Federal Court  Cour fédérale

Date: 20230801

Docket: T-889-22

Citation: 2023 FC 1053

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Toronto, Ontario, August 1, 2023

PRESENT: THE CHIEF JUSTICE

BETWEEN:

DEREK ELLIOTT

Applicant

and

MINISTER OF PUBLIC SAFETY

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Elliott seeks two principal types of relief in relation to a refusal by the Respondent Minister to accept, for processing, a request he made pursuant to the *International Transfer of Offenders Act*, S.C. 2004, c. 21 (the "ITOA").

[2] First, Mr. Elliott seeks an order quashing that refusal (the **"Decision"**). Second, he seeks an order directing the Minister to accept his request for processing (the **"Request"**) and consider it without delay.

[3] In support of his application for judicial review, Mr. Elliott submits that the Decision was unreasonable for essentially three reasons. Specifically, he states that the Decision was based on an unreasonable interpretation of the definition of “Canadian offender” in the ITOA. He also asserts that the Decision failed to address and account for submissions that he made in support of his request to have his entire sentence transferred to Canada. Lastly, he maintains that the Minister misapprehended certain evidence.

[4] For the reasons that follow, I conclude that the Minister’s interpretation of the term “Canadian offender” was not unreasonable. However, the Decision was not sufficiently justified and may well have been based on a misapprehension of some of the evidence provided in support of the Request. Consequently, the Decision will be set aside and the Request will be remitted to the Minister for reconsideration.

II. Background

[5] Mr. Elliott is a Canadian citizen who resides in Southern Ontario, where he lived for most of his life. Between 2004 and 2009, he divided his time between Canada and the Dominican Republic, where his family has run a resort business since the 1980s. He became president of that business in 2003, the same year he got involved with an individual named James Catledge, who ran a financial services company that sold timeshares.

[6] Unbeknownst to Mr. Elliott, Mr. Catledge’s company in fact sold financial products in a pyramid-style, multi-level marketing system.

[7] Both Mr. Elliott and Mr. Catledge were charged and convicted for mail fraud in the United States, in relation to their involvement in the scheme over a period of time that ended in 2007. In August 2012, Mr. Elliott entered into a cooperation agreement with the U.S. Securities and Exchange Commission ("**SEC**"), and provided valuable assistance to the SEC's investigation of Mr. Catledge. He also assisted in the recovery of investor assets. After being criminally indicted in September 2012, Mr. Elliott began to cooperate with the Federal Bureau of Investigation and the U.S. Attorney's Office. Throughout the course of this cooperation, Mr. Elliott voluntarily travelled to the U.S. on several occasions to participate in extensive debriefing sessions in connection with the investigation and prosecution of Mr. Catledge.

[8] In 2019, Mr. Elliott pled guilty to one count of conspiracy to commit mail fraud.

[9] As a result of his extensive cooperation, the prosecution recommended a sentence of three years of probation, including six months of home detention, restitution as set forth in a subsequent filing, and a $100 special assessment. In support of that recommendation, it was noted that Mr. Elliott's participation in the fraud scheme was minor compared to that of Mr. Catledge. It was also noted that Mr. Elliott and his associates sold a negligible amount of product compared to the sales made by Mr. Catledge's operation. It was further observed that Mr. Elliott's cooperation "brought justice to thousands of victims who otherwise may have been denied it": *United States' Sentencing Memorandum and Motion for Downward Departure Pursuant to U.S.S.G. § 5K1.1*, Applicant's Record, at 64.

[10] Despite the foregoing, Mr. Elliott was ultimately sentenced in November 2019 to two years of imprisonment plus three years of supervised release. Mr. Catledge was sentenced to 60 months of imprisonment and was ultimately released after serving approximately 13 months of that sentence.

[11] Unfortunately for Mr. Elliott, he is ineligible to serve his sentence in a minimum security facility in the U.S because he not a U.S. citizen. Consequently, he was designated to serve his sentence in the North Lake Correctional Institute, which is described by Mr. Elliott's U.S. lawyer, Brett Parkinson, as a "Criminal Alien Requirement ('**CAR**') prison that is vastly different from the non-violent minimum security white collar prison camp where Mr. Catledge was sentenced": Applicant's Record, at 29. Mr. Parkinson adds that CARs have "unusually poor healthcare; overcrowding; higher rates of solitary confinement, lockdowns, and deaths in custody than comparable BOP institutions; and a dearth of rehabilitative programs such as drug treatment and education courses, which are offered in other federal prisons", quoting from Emma Kaufman, *Segregation by Citizenship*, 132 Harv. L. Rev. 1379, 1409 (2019): Applicant's Record, at 29.

