Federal Court  Cour fédérale

Date: 20200528

Docket: T-1470-19

Citation: 2020 FC 651

Ottawa, Ontario, May 28, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ROBERT SCHEIRING

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Robert Scheiring seeks judicial review of a decision by the Minister of Public Safety and Emergency Preparedness [Minister] to refuse his request to be transferred to Canada from the United States of America pursuant to the *International Transfer of Offenders Act*, SC 2004, c 21 [ITOA].

[2] Mr. Scheiring is a citizen of Canada. He is 53 years old. In 2000, he relocated to Boston with his wife and three daughters in order to pursue an employment opportunity. The family subsequently moved to Fargo, North Dakota to be nearer Mr. Scheiring's relatives in Manitoba.

[3] In 2009, Mr. Scheiring was arrested and charged in the United States with possession and distribution of child pornography. A search of his home and office revealed approximately 640,000 images and 2,500 videos of children in sexually explicit poses. Mr. Scheiring pleaded guilty to the offences in 2010 and was sentenced to fourteen years in prison (including a concurrent sentence of ten years for the lesser offence of possession). He is currently incarcerated in the United States.

[4] The maximum sentence for the equivalent offences in Canada is ten years. According to the advice provided to the Minister, if Mr. Scheiring had been convicted of possession and distribution of child pornography in Canada then his maximum sentence would have expired on March 2, 2018.

[5] Canada does not enforce foreign sentences that exceed the maximum domestic sentence. Accordingly, if Mr. Scheiring is transferred to Canada, he will be immediately released into the community with no supervision. He will, however, be required to register as a sex offender under s 490.011 of the *Criminal Code*, RSC, 1985, c C-46.

[6] Mr. Scheiring has made four requests to be transferred to Canada under the ITOA. The first three requests were refused by the United States on the ground that Mr. Scheiring was

domiciled in that country at the time he committed the offences. However, his fourth request was approved by the United States on October 6, 2017.

[7] The Minister refused Mr. Scheiring's transfer request on August 13, 2019. The Minister found that Mr. Scheiring had abandoned Canada, and his return to this country would endanger public safety, including the safety of any child.

[8] For the reasons that follow, the Minister did not fully consider or reasonably balance the competing factors in assessing whether Mr. Scheiring's transfer to Canada will endanger public safety, including the safety of any child. The application for judicial review is therefore allowed and the matter is remitted to the Minister for reconsideration.

II. Decision under Review

[9] The Minister acknowledged several factors that favoured Mr. Scheiring's transfer, including his family and social ties in Canada, his acceptance of responsibility for his crimes, and his cooperation with law enforcement agencies in identifying and disabling child pornography websites. The Minister noted that Mr. Scheiring had made positive strides to support his rehabilitation through participation in institutional programming, employment and education.

[10] The Minister accepted the conclusion of Dr. Plaud, a psychologist who prepared a report on behalf of Mr. Scheiring, that there is no indication Mr. Scheiring will engage in "hands-on

sexual offending against children". However, the Minister observed that the act of possessing and distributing child pornography is itself exploitative and harmful towards children.

[11] The Minister noted that public safety may be improved if Mr. Scheiring is transferred under the ITOA, because he will then have a Canadian criminal record and will be required to comply with the *Sex Offender Information Registration Act,* SC 2004, c 10 [SOIRA] and the *Criminal Code*. If Mr. Scheiring is deported to Canada following completion of his sentence in the United States, there will be no formal record in Canada of his foreign convictions (although he will still be required to comply with the SOIRA).

[12] The Minister held that the positive factors were outweighed by two significant negative factors. First, the Minister concluded that Mr. Scheiring's return to Canada will endanger public safety, including the safety of any child. Second, the Minister found that the lengthy period of time Mr. Scheiring lived and worked in the United States, coupled with his ties to his immediate family in the United States, demonstrated his intention to abandon Canada as his place of permanent residence.

[13] The Minister's conclusion reads as follows:

> In coming to my decision to deny Mr. Scheiring's request for transfer to Canada, I have sought to balance factors for and against transfer.
>
> I have considered the factors in favour of his transfer to Canada, including his social and family ties in Canada, his acceptance of responsibility for his offences, his cooperation with a law enforcement agency after his arrest, as well as his commitment to

> support his rehabilitation through participation in numerous programs, employment and educational courses.
>
> However, the factors for transfer are, in my view, outweighed by the factors that do not support his transfer. I have concluded that Mr. Scheiring's return to Canada will endanger public safety, including the safety of any child. Additionally, in my view, Mr. Scheiring left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence.

III. Issues

[14] This application for judicial review raises the following issues:

A. What is the standard of review?

B. Was the Minister's decision reasonable?

C. If not, what is the appropriate remedy?

IV. Analysis

A. *What is the standard of review?*

[15] The Minister's decision is subject to review by this Court against the standard of reasonableness. The Court will intervene only if it is satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of

justification, intelligibility and transparency (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100).

[16] The Court must look respectfully at both the decision maker's reasoning process and the outcome, and must put the reasons first (*Vavilov* at paras 83-84). A reasonable decision is one that is based on an internally coherent and rational chain of analysis, and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

[17] If the reasons given by an administrative decision maker contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for a reviewing court to fashion its own reasons in order to buttress the decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision (*Vavilov* at para 96).

B. *Was the Minister's decision reasonable?*

[18] Mr. Scheiring challenges the Minister's decision on three grounds. He says that the Minister unreasonably focused on past, unchangeable events, contrary to the purpose of the

ITOA. He also maintains that the Minister unreasonably concluded that his transfer to Canada will endanger public safety, including the safety of any child. Finally, he argues that the Minister unreasonably found that he intended to abandon Canada as his place of permanent residence.

[19] The Minister began his analysis by acknowledging that public safety may be improved if Mr. Scheiring is transferred to Canada:

> I have also considered that public safety may be improved by Mr. Scheiring's transfer because of the resulting criminal record of his child pornography offences. If transferred, Mr. Scheiring would be informed of his lifetime requirement to comply with obligations under the *Sex Offender Information Registration Act* (SOIRA) and the *Criminal Code*, which require him to register for the National Sex Offender Registry, provide his address and telephone number to local police (among other required information), and to inform police of the details of any travel. Should Mr. Scheiring not be transferred under the ITOA and be deported to Canada after he is released in the US, there would be no formal record in Canada of his foreign convictions but he would still be required to comply with SOIRA. However, it would be challenging to ensure Mr. Scheiring complies with the obligations as there are no formal mechanisms in place to guarantee Canadian authorities are always alerted when an offender is deported to Canada.

[20] The Minister's analysis continued as follows:

> Notwithstanding the above, an overall examination of this factor, including the seriousness of the offence, the significantly large amount of child pornography images and videos found in Mr. Scheiring's possession, and the fact that Mr. Scheiring would be immediately released upon transfer in Canada, I conclude that Mr. Scheiring's return to Canada will endanger public safety, including the safety of any child. Therefore, I consider this to be a factor against his transfer to Canada.

[21] In *Del Vecchio v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1135, Justice Anne Mactavish observed that the Minister's analysis must be forward-looking, and there must be a meaningful examination of both the offender's past criminal behaviour and his ongoing tendency to engage in similar behaviour (at para 53). This is consistent with the language of s 10(1)(b) of the ITOA, which requires the Minister to consider whether a proposed transfer "will endanger public safety" [emphasis added].

[22] In *LeBon v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1500 [*LeBon FC*], Justice Luc Martineau found that the seriousness of an offender's past conviction was not in itself sufficient reason to refuse a transfer (at para 20). In *Tosti v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 747, a case that bears some resemblance to this one, Justice Glennys McVeigh noted at paragraph 38 that the advice provided to the Minister clearly set out that:

> […] if the Applicant is not transferred, he would be deported to Canada in 2018 and "…then not be subject to any supervision requirement or controls and there would be no record in Canada of his foreign conviction". Further, that if the Applicant was transferred, his offence is a "designated offence" and he would be required to register in Canada as a sex offender.

[23] Justice McVeigh continued in the same paragraph:

> The Minister does not engage at all with the contrary position that public safety in Canada may be enhanced by the Applicant's transfer; the Minister obliquely states that a transfer would not contribute to public safety when there is clear evidence of the opposite. The evidence is simply re-stated in the decision but there is no weighing exercise.

[24] In this case, the Minister accepted that Mr. Scheiring's transfer may enhance public safety, but did not engage further with this factor. The Minister considered Mr. Scheiring's participation in education and programming, and concluded that he had made "positive strides to support his rehabilitation".

[25] Counsel for the Minister asserts that these positive considerations were outweighed by the risk that Mr. Scheiring will continue to act upon his long-standing interest in child pornography, and the Minister was legitimately concerned about the possibility he may reoffend. However, this conclusion is never stated in the Minister's decision. Any concern on the part of the Minister about Mr. Scheiring's risk of reoffending is implicit, and must be inferred from the reasons given.

[26] Even if this Court is prepared to infer that the Minister was concerned about the risk of Mr. Scheiring reoffending, his conclusion that transferring Mr. Scheiring presents an unacceptable threat to public safety finds little support in the evidence. As a Canadian citizen, Mr. Scheiring has a constitutional right to return to Canada at the end of his U.S. sentence. The Minister's reasons acknowledge that it will be more difficult for Canadian law enforcement agencies to monitor and regulate Mr. Scheiring's behaviour if he is deported to Canada, rather than transferred under the ITOA.

[27] The Minister accepted Dr. Plaud's conclusion that there is no significant risk Mr. Scheiring "would act in a hands-on sexually abusive manner towards pre-pubescent females". Counsel for the Minister argues that Dr. Plaud expressed no opinion on the likelihood

of Mr. Scheiring committing further offences relating to child pornography, but a close reading of his report suggests otherwise. Dr. Plaud addressed Mr. Scheiring's ability to control his sexual impulses generally, concluding as follows:

> The totality of the data obtained and analyzed in this evaluation does not point to a conclusion that at this time that Mr. Scheiring has a general lack of control of his sexual or general impulses. […] Results of the present assessment, which included a number of psychometrically validated instruments, points [*sic*] to the conclusion that Mr. Scheiring is not experiencing a general lack of ability to control his impulses, and the combination of sexual interest in pre-pubescent females coupled with ongoing difficulties in managing anxiety may have set the occasion for his acquisition of child pornography, although there is no significant indication that he would act in a hands-on sexually abusive manner towards pre-pubescent females. [Emphasis added.]

[28] Mr. Scheiring notes that his difficulties in managing anxiety were recognized by Dr. Plaud as a factor that may have "set the occasion for his acquisition of child pornography". However, a staff psychologist at the Fort Dix Federal Correctional Institution in the United States wrote in a report dated July 6, 2012 that there was at that time "no evidence of a recent anxiety disorder". This factor was not addressed in the Minister's decision.

[29] The Minister's failure to fully consider and reasonably balance the factors that bear on Mr. Scheiring's risk of reoffending is sufficient to dispose of this application for judicial review. It is therefore unnecessary to examine the Minister's conclusion that Mr. Scheiring abandoned Canada as his place of permanent residence.

[30] I note, however, that abandonment is not a "show stopper" in requests to be transferred under the ITOA. As the Federal Court of Appeal held in *Canada (Public Safety) v Carrera*, 2013 FCA 277 at paragraph 6:

> […] In our view, a reading that exalts the abandonment factor under paragraph 10(1)(b) of the Act above all other section 10 factors is not a reasonable reading of the Act. Section 10, literally read, requires the Minister to consider all of the enumerated factors. Section 10 does not attach primacy to any one factor. Further, any decision must be made with the statutory purposes under section 3 front of mind. Finally, the Minister must also consider the Canadian offender's right to enter Canada under section 6 of the *Charter*: *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paragraph 49.

C. *What is the appropriate remedy?*

[31] Mr. Scheiring asks for a "directed verdict" requiring the Minister to approve his request to be transferred, and to take all reasonable steps to ensure the transfer is effected without delay.

[32] A "directed verdict", more properly described in the administrative law context as an order in the nature of *mandamus*, was granted by Justice Martineau in *LeBon FC* for the following reasons (at para 26):

> There is no factual substratum in this case which is in dispute. The Minister made a conclusion based on speculation that cannot be rationally inferred from the facts. More than four years have elapsed since the request for transfer has been made. The Minister has shown a bias and has ignored the clear evidence on record supporting a transfer. The continued refusal of the Applicant's transfer request has had a serious impact on him, including alienation from his family and support network, frustration of his

> rehabilitation and deprivation of superior programming in a Canadian prison.

[33] The Federal Court of Appeal upheld Justice Martineau's *mandamus* order in *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55, holding as follows (at para 14):

> In our view, in these circumstances, the Federal Court had at least two sources of power to exercise its discretion in favour of making a mandatory order (*mandamus*):
>
> - As mentioned above, the Federal Court found the Minister's conclusion that there was a significant risk that Mr. LeBon would commit a "criminal organization offence" to be unsupported by the evidence, and the Crown does not contest this. With that factor off the table, all that remained were factors supporting the transfer. In these circumstances, it was open to the Federal Court to conclude on this evidence that the only lawful exercise of discretion is the granting of transfer. In such circumstances, mandamus lies: Apotex v. Canada (Attorney General), [1994] 3 S.C.R. 1100, aff'g [1994] 1 F.C. 742 at pages 767-768 (C.A.) (principles 3, 4(d) and 4(e)), approved on this point in Trinity Western University v. British Columbia College of Teachers, 2001 SCC 31, [2001] 1 S.C.R. 772 at paragraph 41.
>
> - In the unusual circumstances of this case, mandamus is also available to prevent the further delay and harm that would be caused to Mr. LeBon if the Minister were given a third chance to decide this matter in accordance with law, in circumstances where the Minister did not follow this Court's earlier decision, paid "lip service" to it, and displayed a "closed mind" and "intransigency": see Pointon v. British Columbia (Superintendent of Motor Vehicles), 2002 BCCA 516 at paragraph 27 (there is a jurisdiction to grant mandamus in exceptional circumstances where delay would result in harm); see also the authorities cited in Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307 at paragraph 148 (there is a jurisdiction, centuries-old, to grant mandamus in exceptional cases of maladministration) (per LeBel J., dissenting, the

> majority not disagreeing with the existence of the jurisdiction).

[34] I am not satisfied that Mr. Scheiring's case meets either of these demanding thresholds. I have found that the Minister did not fully consider or reasonably balance the competing factors in assessing whether Mr. Scheiring's transfer to Canada will endanger public safety, including the safety of any child. However, given the gravity of Mr. Scheiring's offence, and legitimate questions regarding the extent of his rehabilitation, it cannot be said that all factors point to approving the transfer request.

[35] While almost three years have passed since Mr. Scheiring submitted his current request to be transferred, this is the first time the Minister has considered the matter. There is no evidence that the Minister has displayed a "closed mind" or "intransigency", and there is nothing to suggest this is an exceptional case of maladministration.

[36] As the Supreme Court of Canada held in *Vavilov* (para 141):

> […] where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

[37] Nevertheless, given the lengthy period of time that has elapsed since Mr. Scheiring submitted his current transfer request, and the danger that the request may be rendered nugatory

by the expiration of his U.S. sentence, I consider it appropriate to place a reasonable time limit on the Minister's reconsideration.

[38] In *LeBon FC*, the Minister was required to act in accordance with the directions of the Court within 45 days. In that case, however, the Minister was ordered to approve the transfer of the offender. Here, the Minister must reconsider and balance the factors that bear on the decision whether or not to approve Mr. Scheiring's transfer request. Procedural fairness may also require that Mr. Scheiring be given a further opportunity to be heard.

[39] I will therefore direct the Minister to re-assess Mr. Scheiring's request to be transferred under the ITOA within a period of ninety (90) days. If further time is required, either party may informally request an extension by letter addressed to the Court Registry with a supporting rationale.

V. Conclusion

[40] The application for judicial review is allowed, and the matter is remitted to the Minister for reconsideration. The Minister is directed to render a new decision regarding Mr. Scheiring's request to be transferred under the ITOA within a period of ninety (90) days.

[41] By agreement of the parties, costs are awarded to Mr. Scheiring in the all-inclusive lump sum of $3,500.00.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the matter is remitted to the Minister for reconsideration.

2. The Minister is directed to render a new decision regarding Mr. Scheiring's request to be transferred under the ITOA within a period of ninety (90) days.

3. Costs are awarded to Mr. Scheiring in the all-inclusive lump sum of $3,500.00.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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