support after his transfer;
- gave the following account of his version of the offence:

  "DECOUVERTE DE COCAINE DANS LES BAGAGES DANS LA VALISE DU VEHICULE QUE JE CONDUISAIT, APRES AVOIR ÉTÉ ARRETER PAR LA POLICE DE LA ROUTE POUR UNE INFRACTION AU CODE DE LA ROUTE (AVOIR ROULER SUR LA LIGNE DE ACCOTEMENT DROIT)"; and,

- identified only "TRANSPORT ROUTIER-CAMIONNAGE" as his "occupational and program interests" under the "PROGRAM FACTORS" heading.

[14] The Applicant chose not to name any accomplice(s) and left several other sections of the CSC Request Forms blank, presenting no information demonstrating his acceptance of responsibility for his criminal offence, efforts at rehabilitation in the U.S. or any medical or other needs. Significantly, in respect of the "PROGRAM FACTORS" heading, the Applicant identified no other "occupational and program interests", no drug or alcohol involvement, no medical ailments, no medication required, and no immediate treatment or other needs.

[15] The U.S. Department of Justice approved the Request on March 6, 2009.

[16] On August 16, 2010, the Minister of Public Safety and Emergency Preparedness denied the Request.

[17] In his reasons for denying the Request, the Minister: identified the purposes of the *ITOA*; noted that these purposes "serve to enhance public safety in Canada"; and clearly articulated the legislative framework in which he exercised his discretion in considering requests for transfer under the *ITOA*:

> … For each application for transfer, I examine the unique facts and circumstances as presented to me in the context of the purposes of the Act and the specific factors enumerated in section 10. [Emphasis added].

(Decision, Applicant's Record [AR] at p 24).

[18] The Minister outlined the circumstances of the offence for which the Applicant is serving a foreign sentence:

> … The applicant, Yves LeBon, is a Canadian citizen serving a sentence of imprisonment of 10 years in the United States (U.S.) for the following offences: possession with intent to distribute cocaine; and, improper entry by an alien. On August 17, 2007, the offender entered the U.S. stating that he was on his way to visit with family in Maine. On August 22, 2007, during a routine traffic stop, an Illinois State Trooper asked Mr. LeBon if he could search his vehicle. The police officer discovered 119 packages in the trunk, each containing one kilogram of cocaine.

(Decision, AR at p 24).

[19] The Minister identified a number of concerns upon his examination of the unique facts and circumstances of the Applicant's Request – as presented to him – in respect of his mandated consideration of "whether, in [his] opinion, the offender will, after the transfer, commit a criminal organization offence within the meaning of section 2 of the *Criminal Code*" and noted:

- the nature of the criminal activity "suggests that other accomplices were involved who were not apprehended";
- the nature of the criminal activity "is indicative of a serious criminal organization activity";
- "the applicant did not provide a statement to the police after his arrest";
- "it appears from the file that the applicant did not cooperate with the police in identifying other participants in the crime";
- "the offence involved a large quantity of cocaine, which is destructive to society"; and,
- "[t]he applicant was involved in the commission of a serious offence involving a significant quantity of drugs that, if successfully committed, would likely result in the receipt of a material or financial benefit by the group he assisted".

It is noted as significant to the Minister's decision that the offence involved a large quantity of cocaine which could have had serious repercussions for society; and, furthermore, the Applicant did not identify other participants in the crime; thus, no one else was apprehended in regard to the crime in question.

[20] The Minister noted the existence of supportive family ties in respect of his mandated consideration of "whether the offender has social or family ties in Canada" – the only "positive" *ITOA* factor identified in the Applicant's reasons in support of his Request.

[21] In concluding his reasons, the Minister demonstrated that he applied the correct legislative framework and exercised his discretion reasonably:

> Having considered the united 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.

IV. Issues

[22] (1) What is the appropriate standard of review for a decision regarding an offender transfer pursuant to the *ITOA*?

(2) What is the proper characterization of the *ITOA* Legislative Framework and the Minister's Role in the *ITOA* context?

(3) Did the Minister reasonably deny the Applicant's Request for a transfer to Canada?

