Federal Court  Cour fédérale

**Date: 20130718**

**Docket: T-2198-12**

**Citation: 2013 FC 798**

**Toronto, Ontario, July 18, 2013**

**PRESENT: The Honourable Mr. Justice Hughes**

**BETWEEN:**

**RAPHAEL CARRERA (A.KA. RAFFAELE MILONE)**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judicial review of a decision of the Minister of Public Safety dated October 15, 2012, made under the provisions of the *International Transfer of Offenders Act,* SC 2004, c 21 as it existed on May 2, 2012 wherein the Minister did not consent to the Applicant's request for transfer from a United States prison to Canada. For the reasons that follow I have determined that the application is allowed and the matter is to be sent back for redetermination forthwith.

[2] The Applicant Raphael Carrera (a.k.a. Raffaele Milone) and also known as Ralph Milone is a citizen of Canada. He has a criminal record in Canada dating back to 1971 respecting a number of offences. In 1985 he was sentenced in Canada to a term of imprisonment of over four years for the possession of narcotics for the purpose of trafficking. While on day parole he absconded to the United States where he assumed a false name, Carrera, and identity.

[3] While in the United States the Applicant worked and established a common law relationship with a woman in Nevada. He was apprehended in the United States in a sting operation involving a substantial amount of cocaine. He had dealt with substantial quantities of cocaine on previous occasions as well. The Applicant was sentenced by a United States Court to imprisonment for thirty years followed by a five year period of supervised release.

[4] The Applicant has served about fifteen years of this term in a United States penitentiary. The present case deals with his sixth request for transfer to Canada to serve the remainder of his term in Canada. I am advised by Counsel that if he were returned to Canada he would be eligible to apply for parole. The first four requests were denied by the United States, the fifth was denied by the then Canadian Minister of Public Safety. This sixth request was denied by a different Minister of Public Safety. It is this sixth decision that is the subject of this judicial review.

## THE DECISIONS UNDER REVIEW

[5] The Minister's decisions of October 15, 2012 began as follows:

> *Given that Mr. Raffaele Milone's application was made before the coming into force of recent amendments to the International Transfer of Offender's Act (the Act) on May 3, 2012, I am considering Mr.*

> *Milone's request for transfer under the Act as it existed on May 2, 2012.*
>
> *The purpose of the Act is to contribute to the administration of justice which includes public safety and security considerations. It is also to contribute to the rehabilitation of offenders and their reintegration into the community by enabling them to serve their sentences in the country of which they are citizens or nationals.*
>
> *I have examined the facts and circumstances in this case in the context of the purpose of the Act and the specific factors enumerated in section 10 of the Act (set out in the Annex).*
>
> *The information that was presented to me indicates that the Mr. Milone is a Canadian citizen serving a sentence of 30 years imprisonment for the following offences: "Conspiracy to Distribute and Possession with Intent to Distribute Cocaine," and "Attempt to Distribute and Possess with Intent to Distribute Cocaine."*
>
> *I have considered the entire record before me, including the materials submitted by Mr. Milone.*
>
> *I note the following facts:*

The Minister recited some nine pages of facts set out in bullet points. At pages three and four the Minister states his conclusions and reasons for these conclusions:

> *I have noted that Mr. Milone was residing in the U.S. for approximately 10 years prior to his arrest. He moved to the U.S. to escape being apprehended in Canada. I have considered that Mr. Milone returned to Canada for special occasions and that during these visits he sometimes stayed in Ontario for several weeks. However, I have also noted that Mr. Milone concealed his Canadian identity by creating a false identity for himself in the U.S. For many years, Mr. Milone resided and worked in the U.S. under the alias, Raphael Carrera. I further noted that Mr. Milone has a finacée in the U.S., whom he lived with in Las Vagas, Nevada, that he owned a home in the U.S., and that he was sporadically employed in the U.S. With this information in mind and despite Mr. Milone's family ties in Canada, I find that Mr. Milone left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence.*