[12] Due to Mr. Elliott's status as a non-citizen in the U.S., Mr. Parkinson advises that he would not be able to access early release from his two-year sentence of incarceration. In addition, upon completing that sentence, Mr. Elliott would likely be transferred into immigration detention for an indeterminate period of time pending his removal from the United States.

[13] In light of all of the foregoing, and given the long distance between his family and the prison facility mentioned above, Mr. Elliott immediately initiated contact with the International Transfers Unit of Correctional Service Canada ("**CSC**"), with a view to having his sentence transferred to this country. His formal Request was made on January 15, 2020. That request was followed up by numerous e-mail exchanges between his counsel and representatives of CSC over the course of 2020, as well as several letters to the Minister over the course of 2021 and on January 13, 2022.

[14] In his communications with CSC, Mr. Elliott repeatedly requested clarification of the basis for CSC's steadfast position that his Request could not be processed until he had surrendered himself into the physical custody of the U.S. Bureau of Prisons ("**BOP**"). Mr. Elliott also responded to other, evolving, concerns identified by CSC. In the course of doing so, he provided significant documentation from his U.S. proceedings, which he also provided to the Minister. In addition, he made detailed submissions on legal, policy and other issues.

[15] In support of Mr. Elliott's efforts in this regard, the Assistant United States Attorney, Mr. Robert David Rees, confirmed the "significant and substantial cooperation" that was provided by Mr. Elliott. Mr. Rees also stated that he does not object to and knows of no reason to oppose Mr. Elliott's Request: Application Record, at 698.

[16] Mr. Elliott was not immediately ordered into custody. Instead, he was released on a $100,000 unsecured bond and permitted to return to Canada, on his own recognizance, subject to a requirement to surrender into custody in the U.S. on an appointed date. Mr. Elliott's surrender

date was originally set for February 19, 2020, but was postponed multiple times by the United States District Court for the Northeastern District of California (the "**US Court**"), most recently, to November 13, 2023.

III. The Decision

[17] The Decision consists of two letters sent in response to Mr. Elliott's Request. The first, dated March 22, 2022, was addressed to Mr. Elliott and contains the following single substantive paragraph:

> I regret to inform you that your transfer application is not being accepted for processing as you do not meet the statutory requirements to be transferred under the *International Transfer of Offenders Act*. **Specifically, you do not meet the definition of "Canadian offender" as you are neither detained by nor under the supervision of a foreign entity**.
>
> [Emphasis added.]

[18] The second letter, dated April 5 2022, was addressed to Mr. Elliott's legal counsel. The only substantive material it contained reads as follows:

> I can confirm that Mr. Elliott was convicted in the United States in November 2019. **He was to surrender to serve his sentence but did not.** In April 2020, he filed a motion for modification of imposed term of imprisonment. This was denied in November 2020. Since then, he has not surrendered yet to serve his 24-month sentence.
>
> Mr. Elliott's application is not being accepted for processing as he does not meet the statutory requirements to be transferred under the *International Transfer of Offenders Act*. Specifically, Mr. Elliott does not meet the definition of "Canadian offender" as he is neither detained by nor under the supervision of a foreign entity.
>
> [Emphasis added.]

IV. Preliminary Issue

[19] The Minister maintains that the Decision is not a typical "decision" under the ITOA because it does not concern the merits of Mr. Elliott's request to transfer his US prison sentence to Canada. Rather, during the hearing, the Minister asserted that the two letters comprising the Decision were simply "courtesy letters" concerning a preliminary "procedural issue."

[20] When pressed on this during the hearing, the Minister conceded that the letters comprising the Decision constitute a form of discretionary administrative action that is subject to judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. This is because those letters affected Mr. Elliott's legal rights or caused prejudicial effects: *Air Canada v Toronto Port Authority*, 2011 FCA 347, at paras 24 – 29, 32 and 42: *Zaghbib v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 182, at para 30; *Key First Nation v Lavallee*, 2021 FCA 123, at para 34.

V. Relevant Legislation

[21] The definition of "Canadian offender" is included in s. 2 of the ITOA. It states as follows:

Definitions	**Définitions**
2 The following definitions apply in this Act.	**2** Les définitions qui suivent s'appliquent à la présente loi.
Canadian offender means a Canadian citizen within the meaning of the *Citizenship Act* who has been found guilty of an offence — and is detained, subject to supervision by reason of conditional release or probation **or subject to any other form of supervision in a foreign**	***délinquant canadien*** Citoyen canadien au sens de la *Loi sur la citoyenneté* qui a été reconnu coupable d'une infraction et qui, en application d'une décision qui ne peut plus faire l'objet d'un appel, est soit détenu, soit sous surveillance en raison d'une ordonnance

entity — and whose verdict and sentence may no longer be appealed. [Emphasis added.]	de probation ou d'une mise en liberté sous condition, **soit assujetti à une autre forme de liberté surveillée, dans une entité étrangère**. [Non souligné dans l'original.]

VI. Issues

[22] In essence, this application raises the following four issues :

1. Is the Minister's interpretation of s. 2 of the ITOA unreasonable?

2. Is the Decision unreasonable on the ground that it is not appropriately justified?

3. Is the Decision unreasonable on the ground that the Minister misapprehended Mr. Elliott's circumstances?

4. What is the appropriate remedy?

VII. Standard of review

[23] It is common ground among the parties that the standard of review applicable to the first three issues identified above is reasonableness.

[24] In assessing whether a decision is reasonable, the Court will assess whether the decision is appropriately justified, transparent and intelligible. To meet these requirements, the decision must reflect "an internally coherent and rational chain of analysis" and enable the Court to understand the basis upon which the decision was made and to determine whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paras 85-86,

97 and 99 [***Vavilov***]. In making that determination, the Court must review the Decision "holistically and contextually": *Vavilov*, at para 97.

[25] Important aspects of the context will include the evidence that was before the decision-maker, the submissions of the affected person, and the potential impact on that individual: *Vavilov*, at paras 106, 126. Although an administrative decision maker is not required to "respond to every argument or line of possible analysis", a failure to "meaningfully grapple with key issues or central arguments raised by the parties" may call into question the reasonableness of the decision: *Vavilov*, at para 128.

[26] In assessing whether a decision is appropriately justified, the Court must also consider the consequences of the decision for the individual, particularly those that threaten an individual's life or liberty. In brief, "if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislation's intention": *Vavilov*, at para 133.

VIII. **Analysis**

A. *Is the Minister's interpretation of s. 2 of the ITOA unreasonable?*

(1) Introduction

[27] When it comes to statutory interpretation, administrative decision-makers have the "interpretative upper hand": *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, at para 40. In brief, courts must "defer to any reasonable interpretation adopted by an

administrative decision maker, even if other reasonable interpretations may exist": *McLean v British Columbia (Securities Commission)*, 2013 SCC 67, at para 40 [Emphasis in original].

[28] In reviewing the reasonableness of a decision maker's interpretation of a statute, a Court must be careful "not undertake a *de novo* analysis of the question or 'ask itself what the correct decision would have been'": *Vavilov,* at para 116. Instead, a reviewing Court is tasked with reviewing whether "an administrative decision maker's interpretation of a statutory provision [is] consistent with the text, context and purpose of the provision": *Vavilov,* at para 120. An interpretation that is not "sufficiently alive to the text, context and purpose of the legislation" may be unreasonable: *Le-Vel Brands, LLC v Canada (Attorney General)*, 2023 FCA 66 at 16, citing *Vavilov,* at paras 115-124.

[29] Mr. Elliott maintains that when the governing principles of statutory interpretation are considered, any reasonable definition of the "Canadian offender," as that term is used in the ITOA, must include individuals in his circumstances.

[30] I disagree. For the reasons set forth below, the Minister's conclusion that Mr. Elliott does not come within the purview of that term was not unreasonable.

[31] For convenience, the definition of "Canadian offender" is reproduced below:

Canadian offender means a Canadian citizen within the meaning of the *Citizenship Act* who has been found guilty of an offence — and is detained, subject to supervision by reason of conditional release or probation **or subject to any other form of supervision in a foreign**	***délinquant canadien*** Citoyen canadien au sens de la *Loi sur la citoyenneté* qui a été reconnu coupable d'une infraction et qui, en application d'une décision qui ne peut plus faire l'objet d'un appel, est soit détenu, soit sous surveillance en raison d'une ordonnance

entity — and whose verdict and sentence may no longer be appealed. [Emphasis added.]	de probation ou d'une mise en liberté sous condition, **soit assujetti à une autre forme de liberté surveillée, dans une entité étrangère**. [Non souligné dans l'original.]

[32] Mr. Elliott maintains that the words "or subject to any other form of supervision in a foreign entity" must be interpreted broadly, due to the remedial nature of the ITOA: *Interpretation Act*, RSC 1985 c.I-21, s. 12.

[33] It is trite law that "the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'": *Vavilov*, above, at para 117, quoting *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21 [***Rizzo***]; and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 26, both quoting E. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87.

(2) The plain meaning of the definition of "Canadian offender"

[34] In conducting the contextual exercise described above, significant weight should be given to words that are "precise and unequivocal": *Vavilov*, at para 120. Indeed, the Federal Court of Appeal has observed that the ordinary meaning of the words of a statute will play "a dominant role in the interpreted process": *Canada (Attorney General) v Hull*, 2022 FCA 82, at para 49. It has added that "[w]here the words employed are precise and unequivocal, their ordinary meaning will usually be determinative": *Peters First Nation v Engstrom*, 2021 FCA 243, at para 15.

[35] In my view, the words “subject to any other form of supervision in a foreign entity” are precise and unequivocal. They mean that an individual must be subject to a form of supervision **within** an entity outside Canada.

[36] The Minister states that Mr. Elliott does not come within purview of the language quoted immediately above for two reasons. First, the Minister maintains that Mr. Elliott is not subject to any form of supervision “of” a foreign entity. This is the language used in the Decision. Second, during the hearing, the Minister stated that Mr. Elliott is not subject to any form of supervision “in” a foreign entity, as contemplated by the definition of “Canadian offender” in s. 2 of the ITOA.

[37] Mr. Elliott asserts that he is subject to a form of supervision “of” a foreign entity because he is subject to an Order of the US Court that requires him to surrender to his designated facility on November 13, 2023. He adds that a Presentence Investigative Report, dated July 31, 2019, states that he was “[c]ited and released on August 27, 2014 on a $100,000 unsecured bond with U.S. Pretrial Services supervision” [emphasis added]. However, the latter document was only disclosed to counsel for the Minister three days before the hearing in this proceeding. It was not before the Minister when he made the Decision. Accordingly, in the absence of an applicable exception, that document is not admissible on the present application for judicial review: *Delios v Canada (Attorney General)*, 2015 FCA 117, at para 42; *Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74, at para 72. For greater certainty, it is readily apparent that none of the limited exceptions apply: *Maritime Employers*

Association v Syndicat des débardeurs (Canadian Union of Public Employees, Local 375), 2023 FCA 93, at para 78. Mr. Elliott does not suggest otherwise.

[38] Even if I accept that the US Court's Order requiring Mr. Elliott to surrender to his designated facility on November 13, 2023 is a form of "supervision" contemplated by s. 2 of the ITAO, the Minister's contrary conclusion was not unreasonable. To begin, in his Request for a transfer, Mr. Elliott himself stated that he has been "on an unsupervised, unsecured release" from the U.S. since his guilty plea: Applicant's Record, at 41. Moreover, the Judgment issued by the US Court on November 20, 2019 states the following under the heading "SUPERVISED RELEASE": "Upon release from imprisonment the defendant shall be on supervised release for a term of three years." Applicant's Record, at 54 [emphasis in original]. That Judgment also includes standard conditions of supervision that will apply *only after* Mr. Elliott's release from prison. It was not unreasonable for the Minister to interpret these passages of the Judgment as indicating that the US Court does not consider Mr. Elliott to be currently under its supervision, particularly given Mr. Elliott's own statement that he has been on unsupervised release.

[39] I will now turn to the words "in a foreign entity", in the definition of "Canadian offender." Mr. Smith acknowledges that they could be understood to mean that an individual must be physically present in a foreign prison or other entity to come within the scope of the term "Canadian offender." However, he maintains that when the relevant contextual factors are considered, the only reasonable interpretation of the words "in a foreign entity" is that they mean "**of** a foreign entity." Mr. Elliott asserts that such contextual factors include the purpose of the ITOA, the language of the *Treaty between Canada and the United States of America on the*

Execution of Penal Sentences, March 2, 1977, [1978] Can. T.S. No. 12 (the "**Treaty**") and the harsh consequences of a literal reading of the words "in a foreign entity." Mr. Elliott adds that the Minister adopted the words "of a foreign entity" in both of the letters that constitute the Decision, when he stated that Mr. Elliott does not meet the definition of a "Canadian offender" because he is "neither detained by nor under the supervision of a foreign entity" [emphasis added].

(3) The purpose of the ITOA

[40] Turning to the purpose of the ITOA, s. 3 of the legislation provides as follows:

Purpose	**Objet**
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.

[41] The words "reintegration into the community" contemplate that the individual in question is not currently in the community. This interpretation appears to be equally contemplated by the French words "réinsertion sociale." This reading of s. 3 would support the Minister's view that the ITOA was not intended to apply to someone in Mr. Elliott's circumstances, because he is currently living in his community in Canada. Indeed, he has been living in Canada for his entire life, except for when he has voluntarily travelled abroad.

[42] However, the words “serve their sentences in the country of which they are citizens or nationals” are not qualified whatsoever. If Parliament had intended for the ITOA to only permit the serving of “part” of an offender’s sentence in Canada, it could easily have said so. The absence of such qualifying words lends support to Mr. Elliott’s view that the ITOA was intended to permit offenders to serve the entirety of their sentence in Canada.

[43] Having regard to the foregoing, the language of s. 3, taken as a whole, is ambiguous. It can be read in a manner that provides some support for the position of both the Minister and Mr. Elliott. Consequently, I do not consider that the stated *purpose* of the ITAO displaces a plain reading of the definition of “Canadian offender” provided in s. 2 of that legislation, as set forth at paragraph 35 above.

(4) The Treaty

[44] Relying on *National Corn Growers Assn v Canada (Import tribunal)*, [1990] 2 SCR 1324, at p. 1371, Mr. Elliott asserts that the ITOA must be interpreted in a manner that is consistent with the Treaty. However, this general principle, which is now established as the presumption of conformity, can be rebutted where the provisions of the legislation in question are unambiguous: *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software*, 2022 SCC 30, at paras 48 [***SOCAN***]; *Németh v Canada (Justice)*, 2010 SCC 56 at para 35; *Tapambwa v Minister of Citizenship and Immigration*, 2019 FCA 34, at para 44. As noted at paragraph 35 above, the words “in a foreign entity” are precise and unambiguous.

[45] Nevertheless, the language of a treaty or convention "can help to inform whether a decision was a reasonable exercise of administrative power": *Vavilov,* at para 114.

[46] For the present purposes, the relevant provisions of the Treaty are its sole recital, Article 1(c), and Article III(7)(b). The recital states as follows:

DESIRING to enable Offenders, with their consent, to **serve sentences of imprisonment or parole or supervision** in the country of which they are citizens, thereby facilitating their **successful reintegration into society;** **[Emphasis added.]**	DÉSIREUX de permettre aux délinquants, avec leur consentement, **de purger leur peine d'emprisonnement ou de bénéficier d'une libération conditionnelle ou d'être soumis à une surveillance** dans le pays dont ils sont citoyens, favorisant ainsi leur **réinsertion** sociale; **[Non souligné dans l'original.]**

[47] For essentially the same reasons as provided above at paragraphs 40-43 above in relation to the purpose clause of the ITOA, this recital can be read as supporting the positions of both Mr. Elliott and the Minister.

[48] Turning to Article 1(c) of the Treaty, the term "Offender" is defined therein as follows:

"Offender" means a person who, **in the territory of either Party**, has been convicted of a crime and sentenced **either to** imprisonment or to a term of probation, parole, conditional release **or other form of supervision** without confinement. The term shall include persons subject to confinement, custody or supervision under the laws of the Sending State respecting juvenile offenders; [Emphasis added.]	« Délinquant » désigne une personne qui, **dans le territoire de l'une ou l'autre Partie,** a été déclarée coupable d'une infraction et condamnée **soit à** l'emprisonnement, **soit à** une période de probation, de libération con-ditionnelle, de libération sous condition **ou à toute autre forme de liberté sous surveillance.** Le terme englobe les personnes condamnées à l'empri-sonnement, tenues sous garde ou soumises à une surveillance en vertu des lois du Pays d'origine concernant les délinquants juvéniles;

[Non souligné dans l’original.]

[49] A plain reading of the words “in the territory of either Party” is consistent with Mr. Elliott’s position that he does not need to be “in” a foreign entity. So long as an offender is under some form of supervision “of” a foreign entity, that individual would appear to be contemplated by Article 1(c).

[50] However, Article III(7) provides that no offender shall be transferred unless they meet certain conditions. For the present purposes, the relevant condition is that the “sentence which he **is serving** states a definite termination date, or the authorities authorized to fix such a date have so acted”: Article III(7)(b) [emphasis added]. The corresponding passage in the French version of Article III(7)(b) states: « que la peine qu’il subit expire à une date définie ou que les autorités habilitées à fixer cette date aient agi en ce sens ». [Non souligné dans l’original.] The highlighted language in both the English and French versions of this provision quoted above supports the Minister’s position that an individual must have surrendered themself to a foreign authority and be currently serving their sentence. This view of the Treaty has also been endorsed in the jurisprudence, where it has been observed that the purpose of the Treaty is to permit offenders “to serve the **remainder** of their sentence in their home country” [emphasis added]: Divito v Canada (Public Safety and Emergency Preparedness), 2013 SCC 47, at para 42.

[51] Given the foregoing, I do not consider that a reading of the Treaty as a whole weighs significantly in Mr. Elliott’s favour, in the overall contextual assessment. In brief, the terms of

the Treaty can be read consistently with the positions of both Mr. Elliott's position and the Minister's position.

[52] For completeness, I will acknowledge in passing that where legislation "implements a treaty without qualification, the interpretation of the statute needs to be wholly consistent with Canada's obligations under the treaty": *SOCAN*, above, at para 46. However, I find that the ITAO does not implement the Treaty without qualification. Instead, it was adopted to ensure the implementation of the Treaty, a similar treaty with Mexico, and eventual future treaties: *Divito v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 39, at para 22. To this end, the first recital of the ITAO states that it is: "[a]n Act to implement treaties and administrative arrangements on the international transfer of persons found guilty of criminal offences." For greater certainty, there is no specific mention of the Treaty in the ITAO. An additional indication that Parliament did not intend to implement the Treaty "without qualification" is that the definition of "Canadian offender" in the ITO differs in many respects from the definition of "Offender" in the Treaty. Put differently, the difference between those two definitions is not confined to the use of the words "**in** a foreign entity" in the ITAO versus the words "in the territory of **either** Party" in the Treaty.

(5) The consequences for Mr. Elliott of the Minister's interpretation

[53] Mr. Elliott asserts that the consequences of the competing interpretations of "Canadian offender" strongly support an interpretation that includes individuals like himself within the meaning of that term. However, Mr. Elliott does not cite any authority in support of this submission. The "modern principle" of statutory interpretation does not appear to support a role

for the consideration of consequences to an individual when interpreting a statute, unless such consequences implicate another rule of statutory interpretation, such as that which seeks to avoid absurd outcomes : see *Vavilov,* at para 117; *Rizzo*, at paras 21 and 27.

[54] I acknowledge that the consequences for Mr. Elliott of the Minister's interpretation of the ITAO may be harsh. Those consequences include the fact that he would have to start serving his sentence in a non-minimum security institution, where he will not be eligible for early release and where he may face a risk of greater violence than if he were able to serve his entire sentence in Canada. I will return to those consequences in the next part below, where I assess the reasons provided in the Decision. For the present purposes, the significance, if any, of those consequences for the interpretation of the ITAO is not such as to displace the considerable weight to be accorded to the plain meaning of the words "in a foreign entity", in the definition of "Canadian offender."