V. Analysis

A. Standard of Review

[23] Following *Dunsmuir*, above, the Federal Court has held that decisions of the Minister refusing offender transfer requests, pursuant to the *ITOA*, are discretionary, entitled to significant deference, and, thus, reviewable on a reasonableness standard (*Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 983 at para 19, aff'd 2011 FCA 39 at para 58; *Grant*, above, at paras 26-32).

[24] In *Grant*, above, Justice Near found that the Minister's interpretation and application of the *ITOA* in exercising his discretion to grant or deny transfer requests under that statute will similarly attract the post-*Dunsmuir* presumption that his decisions be reviewable on a standard of reasonableness (*Dunsmuir*, above, at para 54; *Grant* at para 28).

[25] Justice Near's reasons for this finding are apposite to the present case:

> [28] … A discretionary ministerial decision made pursuant to legislation which engages the Minister's expertise and policy role will similarly attract a great deal of deference and point to a standard of reasonableness in some matters regarding the interpretation of the statute.
>
> …
>
> [30] … Parliament appointed the Minister to be the gate-keeper of the international transfer of offender's regime. In this role, the Minister of Public Safety and Emergency Preparedness is particularly well suited to consider the evidence before him and appropriately balance the reintegration interests of the Applicant and concerns about the administration of justice in Canada. In this case, the Minister did not interpret provisions that are of central importance to the legal system as a whole, but rather gave context to a fact-laden reasoning process in an effort to produce transparent, intelligible reasons …

[26] As Justice Sean Harrington underscored in *Divito*, above, the question for the reviewing Court is not whether it would have been reasonable for the Minister to agree to the transfer, but whether it was unreasonable to refuse the transfer (*Divito* at para 22; *Grant*, above, at para 32).

[27] Unless the Minister's Decision is unreasonable, the Court should not intervene.

B. *ITOA* Legislative Framework and the Minister's Role in the *ITOA* Context:

[28] Section 6 of the *ITOA* vests the Minister with the responsibility for the administration of the Act. Upon receipt of a request for a transfer under section 7, and subject to the consent of the foreign entity to the transfer under section 8, the Minister is empowered by Parliament to exercise substantial discretion in determining whether to consent to each transfer request, subject to his consideration of the relevant facts and the relevant factors set out in the legislation (*Divito*, above, at paras 57, 70; *Holmes*, above, at paras 11-12, 38; *Kozarov v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 866, [2008] 2 FCR 377 at paras 22-25).

[29] Section 3 of the *ITOA* provides for the Act's layered purpose: to contribute to the administration of justice, the rehabilitation of offenders and the reintegration of offenders into the community:

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.

[30] In *Holmes*, above, Justice Phelan rejected a narrow interpretation of the term "administration of justice" in the Act's purpose clause and held that it includes "public safety and security considerations" (*Holmes* at paras 7-9). In his reasons for concluding that any infringement of the section 6 *Charter* rights is preserved by section 1, Justice Phelan observed that the *ITOA*'s pressing and substantial objectives also included Canada's interests: "ensuring that punishment by countries with whom Canada has relevant treaties is respected"; "respecting the rule of law in other countries"; and "respecting international relations" (*Holmes* at paras 29, 31, 32, 40).

[31] In light of his recognition of the *International Transfer of Offenders Act*'s broad, diverse, pressing and substantial objectives, Justice Phelan noted that the suggestion that, once the foreign country consents to a transfer of an offender, the Minister is "virtually obliged" to consent to the transfer:

> [40] … ignores the goals of rehabilitation by assuming that no other country can rehabilitate a person; ignores the particular individual circumstances of reintegration by assuming that all Canadian citizens have long and deep connections in Canada and ignores the secondary purposes of the Act in respecting the rule of law in other countries and respecting international relations.

[32] In *Divito*, above, Justice Robert Mainville identified the security of Canada and the prevention of offences related to terrorism or to organized crime as additional pressing and substantial objectives served by Parliament's decision to empower the Minister to determine whether or not to allow offenders to serve their sentences in Canada (*Divito* at paras 51-57. Note, while Justice Marc Nadon disagreed with Justice Mainville's conclusion that the *ITOA* violates subsection 6(1) of the *Charter*, he agreed with his justification analysis under section 1 of the *Charter*: *Divito* at para 72).

