Federal Court Cour fédérale

Date: 20110331

Docket: T-1460-10

Citation: 2011 FC 396

BETWEEN:

GENTIAN BALILI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT

HUGHES J.

[1] The Applicant Gentian Balili is a Canadian citizen currently incarcerated in the United States for a crime which committed in that country. He applied for a transfer to a Canadian prison to serve the remainder of his sentence here. His application was subject to review by officials of the Respondent Minister with the resulting recommendation that the transfer be approved. The Respondent Minister nevertheless refused the application for transfer, hence this judicial review.

[2] The Applicant was sentenced by a United States Court on January 29, 2008 for conspiracy with intent to distribute five kilograms or more of cocaine. He was sentenced at the low end of the

guidelines for such an offence for a term of seven years and three months. He is currently serving that sentence in a United States prison.

[3] The Applicant applied to the Respondent Minister for transfer to a Canadian prison to serve the remainder of his sentence in Canada. Under the provisions of the *International Transfer of Offenders Act*, S.C. 2000, c.21, the Minister may consent to such a transfer. Section 10(1) of that *Act* sets out the matters which the Minister shall consider. This does not restrict the Minister from looking at and considering other relevant material. Section 10(1) says:

> *10. (1) In determining whether to consent to the transfer of a Canadian offender, the Minister shall consider the following factors:*
> *(*a*) whether the offender's return to Canada would constitute a threat to the security of Canada;*
> *(*b*) whether the offender left or remained outside Canada with the intention of abandoning Canada as their place of permanent residence;*
> *(*c*) whether the offender has social or family ties in Canada; and*
> *(*d*) whether the foreign entity or its prison system presents a serious threat to the offender's security or human rights.*

[4] If the Minister does not give consent section 11(2) of that *Act* requires the Minister to give reasons:

> *11. (1) A consent, a refusal of consent or a withdrawal of consent is to be given in writing.*
> *(2) If the Minister does not consent to a transfer, the Minister shall give reasons.*

[5] In this case the Minister provided reasons for refusing to give consent. These reasons dated August 5, 2010 stated:

> *The purposes of the International Transfer of Offenders Act (the Act) are 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. These purposes serve to enhance public safety in Canada. 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.

The applicant, Gentian Balili, is a Canadian citizen serving a sentence of imprisonment for seven years and three months in the United States (U.S.) for "conspiracy with intent to distribute five kilograms or more of cocaine." Beginning in May 2007, Mr. Balili and a first accomplice agreed to meet with another person at a hotel in the Bahamas to discuss the purchase of large quantities of cocaine and its planned delivery to the Chicago area. On June 15, 2007, Mr. Balili and a second accomplice met with two individuals to allegedly purchase 100 kilograms of cocaine. They were arrested after the U.S. Drug Enforcement Agency searched their vehicle and found 22 separately sealed bags containing a total of $500,915 in U.S. currency. The whereabouts of the first accomplice are unknown.

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 at least two accomplices were involved in the commission of the offence with the applicant. Furthermore, there is information on file to suggest that the applicant is involved in drug trafficking and is associated with members of an organized crime group.

The applicant was involved in a drug transaction involving an amount off drugs and money. Furthermore, file information suggests that the applicant and his accomplices were interested in purchasing and distributing narcotics in the U.S. and other parts of the world. 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.

I do note that the applicant expresses remorse for his involvement in the offence, which he indicated in his application for transfer to Canada.

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 sister and godmother 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.*

[6] The Applicant raises four issues in seeking judicial review of this decision:

- Issue #1: Was there a failure to disclose to the Applicant material information as found in the record placed before the Member?
- Issue #2: Did the Minister fail to have regard to relevant material filed by the Applicant with the Minister's officials;
- Issue #3: Were the Minister's reasons adequate?
- Issue #4: Did the Minister fail to give appropriate weight to the policy considerations in respect of the objectives of the *Act*?

[7] The fourth issue above was not seriously pursued by Applicant's counsel and requires no further consideration here.

[8] The remaining issues are considered collectively in the following discussion.

[9] The record of the materials placed before the Minister includes a Memorandum dated April 27, 2010 which is a report to the Minister by his officials setting out a good deal of information about the Applicant and his circumstances. Neither this Memorandum nor a fair summary of its contents was given to the Applicant. Therefore the Applicant had no opportunity to make submissions as to any facts recited in the Memorandum that may be inaccurate or require explanation.

[10] Included in the Memorandum at two places are the following statements:

> *"…information recorded by CSC Ontario regional security division Officer, indicates that Mr. Balili is involved in drug trafficking and is associated with Eastern European Organized Crime subjects from Detroit."*
>
> and
>
> *"While the American documentation indicates that Mr. Balili is not affiliated with a drug cartel or gang, CSC's Ontario Intelligence officer received information that Mr. Balili is involved with drug trafficking and is associated with members of the Easter European Organized Crime in Detroit."*

[11] The "American documentation" referred to above is most likely a reference to a Case Summary prepared by the U.S. Department of Justice which concluded:

> *"The record does not indicate that Gentian Balili is affiliated with a drug cartel or gang."*

The Applicant did have a copy of this Case Summary whose conclusions are favourable to him.

[12] Information supporting the allegations as to a "Detroit" connection contained in the Memorandum given to the Minister is nowhere to be found in the record. The simple hearsay references recited above are all that is to be found.

[13] The Minister's reasons state that the Minister has examined the *"unique facts"* of the case and references information in the file that the Applicant *"is associated with members of an organized crime group"*.

[14] The reasons do not clarify what the Minister is referring to when he says that the Applicant is a member of an organized crime group. If it is reference to the “Detroit” entries in the Memorandum that the Applicant did not see, the Applicant should have been given a copy of that Memorandum or a fair summary. If it is a reference to something else, there is nothing in the file to support the statement. The statement clearly contradicts the conclusions reached by the U.S. Department of Justice. As such the reasons are unclear and are not sufficiently transparent as to provide an understanding as to the reasoning of the Minister.

[15] The Minister has not adhered to the principles of natural justice. He failed to provide relevant information as to the “Detroit” allegations to the Applicant. The Minster’s reasons are inadequate in that they fail to set out clearly what information was considered and how it was weighed. In this respect the case is similar to that decided by Justice Phelan of this Court in *Singh v Canada (Minister of Public Safety and Emergency Preparedness),* 2011 FC 115 where he wrote at paragraphs 12 to 14:

> *[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.*
>
> *[14] The Minister’s decision does not meet the requirements for transparency, intelligibility and acceptability required under Dunsmuir v. New Brunswick, 2008 SCC 9. The reasons are wholly inadequate as they leave one guessing as to how the Applicant*

> *could continue criminal organization activities when he had no links to such organizations and where there is no finding that his drug importation offence was a criminal organization offence. In these circumstances and against the background of the advice received, there is a requirement for an articulation of how the Minister reached his conclusion.*

[16] For the same reasons as Justice Phelan gave in that case, this judicial review must be allowed.

[17] In allowing this matter I am mindful that the Applicant raised as Issue #2 the fact that the Minister's officials failed to pass on to the Minister a transcript of the Applicant's sentencing hearing before the United States Court. That transcript shows that the Applicant was out on bail, that he expressed remorse under oath and that he was given a light sentence. Some of this information may already be elsewhere in the materials given to the Minister. I remind the officials that section 10(1) of the *Act* does not mean that only the matters referred to that section should be given to the Minister. Where the officials have received apparently relevant material, that material or a fair summary should be given to the Minister.

[18] I will give judgment accordingly with costs to the Applicant fixed at the sum of $5,000.00 as discussed with Counsel at the hearing.

"Roger T. Hughes"
Judge

Toronto, Ontario
March 31, 2011

FEDERAL COURT

SOLICITORS OF RECORD

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