(6) CSC's policy and the Commissioner's Directive

[55] The Minister maintains that, upon receipt of Mr. Elliott's Request, CSC personnel acted in accordance with CSC's policy and Directive 704 issued by the Commissioner of CSC, entitled *International Transfers - Commissioner's Directive*. Among other things, those documents require the International Transfers Unit of CSC to verify the eligibility of the applicant offender, and ensure the quality and completeness of the application and supporting documentation. That documentation includes personal data (such as a photograph, fingerprints and date and place of birth), case history information, and data pertaining to the offender's sentence. The Minister explained that CSC relies on the assistance of the BOP to assist in collecting and sharing that

information, to ensure its accuracy and completeness. The Minister further asserted that CSC personnel cannot begin to liaise with the BOP until an applicant under the ITOA has surrendered to the BOP, to commence their sentence.

[56] In my view, and as a general matter, there is nothing unreasonable about the process described above. However, I will observe in passing that it is not immediately apparent why CSC cannot depart from its own policy in exceptional circumstances, such as those presented by Mr. Elliott. Stated differently, in circumstances in which the BOP may not have the requisite information relating to an applicant, and in which the interests of justice and the equities may warrant a departure from typical practice, it is not apparent why CSC cannot obtain the information described in the Commissioner's Directive from another official source in the US. In this regard, I observe that a US Probation Officer Specialist filed a very detailed and comprehensive report with the US Court, dated July 31, 2019, which appears to contain much of the information contemplated by the Commissioner's Directive. I am left wondering why such a person could not obtain any and all information that CSC may require to process Mr. Elliott's request.

(7) Summary

[57] For all of the reasons set forth above, I find that the Minister's interpretation of the scope of the term "Canadian offender" was not unreasonable. That is to say, it was not unreasonable to conclude that Mr. Elliott is not under the supervision "of" a foreign entity. Even if might have been reasonably open to the Minister to conclude that Mr. Elliott is currently under the supervision of the US Court, his conclusion to the contrary was not unreasonable: *McLean v*

British Columbia (Securities Commission), 2013 SCC 67, at paras 40-41. The Minister's conclusion that Mr. Elliott does not currently come within the ITOA's definition of "Canadian offender" is further supported by the plain meaning of the language in that definition, in particular the words "**in** a foreign entity" [emphasis added].

B. *Is the Decision unreasonable on the ground that it is not appropriately justified?*

[58] Mr. Elliott submits that the two letters comprising the Decision fail to adequately justify the Decision.

[59] I agree. Both the single substantive paragraph in the Minister's letter to Mr. Elliott and the similarly very brief explanation that was provided to his counsel (see paragraphs 17 and 18 above) fall far short of what was required.

[60] Mr. Elliott made extensive submissions to both the Minister and CSC regarding his interpretation of the ITOA, the application of the definition of "Canadian offender" to his particular circumstances, and the adverse impacts of CSC's position on his liberty interests. Those adverse impacts would occur if he is required to wait until he surrenders to the BOP before his application will be considered. They include the increased length of time that he will experience harsher conditions of imprisonment because he is not a U.S. citizen and the fact that the processing delays may result in his two-year sentence being completely served before an ultimate decision is made on his Request. During the hearing, counsel explained that Mr. Elliott has a legitimate concern about delays because the Decision was issued more than two years after he made his Request. Counsel added that the Treaty stipulates a condition that there be at least

six months of an offender's remaining sentence. This suggests that if CSC's processing delay is greater than 18 months after Mr. Elliott surrendered to the BOP, he might well be ineligible for transfer under the Treaty.

[61] Beyond the foregoing, Mr. Elliott also noted that, upon his release from prison at the end of his two year sentence, he would likely be kept in immigration detention for an indeterminate period of time, pending his transfer to Canada.

[62] The Decision ought to have reflected the foregoing consequences for Mr. Elliott's liberty interests: *Vavilov*, at para 133. It also should have grappled with the key issues or central arguments raised by Mr. Elliott: *Vavilov*, at para 128. The complete failure the Decision to do these things renders it inadequately justified and therefore unreasonable.

C. *Is the Decision unreasonable on the ground that the Minister misapprehended Mr. Elliott's circumstances?*

[63] Mr. Elliott notes that the Decision summarized his circumstances as follows:

> … Mr. Elliott was convicted in the United States in November 2019. **He was to surrender to serve his sentence but did not.** In April 2020, he filed a motion for modification of imposed term of imprisonment. This was denied in November 2020. **Since then, he has not surrendered yet** to serve is 24-month sentence.
>
> [Emphasis added.]

[64] Mr. Elliott maintains that the highlighted language in the above-quoted passage suggests that the Minister believed that he had not surrendered himself into custody, despite a requirement to do so. Mr. Elliott underscores that he repeatedly explained to CSC and the Minister that he

continued to attorn to the jurisdiction of the US Court and had been granted a series of court orders extending his surrender date, with the consent of the prosecution.

[65] Given my conclusion at paragraph 62 above, it is unnecessary to make a definitive finding as to whether the Minister misapprehended Mr. Elliott's circumstances, as alleged by Mr. Elliott. However, I will observe that the highlighted language in the passage quoted at paragraph 63 above raises a genuine question as to whether the Minister misapprehended the circumstances under which Mr. Elliott is currently in Canada.

[66] For the record, I will add that this potential misapprehension is compounded by the fact that the Decision referenced correspondence addressed to the Minister by two of Mr. Elliott's legal counsel (Mr. Hasan and Ms. Rakic), but not additional, detailed submissions made by Mr. Elliott's other legal counsel (Mr. Gold). This raises a question about whether Mr. Gold's submissions were in fact considered. Unfortunately, none of the submissions by Mr. Elliott's counsel appear to have been included in the certified record that was before the Minister.

D. *What is the appropriate remedy?*

[67] Mr. Elliott submits that, in the particular circumstances of this case, the appropriate remedy is to set aside the Decision and order that CSC accept his transfer application. He maintains that the totality of the circumstances weigh in favour of the exercise of the Court's discretion not to remit this matter, but instead to order the Minister to accept his Request for processing. He asserts that those circumstances include the urgency of the situation, the delays he

has incurred to date, considerations of fairness and the fact that the Minister has had ample opportunity to address his submissions.

[68] For the reasons provided in part VIII.B above, I agree that the Decision should be set aside.

[69] However, I disagree with Mr. Elliott's position that the Court should exercise its discretion to order CSC to accept his application for processing.

[70] In *Canada (Citizenship and Immigration) v Tennant,* 2019 FCA 206, at paragraphs 79, 82-86 and 90 [***Tennant***], the Federal Court of Appeal noted that this form of relief is available only in exceptional circumstances. Those circumstances are where "there is only one reasonable outcome, so that returning the matter to the administrative decision-maker would be pointless": *Tennant*, at para 82.

[71] Given the reasons provided in part VIII.A above, such exceptional circumstances do not exist in this case.

[72] Accordingly, the appropriate remedy in this application for judicial review is to set aside the Decision and to remit it to the Minister for reconsideration.

IX. Conclusion

[73] For the reasons set forth above, this application is granted in part. The Decision will be set aside and remitted to the Minister for reconsideration.

X. Costs

[74] In his Notice of Application, Mr. Elliott requested the costs of his application.

[75] In a Direction, dated July 26, 2023, I directed the parties to consult with a view to making a short, joint, submission to the Court regarding a lump sum amount of costs payable to the prevailing party in the event that one party was entirely successful in this proceeding. I further directed the parties to endeavour to reach an agreement regarding a lump sum amount of costs, if any, payable in the event of split success. In the event that the parties were unable to reach an agreement regarding the costs to be paid in those two scenarios, I directed them each to file submissions not exceeding 3 pages by the close of business on Friday July 28, 2023.

[76] In response to my Direction, counsel to Mr. Elliott advised the Court in writing that the parties had agreed that no costs should be awarded to either party in the event of split success on this application.

[77] Given that my disposition of the application has indeed resulted in a situation of split success, no costs will be ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is granted in part. Mr. Elliott's request that his application under the *International Transfer of Offenders Act*, S.C. 2004, c. 21, be processed is referred back to the Minister for reconsideration.

2. No costs shall be awarded on this application.

"Paul S. Crampton"
Judge

Ottawa, Ontario
August 1, 2023

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-889-22
STYLE OF CAUSE:	DEREK ELLIOTT v MINISTER OF PUBLIC SAFETY
PLACE OF HEARING:	TORONTO
DATE OF HEARING:	JULY 25, 2023
REASONS FOR JUDGMENT:	PAUL CRAMPTON
DATED:	AUGUST 1, 2023

APPEARANCES:

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Jacob Blackwell	FOR THE RESPONDENT

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