[33] The *ITOA* does not create or recognize a "right" of Canadian offenders to return to Canada, but creates a framework for implementing Canada's international treaty agreements and administrative arrangements designed to enable offenders to serve their sentences in the country of which they are citizens or nationals (*ITOA* preamble; *Holmes* at paras 6, 21-28; *Divito*).

[34] In *Getkate v Canada (Minister of Public Safety and Emergency Preparedness*), 2008 FC 965, [2009] 3 FCR 26, the Court noted that the *ITOA* does not create an automatic right to return to Canada to serve their sentence, but serves "to assist rehabilitation and reintegration in appropriate situations" [Emphasis added] (*Getkate*, at paras 26, 29). Although rehabilitation is a core objective of the *ITOA*, there is no presumption that a given transfer will serve the objective of rehabilitation (*Getkate* at para 29; *Holmes* at paras 35, 40) and, even if the Minister believes a transfer would serve this objective, it is open for the Minister to deny the transfer request based on his consideration of the other pressing and substantial objectives of the *ITOA*.

[35] Similarly, in *Divito*, the Federal Court of Appeal observed:

> [62] … Though for some offenders the loss of the perceived "benefit" of a potential earlier conditional release under the Canadian correctional system may be unfair …
>
> [63] … Barring exceptional circumstances, there is nothing unfair or unreasonable in the fact that [offenders who have committed offences in foreign jurisdictions] are subject to the incarceration systems of the foreign jurisdictions in which they committed their offences …

[36] In *Divito,* Justice Mainville found that the legislative framework in which the Minister's discretion is exercised in the *ITOA* context is reasonable and rationally linked to the pressing and substantial objectives of the *ITOA* in a number of ways:

> [58] … First, the Minister's discretion is strongly fettered by specific enumerated factors which must be considered, including notably whether the offender's return to Canada would constitute a threat to the security of Canada (paragraph 10(1)(*a*) of the act) or whether the offender will, after the transfer to Canada, commit a terrorism offence or criminal organization offence (paragraph 10(2)(*a*) of the act). These are serious and important constraints on the Minister's discretion. Second, the scheme of the legislation allows the offender to make prior representations to the Minister through a written request in which all pertinent factors and circumstances can be addressed (section 7 of the act). Third, the Minister must provide written reasons if he refuses his consent to the transfer (section 11 of the act). Finally, the decision of the Minister is subject to judicial review before the Federal Court, and the decision of that court is itself subject to appeal to this Court and ultimately, in appropriate cases, to the Supreme Court of Canada.

[37] As transfers under the *ITOA* are a discretionary privilege for offenders incarcerated abroad, predicated on Canada undertaking to administer their sentences and assuming the risks and responsibilities of these undertakings (*Kozarov*, above, at para 28; *Divito*, above, at paras 81, 88-89), and not a right or presumptive entitlement, applicants must demonstrate that their transfers would advance – and not threaten or undermine – the beneficial objectives of the Act (*Holmes*, above, at para 37; *Divito*, at para 53). Applicants are put on notice of what "pertinent factors and circumstances" will be considered by the Minister by virtue of the purposes of the *ITOA*, the factors set out in section 10 of the *ITOA*, and the information requested in the CSC Request Forms.

Minister's Discretion in respect of Consideration of Section 10 Factors

[38] Subsection 10(1) of the *ITOA* sets out the factors that a Minister shall consider in determining whether to grant or deny a Canadian offender's request for a transfer:

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

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.

canadien :

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

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

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

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

[39] Subsection 10(2) of the *ITOA* sets out the factors that a Minister shall consider in determining whether to grant or deny a Canadian offender's or a foreign offender's request for a transfer :

Factors – Canadian and foreign offenders

10. (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

Facteurs à prendre en compte : délinquant canadien ou étranger

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

a) à son avis, le délinquant commettra, après son transfèrement, une infraction de terrorisme ou

terrorism offence or criminal organization offence within the meaning of section 2 of the Criminal Code; and	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).