> *I have also considered the seriousness of the offence for which Mr. Milone was convicted and its harm to society. I note the substantial sentence that was imposed by the U.S. court which further reflects the gravity of the offence. I note that Mr. Milone has spent 14 years incarcerated, with 16 years remaining until the end of his sentence.*
>
> *I note that Mr. Milone directed his accomplice to transport large quantities of cocaine across the U.S. Mr. Milone instructed his accomplice on where and when to deliver the drugs. I further note that Mr. Milone's accomplice transported and delivered cocaine to Mr. Milone on at least four previous occasions. This indicates to me that Mr. Milone's criminal activities were well planned and executed and resulted in financial benefit to the members of the group. In my view, the organized nature of the offence enhances the seriousness of the crime and, along with his criminal record, create a significant risk that Mr. Milone will engage in similar activities if returned to Canada. This factor goes to the public safety of those in Canada, which is foremost in my mind.*
>
> *While I take into account the progress that Mr. Milone has made since he has been incarcerated, his participation in a General Education Diploma and a substance abuse program, and the family ties that he has maintained in Canada, when these factors are balanced against the evidence indicating that Mr. Milone abandoned Canada as his place of permanent residence as well as the seriousness, organized and sophisticated nature of the offence, the sentence received, and the significant risk that I believe Mr. Milone will engage in similar activities if transferred to Canada, I am of the view that a transfer in this case would not contribute to the administration of justice, including public safety, in Canada.*
>
> *I therefore do not consent to Mr. Milone's transfer request to Canada.*

[6] Counsel for Mr. Milone argued that the Minister made this decision essentially on two grounds: the first is based on abandonment of Canada; the second is based on serious organized crime.

[7] Counsel for the Minister argued that there were three grounds: first was based on abandonment of Canada; second was serious criminality; the third was organized crime which

Counsel argued was either a third and separate ground or a ground that supplemented the second ground of serious criminality.

**THE ISSUES**

[8] The following issues were presented by one or other of the parties:

i. What is the standard of review?

ii. Were the Minister's reasons sufficient in respect of justification, transparency and intelligibility?

iii. Was the Minister's decision in respect of abandonment of Canada clearly stated and reasonable?

iv. Was the Minister's decision in respect of serious (organized) criminality clearly stated and reasonable?

**ISSUE #1:** ***What is the Standard of Review?***

[9] Counsel for each of the parties stated that the appropriate standard of review is reasonableness. I agree. As Dawson JA for the Federal Court of Appeal in *LeBon v Canada (Attorney General)*, 2012 FCA 132 [*LeBon*] wrote at paragraph 15, the Minister's decision whether to consent to a transfer is fact-specific and discretionary in nature, reasonableness is the appropriate standard:

> *15 In the present case, the Minister's decision whether to consent to the transfer to Canada of the Canadian offender is fact-specific and discretionary in nature. Generally, reasonableness is the standard of review applicable to such decisions (Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 53). Given the nature of the Minister's decision, the Judge correctly selected reasonableness as the applicable standard of review.*

**ISSUE #2:** ***Were the Minister's reasons sufficient in respect of justification, transparency and intelligibility?***

[10] The parties are agreed as to the applicable principles. It is appropriate to refer again to the reasons written by Dawson JA in *LeBon*. I repeat paragraphs 16 to 19:

> *16 In Telfer, this Court explained the nature of review on the reasonableness standard in the following terms:*
>
> > *25 When reviewing for unreasonableness, a court must examine the decision-making process (including the reasons given for the decision), in order to ensure that it contains a rational "justification" for the decision, and is transparent and intelligible. In addition, a reviewing court must determine whether the decision itself falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": Dunsmuir at para. 47.*
>
> *17 More recently, the Supreme Court has provided further clarification as to the nature of review on the reasonableness standard. In Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), 2011 SCC 62, [2011] 3 S.C.R. 708 Justice Abella wrote as follows for the Court at paragraphs 14 to 16:*
>
> > *14 Read as a whole, I do not see Dunsmuir as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses - one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at ss. 12: 5330 and 12: 5510). It is a more organic exercise - the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of*

> *possible outcomes. This, it seems to me, is what the Court was saying in Dunsmuir when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).*
>
> *15 In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (Dunsmuir, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.*
>
> *16 Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn., [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria are met.*
>
> *18 Therefore, having regard to the record before the Minister, the question to be answered is whether the Minister's reasons allow the reviewing Court to understand why the Minister made his decision and then to determine whether the Minister's conclusion was within the range of acceptable outcomes.*
>
> *19 Before turning to consider the Minister's decision, it is important to acknowledge the correctness of the Attorney General's submission that transfers under the Act are a privilege for Canadian offenders who are incarcerated outside of Canada. There is no right to be returned to Canada. Equally correct is the submission that the Minister is not bound to follow the advice of the CSC.*

[11] With these principles in mind I will turn to the bases stated by the Minister for his decision.

**ISSUE #3:** ***Was the Minister's decision in respect of the abandonment of Canada clearly stated and reasonable?***

*[12]* The Minister's decision respecting abandonment of Canada is contained in the first of the "decision" paragraphs previously recited. The conclusion reached by the Minister was that *"…Mr. Milone left or remained outside Canada with the intention of abandoning Canada as his place of permanent residence.*"

[13] The *International Transfer of Offenders Act*, SC 2004, c 21, section 10(1)(c) provides as one of the factors that the Minister shall consider "*whether the offender has social or family ties in Canada*." This is not the same as abandonment.

[14] The Minister appears to be of the view that once a party has apparently "abandoned" Canada at one stage of their life, they can never change their mind or circumstances may never change such that a person no longer abandons Canada.

[15] A Community Assessment prepared by Corrections Canada dated August 21, 2007 concisely captures Mr. Milone's circumstances:

> *According to the contact, the subject had a drug relapse shortly after his day parole release in 1987. In fear of incarceration, he chose to abscond from the CRF. Several months later, he called his family members from US to advise that he was ok. According to the contacts, the subject told his father and siblings that he would come back to Canada to face whatever the consequence his UAL might result. Unfortunately, his plan to return to Canada was delayed after he became involved in a relationship with a woman Christina and started a short-lived business venture with Christina's father. According to the contacts, the subject's relationship with Christina has been over for 7 years now and Christina has since married with*

*another man many years ago. According to the contacts, the subject has no family or social ties (except negative or criminal associates) in the United States after his separation with his ex-girlfriend Christina.*

*According to the contacts, the subject had been maintaining regular contact via telephone, post cards and letters with his father, siblings and two sons throughout the late 1980s and 1990s. He had always told them that he wanted to return to Canada to live close to his family. He was also planning to reconcile with his ex-wife Ann on his return to Canada. According to the contacts, the subject has never given up his plan to return to Canada. He has submitted four applications for international Transfer since his incarceration in 1998. In addition, he has written to the Public Safety Minister to seek support from the Canadian Government.*

[16] The Corrections Canada Community Assessment dated February 17, 2006 provided the following overall assessment:

*OVERALL ASSESSMENT*

*Ralph MILONE continues to have strong family support in Canada. Although they do currently visit the offender in the USA when they can, the drive is lengthy (over 6 hours) and visiting could be better accommodated if MILONE was transferred to Ontario. Family members have advised that MILONE'S focus is to return to Canada and that he has no further ties or interests in remaining in the USA. His ex-common-law wife Christina has since married another man and his two adult sons live in Ontario. Although it appears as though MILONE left Canada years ago with the intention of abandoning Canada as the offender's permanent place of residence (he had also absconded from his Canadian federal sentence) he has since changed his mind and had been pursuing an International Transfer for several years. Continued social and family ties in Canada have indeed been confirmed through completion of this Community Assessment.*

[17] Mr. Milone himself wrote in his Request for Transfer dated September 23, 2010:

> *I have always maintained my citizenship and allegiance to Canada and made no effort to denounce my citizenship. Corrections Services Canada completed a community assessment attached – A, which was included in the 2008 Analysis Report that clearly states that I have strong family ties in Canada. Although I did work and live in the U.S., I was also living in Canada for certain intervals and took great risks in order to maintain contact with my children. Despite my fears of detection and incarceration in Canada, I attended my cousin David and Lisa's wedding in Toronto in 1997 and visited my Dad in 1998 to celebrate his 75th birthday, just prior to my arrest. There are pictures to corroborate these events. I acquired false U.S. identification in order to facilitate a very covert fugitive lifestyle which was fuelled by my abuse of cocaine and alcohol. When I went on my many journeys back and forth to Canada, I was in a permanent chemically induced state of mind. I was a cocaine addict. I am no longer trapped by those demons which controlled my movements. In a way I can say that I am truly free even though I am incarcerated. I thank God I am not longer imprisoned by the same mind that governed my actions.*
>
> *I am remorseful and ashamed of my actions and will make amends where I can to the people I have hurt through my actions. Canada is my homeland where I was born, raised, was married, where my children and grandsons were born and where my siblings, family and extended family all reside. We have been living in Canada for five generations, I would never abandon my country. I have strong support from my family who will ensure that I will fulfill my future career aspirations and remain drug free.*

[18] The Minister seemingly ignored the advice of Corrections Canada and gave no weight to or ignored Mr. Milone's changed circumstances. So stated by Justice Mactavish of this Court in *Del Vecchio v Canada (Public Safety and Emergency Preparedness),* 2011 FC 1135, at paragraph 53, a Minister's analysis must be forward-looking:

> *53 It is clear from the wording of paragraph 10(2)(a) of the ITOA that Parliament did not contemplate a blanket ban on the*

> *transfer of individuals convicted of criminal organization offences. Moreover, the Minister's analysis must be forward-looking. Consequently, there must be a meaningful examination of both the offender's past involvement with organized crime and the ongoing ties of the individual to criminal organizations.*

[19] Here the Minister's analysis was backward-looking, not forward-looking. It fixed on one period in the Applicant's life and not on the present or future. In this respect the decision was not reasonable.

**ISSUE #4:** ***Was the Minister's decision in respect of serious (organized) crime clearly stated and reasonable?***

[20] The Minister's reasoning in this respect, whether it is considered as one ground or two, closely parallel's that considered in *LeBon supra*. In that case the Federal Court of Appeal held that the Minister failed to address all the grounds before him and in particular failed to explain the basis for his departure from Corrections Canada's advice and failed to explain how the Minister weighed all the relevant factors including those that favoured the incarcerated person so as to arrive at the conclusion that the relevant factors in favour of that person were outweighed. I note in this respect that the Federal Court of Appeal recently held in a further *LeBon* decision, *Canada v LeBon,* 2013 FCA 55 that a revised Minster's decision failed in this respect as well.

[21] In the present case the information in the Minister's file includes Mr. Milone's Request for Transfer dated September 23, 2012 in which he wrote, in part:

> *I also acknowledge that I have been associated with criminal elements in the past, but over many years of incarceration those ties have been severed. I have had ample opportunity to reflect on my life and have no desire whatsoever to re-establish any ties with any*

*criminal activity. My criminal ties existed only in the US, and not in Canada. After 12 years of imprisonment these ties no longer exist and the potential of me ever getting involved is negligible. There was no evidence on record demonstrating that I would, after transfer, commit a criminal organization offence within the meaning of section 2 of the Criminal Code. Correction Services Canada, International Transfer of Offenders division, requested a security check be done on myself which was included in the Analysis Report sent to the Minister as noted on page 2 and 3 of the attached – B. Robert w. MacLean, Director of Operations, Regional Headquarters, Ontario conducted the security check in 2007 and 2008 using the Automated Central Intelligence System, operated by Criminal Intelligence Service of Canada and the provincial bureaus, (ACIIS) and the Records Management System for the Ontario Provincial Police (RMS NICHE) and RCMP Intelligence Unit to check their national database. The results were conclusive. The search did not turn up any relevant information relating to the international transfer, attached – C. I have never committed a violent offence, I am not a potential threat to the safety of Canadians or the security of Canada nor is there any reason that I would reoffend.*

*During my imprisonment and with a clearer mind, I have had many opportunities to reflect upon the seriousness of my crime and the damaging impact it has had on my life and my family. There is nothing I can do to change the choices I made in the past, but I do know for sure that I love my family so much and would never ever do anything to hurt them again. With clearer mindset, my awareness of drugs, the harmful effects of illegal drug trafficking and drug use on our society, especially our children, has come into sight. There is no safe way to take drugs. I realize the impact my crime has had on the people of the community and those that I have put in harm's way. I know that looking into the future I would do all I can to help avoid crime of any sort, to ensure my country is a safe place for all citizens to live.*

*As far as my past behaviour, however serious my crimes have been, I have spent more than twelve years making amends for it and I sincerely regret all the grief and hardships I have caused. My ways have changed in such a positive manner and I am truly sorry for what I have done. I am planning to use my life experiences and credentials to offer counselling in order to prevent those at risk from falling into the same situation as myself. One of my future ambitions is to find employment, where I can help those with addictions, their families and communities at large. This is evident in a letter dated July 2nd 2007, written by Kim Burdo, RN, Health System Specialist, FCI Raybrook on my behalf, to Vitanova Foundations inquiring*

> *about future employment, which was one year prior to my U.S. transfer approval, attached – D. I have a lot to give back to society and my family given the opportunity to do so.*

[22] While undoubtedly self-serving, these remarks indicate that Mr. Milone has quit his past behaviour, is remorseful, and seeks to pursue a positive lifestyle.

[23] Most important is the Report submitted by the Director of the International Transfer Unit of Corrections Canada dated June 6, 2011 which, among the factors provided to the Minister for consideration are the following:

> ***A. Subsection 10.(1)(a) of the ITOA:***
>
> *Reliable information obtained to date does not indicate that Mr. Milone's return to Canada would pose a threat to the security of Canada.*
>
> ***B. Subsection 10.(1)(b) of the ITOA:***
>
> *File information indicates that Mr. Milone was living in the United States prior to his offence. He absconded to the United States in 1987, while on Day Parole in Canada. Mr. Milone resided and worked in the United States under the alias, Raphael Carrera. In his sixth application, Mr. Milone explains that although he worked and lived in the United States, he was also living in Canada for certain periods of time in order to maintain contact with his children, who reside in Toronto, Ontario.*
>
> ***C. Subsection 10.(1)(c) of the ITOA:***
>
> *The community assessment completed with his sister and other members of his family, who all resides in Ontario, attests that he has social and familial ties in Canada.*

***D. Subsection 10.(1)(d) of the ITOA:***

*The United States or its prison system does not present a serious threat to the offender's security or human rights. His adjustment is reported as positive.*

***E. Subsection 10.(2)(a) of the ITOA:***

*Information obtained to date from the Correctional Service of Canada's security and intelligence division, RCMP, as well as information from other reliable sources, does not indicate that Mr. Milone has ties to terrorism or a criminal organization, within the meaning of section 2 of the Criminal Code.*

***F. Subsection 10.(2)(b) of the ITOA:***

*Mr. Milone has never been transferred under the International Transfer of Offenders Act or the Transfer of Offenders Act, chapter T-15 of the revised Statutes of Canada (1985).*

[24] While the Minister has discretion as to whether to follow such assessments it is incumbent, as found in *LeBon supra,* for the Minister to indicate that he was aware of such assessments, that he took them into account, and if there were other factors which outweighed those assessments, what those factors were and how they outweighed the assessment. Just as in *LeBon supra*, the Minister has not done this in this case.

## CONCLUSIONS AND COSTS

[25] In conclusion I find that the Minister's decision is unreasonable and must be returned for a full and proper assessment of all relevant factors and the promise of a clear, transparent and intelligible decision. As in *LeBon supra* this should be done forthwith.

[26] The parties have argued that the successful party may be awarded costs fixed in the sum of $2500.

**JUDGMENT**

**FOR THE REASONS PROVIDED:**

**THIS COURT ADJUDGES that:**

1. The application is allowed;

2. The matter is returned for redetermination by the current Minister having regard to all relevant facts with the provision of a clear, transparent and intelligible decision, forthwith;

3. The Applicant Mr. Milone is entitled to costs fixed in the sum of $2500.

"Roger T. Hughes"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2198-12 |
| **STYLE OF CAUSE:** | RAPHAEL CARRERA (AKA RAFFAELE MILONE) v THE MINISTER OF PUBLIC SAFETY |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | July 17, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | HUGHES J. |
| **DATED:** | July 18, 2013 |

**APPEARANCES:**

| | |
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| John Norris | FOR APPLICANT |
| Michael J Sims | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| William F. Pentney<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |