

Federal Court



Cour fédérale

Date: 20111207

Docket: T-1520-10

Citation: 2011 FC 1433

Ottawa, Ontario, December 7, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

FRANCO TANGORRA

Applicant

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Franco Tangorra is a Canadian citizen who is serving a prison sentence in the United States for drug trafficking. He applied to the Minister of Public Safety and Emergency Preparedness for a transfer to Canada in order to serve the remainder of his sentence here. The Minister denied Mr. Tangorra's application.

[2] Mr. Tangorra argues that the Minister's decision was based on allegations to which he was not given an opportunity to respond and, therefore, that the decision was arrived at unfairly. He also submits that the Minister's decision was unreasonable because it was unsupported by the evidence. He asks me to overturn the decision and order the Minister to reconsider.

[3] I agree with Mr. Tangorra that the Minister's decision should be overturned. I must, therefore, allow this application for judicial review.

[4] The main issue is whether the Minister's decision was unreasonable. Since I agree with Mr. Tangorra that the Minister's decision was unreasonable, it is unnecessary to consider separately the issue of unfairness. In my view, on the facts of this case, the two issues run together.

II. The Legislative Framework

[5] Canadian offenders incarcerated in foreign states can request a transfer of their sentences to Canada. A transfer requires the consent of the foreign state and the Minister.

[6] In deciding whether to consent, the Minister must consider the factors set out in ss 10(1) and (2) of the *International Transfer of Offenders Act*, SC 2004, c 21 (see Annex for statutory provisions cited). Those factors include whether:

- the offender's return would constitute a threat to Canadian security;
- the offender has social or family ties in Canada; and

- the offender will, in the Minister's opinion, commit a terrorism offence or criminal organization offence after the transfer within the meaning of s 2 of the *Criminal Code*, RSC 1985, c C-46.

[7] In addition to the statutory factors, the Minister may also consider other factors that are relevant to the purposes of the Act (see *Holmes v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 112, at para 12; *Balili v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 396, at para 3).

III. The Minister's Decision

[8] The Minister denied Mr. Tangorra's request for a transfer. In his reasons, the Minister cited the purposes underlying the Act. By enabling offenders to serve their sentences in their countries of origin, the Act contributes to the administration of justice, the rehabilitation of offenders, and the reintegration of offenders into the community. In turn, these purposes enhance public safety.

[9] Turning to Mr. Tangorra's particular circumstances, the Minister noted that he was serving a sentence of seven years and three months in the United States for "conspiracy to possess with intent to distribute" MDMA (known as "Ecstasy"), plus two years of supervised release. He then summarized the offence. In August 2007, Mr. Tangorra had made arrangements to provide 30,000 units of MDMA to a person who later turned out to be an undercover agent. Over the course of the next several weeks, Mr. Tangorra sent the drugs to the agent by mail; the drugs were concealed in motorcycle helmets. He was arrested in October 2007 when he attempted to collect payment.

[10] The Minister observed that he had to consider whether, in his opinion, Mr. Tangorra would, after the transfer, commit a criminal organization offence as defined in s 2 of the *Criminal Code*. He noted that Mr. Tangorra had sold drugs to another person and that the circumstances suggested that other persons were involved but not apprehended. He alluded to information in Mr. Tangorra's file that identified him as being linked to organized crime. The Minister then stated that Mr. Tangorra had committed a serious offence involving a large quantity of drugs that would have yielded a material or financial benefit for the "group" he had assisted. His conduct involved the planning and execution of a number of steps that had been taken for financial purposes.

[11] The Minister concluded that, given the unique facts and circumstances of Mr. Tangorra's application and the relevant factors, a transfer would not achieve the purposes of the Act.

IV. Was the Minister's decision unreasonable?

[12] The Minister based his decision on the purposes of the Act, and the relevant factors. The Act's purposes are as follows:

Purpose	Objet
<p>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.</p>	<p>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.</p>

[13] The Act is meant to enable offenders to serve their sentences in their countries of origin. This aids their rehabilitation and reintegration into society, and advances the administration of justice. In turn, as the Minister explicitly acknowledged in Mr. Tangorra's case, these purposes enhance public safety.

[14] The factors the Minister must consider in deciding whether these purposes are served in an individual case are specified in the Act but, as mentioned, those factors are not exhaustive. The Minister can consider other factors that serve the Act's purposes.

[15] Here, the Minister had before him a considerable record relating to Mr. Tangorra. The following is a summary of the evidence as it relates to the relevant purposes and factors in the Act, as prepared by the Correctional Service of Canada [CSC] and put before the Minister:

- there was no reason to believe Mr. Tangorra's return to Canada would pose any security threat;
- there was no indication that Mr. Tangorra had intended to abandon Canada as his place of residence;
- Mr. Tangorra's social and family ties in Canada were very supportive;
- the U.S. prison system posed no threat to Mr. Tangorra's security;
- there was no reason to believe that Mr. Tangorra would commit an act of terrorism in Canada;
- Mr. Tangorra was linked to organized crime, but merely as a courier;
- if Mr. Tangorra remained in the U.S., he would be deported to Canada in 2014 and would not be subject to any supervision;
- if Mr. Tangorra was transferred to Canada, he would be assessed and a correctional plan would be developed for him;

- Mr. Tangorra had no previous criminal record, and no convictions for sexual offences;
- Mr. Tangorra had worked for his father and had run his own business;
- Ms. Lucia Fosco, Mr. Tangorra's spouse, was a positive source of support; and
- Mr. Tangorra had behaved well in custody, had no history of violence or sexual aggression, and was unlikely to re-offend.

[16] In addition, Mr. Tangorra's file included supportive letters from his Member of Parliament and his lawyer. His spouse declared that he was a good husband and father, and asked the Minister to permit his transfer so that he could visit his daughter and the rest of the family.

[17] The file also included Mr. Tangorra's medical particulars and his own explanation for his offence. Mr. Tangorra stated that he had been suffering from financial and medical issues and had become desperate. He was bankrupt and his mother, daughter and nephew were experiencing serious medical issues. These pressures led him to commit the offence at issue. His doctor confirmed that Mr. Tangorra's parents are unwell and would benefit from a transfer of their son to Canada. Mr. Tangorra acknowledged his wrongdoing and maintained that his offence was an isolated incident.

[18] A decision is reasonable if it is intelligible, transparent, and represents a defensible outcome based on the facts and the law before the decision-maker. The relevant facts are set out above, as are the statutory criteria. The applicable case law may be summarized as follows.

[19] By requiring the Minister's consent for a transfer, the Act restricts the ability of Canadian prisoners to return to Canada in violation of s 6 of the *Canadian Charter of Rights and Freedoms*

(*Divito v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 39, at paras 42-45). While the Act constitutes a reasonable limit on s 6 rights, the Minister must exercise his discretion in a manner consistent with an applicant's *Charter* rights (at para 47).

[20] According to the Act, the Minister must give written reasons (s 11). Those reasons must satisfy the various purposes for which reasons are required. In particular, the reasons must communicate, in a transparent and intelligible manner, the substance of the decision and the reason why the Minister decided as he did: *Holmes*, above, at para 44, relying on *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158, at paras 16-17.

[21] While the Court must afford the Minister significant deference, the Minister's decision must be reasonable (*Holmes*, above, at paras 45-46).

[22] The Minister is free to disagree with CSC's analysis, but he must explain why he disagrees (*Singh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 115, at para 12). This is particularly so where CSC finds that the applicant has no ties to organized crime, yet that is the primary basis for the Minister's refusal (at paras 13-14; *Vatani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 114, at para 9; *Yu v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 819, at para 25).

[23] Where the Minister relies on evidence of an alleged link to organized crime in refusing a transfer, his failure actually to decide whether the applicant will commit a criminal organization offence (as required by the Act) renders his decision unreasonable (*Randhawa v Canada (Minister*

of Public Safety and Emergency Preparedness), 2011 FC 625, at para 4; *Downey v Canada (Minister of Public Safety)*, 2011 FC 116, at para 10; *Yu*, above, at para 26).

[24] In addition, where the Minister relies on an allegation that the applicant has been involved in organized crime, he must give the applicant a chance to respond to that evidence (*Balili*, above, at paras 14-15).

[25] In this context, “will” does not connote a certainty of the applicant’s involvement in a criminal organization offence. The question is whether, “in the opinion of the Minister, there is evidence that leads [the Minister] to reasonably conclude that an organized criminal offence will be committed by the Applicant after the transfer” (*Grant v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 958, at para 37).

[26] In most of the above cases, the Minister’s decision was overturned for failure to adhere to one or more of the applicable requirements. However, in two cases that are somewhat similar to Mr. Tangorra’s, the Minister’s decision was upheld.

[27] In *Holmes*, above, Justice Michael Phelan found the Minister’s decision to be reasonable where the applicant was a mere courier for a criminal organization. The Minister considered the various factors related to the administration of justice, including the nature of the offence, the circumstances and consequences of the crime, as well as the other purposes of the Act, including rehabilitation and reintegration. The Minister took account of the applicant’s strong family support, lack of criminal record and efforts at rehabilitation. Justice Phelan found that, even though the

applicant appeared to be a perfect candidate for a transfer, he could not intervene in the Minister's decision since the Minister had considered and weighed the relevant factors (at para 62).

[28] Similarly, where the applicant had ties to a criminal organization, a prior criminal record in Canada, and had participated in a crime with a number of other persons involving a large quantity of drugs, the Minister was entitled to disagree with CSC's opinion that the applicant would be unlikely to commit a criminal organization offence (*Duarte v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 602, at para 20).

[29] The question, then, is whether the Minister applied the proper factors, based his decision on the evidence before him, explained adequately why the transfer should be denied, and gave Mr. Tangorra an opportunity to respond to the evidence on which he relied.

[30] Here, unlike in *Holmes* and *Duarte*, the Minister appears to have relied only on one factor – the circumstances of Mr. Tangorra's crime. The Minister made no reference to any of the other relevant factors, such as the security of Canada, whether the offender had abandoned Canada as a place of permanent residence, Mr. Tangorra's social or family ties in Canada, or the threat presented by the foreign state's prison system to the offender's security or human rights.

[31] In fact, the Minister did not explicitly consider the likelihood of Mr. Tangorra's committing a criminal organization offence, which is defined as "a serious offence committed for the benefit of, at the direction of, or in association with" a group of three or more persons whose main purpose is to commit serious crimes for the benefit of the group (see *Criminal Code*, RSC 1985, c C-46, ss 2,

467.1(1)). Nor did the Minister explain why he discounted CSC's opinion that Mr. Tangorra would not re-offend. Still, the nature of Mr. Tangorra's offence obviously was of considerable concern to the Minister. Yet, the Minister never actually concluded that Mr. Tangorra would commit an organized crime offence if he were transferred to Canada. His reasons do not explain why Mr. Tangorra's application should be denied.

[32] Finally, CSC's suggestion that Mr. Tangorra was a courier for a criminal organization was never disclosed to him. He had no opportunity to respond to that allegation. Yet, his application for a transfer appears largely to have turned on the fact that he had some unspecified connection to organized crime. The Minister appears to have based his decision on the following statements in the summary:

[T]he CSC regional security division confirms that Mr. Tangorra is linked to organized crime. There is no evidence to indicate that his role was anything other than that of a courier.

[33] Presumably, it was this information that caused the Minister to point out that Mr. Tangorra had links to organized crime and was acting on behalf of a "group". There is no other reference in the record connecting Mr. Tangorra to organized crime. Mr. Tangorra argues that it was unfair for the Minister to rely on information of which he had no knowledge and to which he had no opportunity to respond. But it is also the case that the degree to which the Minister relied on a vague assertion of which Mr. Tangorra was unaware and whose source is unknown goes to the reasonableness (i.e. the transparency and intelligibility) of that decision.

[34] In my view, the Minister's decision must be overturned. In keeping with the case law, the Minister's decision must be set aside when it fails to explain why the transfer should be denied, in particular, where the decision does not include a conclusion that would justify the denial, such as whether the offender will commit an organized crime offence after the transfer. A decision should also be quashed when it is based on information to which the applicant had no opportunity to respond. Both grounds apply here.

V. Conclusion and Disposition

[35] Judges naturally approach an application to review a decision of a Minister of the Crown with an anxiety to uphold that decision. At the same time, they have an obligation to ensure that the Minister's decision accords with the Constitution, the statutory parameters set down by Parliament, and the principles of justice found in the prevailing administrative law jurisprudence, especially the requirements relating to reasonableness, fairness and adequacy of reasons.

[36] In this case, the Minister's decision did not accord with either the statutory parameters set down by Parliament or the applicable principles of justice. The decision did not disclose why Mr. Tangorra's application was denied. Further, the Minister arrived at his decision without affording Mr. Tangorra an opportunity to respond to the suggestion that he had been involved in an organized crime which was the main basis for the Minister's denial of the transfer.

[37] Accordingly, I find that the Minister's decision was unreasonable. I must, therefore, allow this application for judicial review, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, with costs.

“James W. O’Reilly”

Judge

Annex

International Transfer of Offenders Act, SC 2004, c 21***Loi sur le transfèrement international des délinquants, LC 2004, c 21***

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;
- (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.

- a) le retour au Canada du délinquant peut constituer une menace pour la sécurité du Canada;
- b) le délinquant a quitté le Canada ou est demeuré à l'étranger avec l'intention de ne plus considérer le Canada comme le lieu de sa résidence permanente;
- c) le délinquant a des liens sociaux ou familiaux au Canada;
- d) l'entité étrangère ou son système carcéral constitue une menace sérieuse pour la sécurité du délinquant ou ses droits de la personne.

Factors — Canadian and foreign offenders

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
- (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*.

- a) à son avis, le délinquant commettra, après son transfèrement, une infraction de terrorisme ou une infraction d'organisation criminelle, au sens de l'article 2 du *Code criminel*;
- b) le délinquant a déjà été transféré en vertu de la présente loi ou de la *Loi sur le transfèrement des délinquants*, chapitre T-15 des *Lois révisées du Canada (1985)*.

...

[...]

Writing

11. (1) A consent, a refusal of consent or a withdrawal of consent is to be given in writing.

Documents écrits

11. (1) Le consentement au transfèrement, le refus de consentement et le retrait de consentement se font par écrit.

Reasons

(2) If the Minister does not consent to a transfer, the Minister shall give reasons.

Refus du ministre

(2) Le ministre est tenu de motiver tout refus de consentement.

Criminal Code, RSC, 1985, c C-46

Code criminel, LRC (1985), ch C-46

2. In this Act,
“Criminal organization offence” means

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

Infraction d’organisation criminelle

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

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

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

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

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1520-10

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