[40] In *Kozarov*, above, Justice Harrington recognized that the Minister's determination of whether to consent to a transfer under section 8 of the *ITOA* is to be treated as a discretionary decision and not as a fact-finding mission mandating approval based on a binary analysis of the factors (*Kozarov* at paras 19, 20, 22, 24-25). The Court has repeatedly emphasized the Minister's residual discretion under the *ITOA*, noting that the factors the Minister must consider under section 10 are not exhaustive, nor are any "determinative of the result" (*Kozarov* at paras 19-21, 22, 25; *Holmes*, above, at paras 12, 38-39; *Divito*, above, at para 18). Rather, they "are simply factors to be weighed by the Minister in a reasonable and transparent way" (*Holmes* at paras 38-39). [Emphasis added].

[41] The factors that the Minister must consider under s 10 of the *ITOA* are consistent with an rationally connected to the stated purpose of the Act as set out in s 3 and the objectives of the legislation (*Holmes*, above, at para 34; *Kozarov*, above, at para 20; *Divito*, above, at paras 53-58). In *Holmes*, Justice Phelan noted that "[t]he protection of society and the best interests of the Canadian citizen prisoner are balanced in the Act through the factors which the Minister is required to consider" (*Holmes* at para 33).

[42] Justice Phelan identified the paragraph 10(2)(*a*) factors as "address[ing] both the need to protect society and the utility of attempting to rehabilitate a person who will continue the same kind of conduct that has led to his or her incarceration" [emphasis added], and rejected the argument that paragraph 10(2)(*a*) is a significant impairment on an offender's disputed section 6 rights as "ignore[ing] the consideration that persons who will (again) engage in these offences undermine the beneficial objectives of the Act" (*Holmes*, above, at paras 35, 37).

[43] The Court has consistently recognized that the Minister's exercise of his discretion under the *ITOA* requires that he consider and weigh information from various sources and ultimately make a decision in light of his obligations under the *ITOA* as well as his other statutory obligations and policy considerations, including "prevent[ing] members or associates of criminal organizations from exercising influence and power in institutions and in the community" and balancing the protection of society and the best interests of the Canadian citizen prisoner (*Holmes*, above, at para 33; *Divito*, at paras 18-24, citing Commissioner's Directive (CD) 586-3 – Identification and Management of Criminal Organizations; *Corrections and Conditional Release Act*, SC 1992, c 20, sections 3, 4).

[44] In determining whether he will approve a transfer request by a Canadian citizen, the Minister may weigh the corollary risks and obligations of undertaking to administer an applicant's foreign sentence in Canada. Accordingly, the Minister's discretion to grant or deny a transfer request imports considerations and decision-making functions pertaining to the administration of a custodial sentence for a criminal conviction, such as offender classification, placement and transfers within Canada, as well as parole and conditional release.

[45] Although it is open for the Minister to base his decision to grant or refuse a transfer request on his assessment of the enumerated factors, he is not required to limit his consideration to these factors, nor is he required to make findings in respect of any or all of the mandated factors.

[46] The Minister's role is to consider the enumerated factors and weigh them in a reasonable and transparent way in informing his global assessment of whether a given transfer meets the stated objectives of the Act; however, having addressed the enumerated factors, the Minister may weigh or balance the relevant factors and considerations as he sees fit (*Divito*, above, at paras 57-58, 70; *Holmes*, above, at paras 61-63).

The Minister's Decision

[47] In regard to the standard of reasonableness, the Minister's Decision is defensible in respect of the facts and law. His reasons are complete, intelligible and sufficient to allow the Applicant to know that all of the factors set out in section 10 of the *ITOA* were fairly considered (*Divito*, above, at para 70; *Holmes*, above, at para 63).

[48] In *Holmes*, above, Justice Phelan observed that the Minister's discretion in respect of the *ITOA* legislative framework is broad and significant deference is owed to the Minister's assessment of relevant factors in the exercise of his discretion (*Holmes*, above, at para 46). The Minister's role is to consider the enumerated factors and weigh them in a reasonable and transparent way in informing his global assessment of whether a given transfer meets the objectives of the Act (*Holmes* at paras 38-39). "[H]aving addressed the relevant considerations, the actual weighing or balancing is

for the Minister to conduct." (*Holmes*, at paras 38-39, 61-63 [emphasis added]; *Divito*, above, at paras 57-58 70).

[49] While the Minister may take advice in respect of a transfer request under the *ITOA*, he must make the final decision and not delegate (*Kozarov*, above, at para 24). In *Markevich v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 113, Justice Phelan provided guidance regarding the reasonableness requirements for *ITOA* decisions where the Minister chose not to follow the departmental advice, noting that the *Dunsmuir* test of transparency and intelligibility would be met where, "to the extent that it departs from that advice or emphasizes other relevant factors, the decision clearly explains the departure and the shift of emphasis" (*Markevich*, at para 20; reference is also made to *Grant*, above, at para 41).

[50] In his reasons for denying the Request, the Minister clearly articulated and applied the legislative framework for the exercise of his discretion in considering requests for transfer under the *ITOA*, in accordance with the guidance provided by *Divito*, above, and *Holmes*, above, namely basing his Decision on his belief that a transfer would not achieve the purposes of the Act, subject to his consideration of the unique facts and circumstances of the Request as presented to him in the context of the purposes of the Act and the specific factors enumerated in section 10 of the *ITOA*.

[51] As in *Holmes*, above, the Decision "focused on the potential for commission of a criminal organization offence", making reference to the specific information relating to the paragraph 10(2)(*a*) factor that caused the Minister concern (*Holmes* at para 59; Decision, AR at pp 23-24). For example, the Minister's observation that the nature of the criminal activity "suggests that other

accomplices were involved who were not apprehended" and "is indicative of a serious criminal organization activity" was reasonably open to him on the evidence [Emphasis added].

[52] Contrary to the Applicant's assertions, there is no evidence that the Applicant was acting as a "drug mule" when he was apprehended with 119 kilograms of cocaine (The only basis for this reference are Ms. Lavigne's affidavit statement (based on her conversations with the Applicant and her review of his file) and the statement made in the CSC Executive Summary that "[i]t can be speculated that the offence may have been committed for financial gain and that his role was that of the 'mule'." [Emphasis added]); Lavigne Affidavit at para 3). Similarly, there was no "observation of the CSC stating that this offence was not part of an organized crime" anywhere in the record before the Minister. The CSC Executive Summary and the CSC Community Assessment merely confirm that there are no known accomplices.

[53] In fact, the CSC Community Assessment observed that the quantity of drugs being transported by the Applicant (identified in the CSC's information as being 112 kilograms) was large enough that one could believe he was dealing with people fairly well placed in the criminal underworld. The Assessment also notes that, considering the known illicit activities at the Port of Montreal, the Applicant's long-term employment as a truck driver at said Port may shed some light on the various opportunities that led to his involvement in the transport of drugs.

[54] As Justice Near noted in *Grant*, above, international drug trafficking constitutes "a very serious crime that one could reasonably conclude required financing, planning and other logistics often associated with organized crime" (*Grant*, at para 46 [emphasis added]). Furthermore, the

Court can take judicial notice of the fact that cocaine is dangerous, and sells between $100 and $120 per gram, placing the street value of the drugs seized from the Applicant at between $11,900,000 and $14,280,000 (*R v Mackey* (2007), 280 Nfld & PEIR 231, [2007] NJ No 457 (NLP.C) at para 4 (QL); *R v Meech*, 2011 ONSC 1815, [2011] OJ No 1417 at para 7 (QL)).

[55] Accordingly, the Minister's consideration of the fact that the Applicant's offence involved a large quantity of cocaine which would cause harm to society and benefit to the group he assisted is relevant to his assessment of the paragraph 10(2)(*a*) factor, as this recognizes the resources, premeditation, and organization of the Applicant's unidentified associations in Canada and the U.S. Moreover, the Minister's focus on the "seriousness of the drug trade and its social implications" in respect of his consideration under paragraph 10(2)(*a*) demonstrates that his rationale in finding that the Applicant's transfer would not achieve the purposes of the Act was informed by his consideration of aspects of the administration of justice purpose (*Holmes*, above, at paras 59-61).

[56] It was similarly open to the Minister to consider the Applicant's failure to provide a statement to the police after his arrest and his failure to cooperate with the police in identifying other participants in the crime as relevant factors in his determination of whether to grant his Request for a transfer under the *ITOA*.

[57] The relevance of the Applicant's acceptance of responsibility and cooperation with authorities in identifying accomplices is underscored by the inclusion of an opportunity for him to provide information regard his "accomplice(s)" and his "version of offence(s)" in the CSC Request Forms; however, as noted, the Applicant chose not to identify any accomplices in his Request and

provide an account of his offence that demonstrated no acceptance of responsibility for his offence, which more so sheds light on the Minister's consideration of whether the Request advanced the purposes of the *ITOA*.

[58] The Minister, "in reaching his negative conclusion on the transfer application," also "noted the positive aspects of [the Applicant's] situation", namely his family ties in Canada, "including the fact that his wife and son remain supportive" (*Holmes*, above, at para 60; Decision, AR at p 24). While the Minister's reference to the "positive aspects" in respect of the Request is limited to his consideration of the paragraph 10(1)(*c*) factor, this was the only *ITOA* factor for which the Applicant presented the Minister supportive reasons in his CSC Request Forms in support of his Request under section 7 of the Act (*Divito*, above, at para 58).

[59] Although the Minister's Decision clearly weighed the "public safety" and "administration of justice" objectives of the Act more heavily than the rehabilitation and reintegration purposes, he did not ignore those purposes (*Holmes*, above, at para 61). Rather, to the extent that these purposes were raised in respect of the Applicant's Request, these objectives were addresses in the Minister's consideration of the paragraph 10(2)(*a*) factor, which "addressed both the need to protect society and the utility of attempting to rehabilitate a person who will continue the same kind of conduct that has led to his or her incarceration" (*Holmes*, at para 35).

[60] The Minister's observations that the Applicant did not provide a statement to the police or cooperate with the police in identifying other participants in the crime and that the nature of the criminal activity "suggests that other accomplices were involved who were not apprehended".

According to the Minister's observations, this "is indicative of a serious criminal organization activity" which informs the Court of the Minister's consideration of whether the Applicant has accepted responsibility for his offending, severed ties with his accomplices, and made sincere efforts towards his own rehabilitation such that his transfer would not undermine the beneficial objectives of the Act (*Holmes*, above, at para 37).

ITOA Statutory Context, Minister's Role, and Reasons

[61] The Applicant improperly alleges that the Minister's Decision was based on an implied "conclusion" or "suggestion" that the Applicant "would likely commit a criminal organization offence" – which "conclusion was unreasonable given the record of information before the Minister" and in spite of the Applicant's allegedly "[meeting] all criteria outlined in the Act to be permitted a transfer to Canada".

[62] As noted above, the Applicant is not presumptively entitled "to be permitted a transfer to Canada" to serve his sentence upon having "met all criteria outlined in the Act". Similarly, it is well-established that the factors the Minister is mandated to consider under section 10 are fluid, non-binary, non-determinative, and do not exhaust the Minister's discretion (*Kozarov*, above, at paras 19-22, 24-25; *Divito*, above, at para 18; *Holmes*, above, at paras 38-39). Rather, they "are simply factors to be weighed by the Minister in a reasonable and transparent way" (*Holmes*, at paras 38-39).

[63] The Minister's Decision neither "suggests" nor "concludes" that the Applicant "would likely commit a criminal organization offence". Although the Minister addressed this factor in the

Decision, he was not required to make findings or conclusions in respect of whether or not this factor was "met" in the context of the Applicant's Request, nor did he make any such findings or conclusions.

[64] Contrary to the Federal Court's findings in respect of the Minister's broad discretion to weigh the relevant facts or factors as he sees fit, subject to his having addressed the relevant factors raised in respect of a given transfer request (*Divito*, above, at paras 57-58, 70; *Holmes*, above, at paras 38-39; *Markevich*, above, at para 20), the Applicant invites the Court to reweigh the factors cited by the Minister in respect of his consideration of the paragraph 10(2)(*a*) factors.

[65] The Applicant also improperly attempts to prescribe the facts and factors that the Minister may consider in the exercise of his discretion to those facts that "prove or disprove" a conclusion in respect of a mandated factor under section 10. In so doing, the Applicant presents the Minister's concerns in respect of factors informing his consideration of the objectives of the *ITOA* – namely, administration of justice and public safety – as improper considerations in respect of the Minister's exercise of his discretion under subsection 10(2)(1).

[66] The above submission belies the intention of Parliament that the Minister exercise substantial discretion in his assessment of the section 10 factors – and any other factors or considerations relevant to the purposes of the Act – in determining whether a transfer would serve the purposes of the Act. It is now well-established that the factors outlined in section 10 are not to be treated as some form of test for either an applicant or the Minister to satisfy in order to entitle or disentitle an applicant to a transfer. It would fundamentally undermine the beneficial objectives of

the *ITOA* regime to find that – in exercising his discretion under the *ITOA* – the Minister may only consider the mandated factors in respect of the purposes of the Act but may not consider the purposes of the Act themselves.

[67] The Applicant attempts to undermine the Minister's observation that the nature of the criminal activity "suggests that other accomplices were involved who were not apprehended" and "is indicative of a serious criminal organization activity" by imputing a criminal law standard to the Minister's reference to a "criminal organization" and noting the absence of a conviction "of a criminal organization offence within the meaning of section 2 of the Criminal Code of Canada or its equivalent in the State of Illinois"; however, the principles of "dual criminality" and "conduct determinative" provided by section 4 of the *ITOA* expressly provide that the characterization of the conduct forming the basis for their foreign sentences is not relevant in respect of the availability of a transfer, provided the conduct would have constituted a criminal offence in Canada.

[68] The Applicant's assertion that the Minister "may draw no adverse inferences from the silence of the Applicant" is similarly predicated on a conflation of criminal law standards of proof and due process rights and the *ITOA* legislative framework and the Minister's Role in the *ITOA* context. While the confessions rule does prevent one's silence in respect of criminal charges to be used against him or her in respect of a finding of criminal liability, this presumption does not apply in respect of the determination and administration of a sentence for a criminal offence. In fact, the *Criminal Code*, RSC 1985, c C-46, section 718, identifies the "promot[ion of] a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community" as an objective tied to the fundamental purpose of sentencing. Moreover, an offender's

expression of remorse, timely plea of guilty, and cooperation with authorities when apprehended are all regarded as mitigating factors in respect of sentence length (*Criminal Code*, s 718.2; *Nash v R*, 2009 NBCA 7, at para 47; *R v Knoblauch*, 2000 SCC 58, [2000] 2 SCR 780 at para 63).

[69] Finally, even it if was "more likely, given the evidence on the record, that he and others spontaneously formed a group for the commission of a single offence", it was nevertheless reasonable for the Minister to articulate his concern regarding the nature of the Applicant's activity as engaging both paragraphs 10(2)(*a*) and the administration of justice purpose of the *ITOA*.

Additional Consideration

[70] The Applicant has filed the affidavit of his spouse, Ms. Johanne Lavigne, in support of this application. Via this affidavit, the Applicant attempts to introduce evidence that was not before the Minister at the time he made the Decision, including evidence regarding the Applicant's health. The jurisprudence is clear that absent exceptional circumstances, which are not present in this case, the role of the Court on judicial review is to review the decision on the basis of the record that was before the decision-maker. It is incumbent on an applicant to present any evidence at the time he or she wishes the Minister to consider as part of his or her application (*Divito*, above).

[71] This affidavit also improperly adduces evidence of Ms. Lavigne's impression and beliefs about the circumstances of the Applicant's criminal involvement and the conditions of his sentence and conditional release. As noted in the CSC Community Assessment, Ms. Lavigne would seem to know very little about the circumstances of the Applicant's offence; did not know the Applicant's

motives for transporting drugs; and did not seem aware of the full extent of the circumstances and context in which the Applicant was involved and the large amount of drugs involved.

[72] Based on the foregoing, Ms. Lavigne's affidavit evidence is improper and, therefore, afforded little weight by the Court on this application.

VI. Conclusion

[73] For all of the above reasons, the Applicant's application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT ORDERS that the Applicant's Application for Judicial Review be dismissed with costs.

"Michel M.J. Shore"
Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1539-10
STYLE OF CAUSE:	YVES LEBON v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	August 24, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	August 26, 2011

APPEARANCES:

Yavar Hameed Silma Abdullah (Law Clerk)	FOR THE APPLICANT
Alexander Kaufman David Cowie Jessica DiZazzo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hameed & Farrokhzad Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT