

Court File No. T-889-22

FEDERAL COURT

BETWEEN:

DEREK ELLIOTT

FEDERAL COURT COUR FÉDÉRALE	
FILED	MAY 2 2022
MARY SANSONE	
TORONTO, ON	

Applicant

and

MINISTER OF PUBLIC SAFETY

Respondent

APPLICATION UNDER subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended.

NOTICE OF APPLICATION

TO THE RESPONDENT

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor or, if the Applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date MAY 2 2022 Issued by MARY SANSONE
REGISTRY OFFICER
(Registry Officer)

Address of
local office: 180 Queen Street West, Suite 200
Toronto, Ontario
M5V 3L6

TO: **MINISTER OF PUBLIC SAFETY**
c/o Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Tel: 613-670-6214
Fax: 613-954-1920
AGC_PGC_OTTAWA@JUSTICE.GC.CA

Respondent

APPLICATION

This is an application for judicial review in respect of the decision of The Honourable Marco Mendicino, the Minister of Public Safety (the “**Minister**”) communicated in a letter from his delegate France Gratton, Assistant Commissioner, Correctional Operations and Programs Sector, Correctional Service Canada (“**CSC**”), dated March 22, 2022 and received by the applicant no earlier than April 1, 2022 (the “**Decision**”), refusing to process the applicant’s application to transfer his sentence to Canada under the *International Transfer of Offenders Act*, S.C. 2004, c. 21 (the “*Act*”) (the “**Sentence Transfer Application**”).

The applicant makes application for:

1. An order quashing the Decision;
2. An order directing the Minister to accept the Sentence Transfer Application for processing and consider it without delay;

3. Costs of this application;
4. Such other relief as counsel may advise and this Court deems just; and
5. If necessary, an order under s. 18.1(2) of the *Federal Courts Act* for an extension of time to bring this application.

The grounds for the application are:

A. The Parties

1. The applicant is a Canadian citizen by birth. He holds no other citizenship.
2. Other than a period between 2004 and 2009, when he split his time between Canada and the Dominican Republic in order to run his family's business, the applicant has always lived in southern Ontario full time and continues to do so today.
3. The applicant pled guilty in the United States District Court of the Northern District of California to one count of conspiracy to commit mail fraud. His conviction was formally entered in 2019 and he was sentenced to two years of incarceration. He is presently released on his own recognizance pending his surrender into custody.
4. The respondent Minister, along with the Minister of Emergency Preparedness, is responsible for the administration of the *Act*.

B. The Events Leading to the Applicant Being Charged in the United States

5. Beginning in the 1980s, the applicant's family, the Elliots, ran a resort in the Dominican Republic. The applicant became the president of the family company in 2003.

6. That year, the Elliotts were introduced to James Catledge by a third party. Mr. Catledge told the family that he was the president and CEO of a large financial services company that sold timeshares and was looking for a new partner for this aspect of his business. Unbeknownst to the Elliotts, Mr. Catledge's company sold financial products in a pyramid-style, multi-level marketing system.

7. The Elliotts were unfamiliar with the timeshare/fractional ownership business but agreed to partner with Mr. Catledge and his company. Mr. Catledge designed various timeshare/fractional ownership products at the Elliotts' resort and his company sold them to investors in the United States and Canada. The operation was subsequently expanded to another resort in the Dominican Republic, the Juan Dolio. However, a portion of funds received from investors and intended for renovations was instead paid out as commissions to Mr. Catledge and the applicant, used to pay back other investors, or used to fund other real estate development projects, without this being disclosed to investors.

8. Eventually, the CFO of the Elliott company warned that the project was struggling to generate cash flow. The Elliotts parted ways with Mr. Catledge and the applicant employed outside advisors to attempt to save the investments and protect investors' equity. Mr. Catledge undermined these efforts. Ultimately, despite the applicant's efforts at mitigation, many investors did not receive a return on their investments.

C. The Applicant Fully Cooperated with the U.S. Investigations into the Juan Dolio Scheme

9. The applicant took responsibility for his part in the Juan Dolio scheme and fully cooperated with the U.S. Securities and Exchange Commission (“SEC”) and criminal investigations into the Juan Dolio scheme and provided invaluable assistance to law enforcement authorities. In August 2012, the applicant entered into a cooperation agreement with the SEC, agreeing to provide assistance to the SEC’s investigation of Mr. Catledge and to assist in the recovery of investor assets.

10. The applicant also fully cooperated with the U.S. Attorney’s Office and the FBI. He entered into a plea agreement with the U.S. Attorney’s Office in August 2014 (before even receiving disclosure). The plea deal did not include an agreement as to the applicable offence level or sentencing range, but precluded any right to appeal his conviction or any aspect of his sentence.

11. After pleading guilty, the applicant participated in extensive debrief sessions with the U.S. government, travelling voluntarily at his own expense from Ontario to California on six separate occasions. The U.S. prosecutor with carriage over the case repeatedly noted that the applicant’s assistance was invaluable to the investigation and the conviction of Mr. Catledge.

12. The applicant’s extraordinary cooperation and assistance and the fact that he played only a relatively minor role in the scheme were among the factors that led the U.S. prosecutor to take the position that a carceral sentence was not warranted for the applicant and to seek a probationary sentence instead. Despite the prosecution’s position, the court sentenced the applicant, in November 2019, to two years of incarceration to be followed by three years of probation.

13. The applicant's conviction and sentence were formally entered in December 2019. Initially, the applicant was assigned to report to the United States to surrender into custody on February 19, 2020. The sentencing court recommended that he be "housed as close as possible to Toronto, Canada to facilitate family visits."

D. The Applicant Applied for a Transfer of his Sentence to Canada

14. Following the imposition of sentence, the applicant was permitted to remain in Canada, on his own recognizance, pending his surrender date, originally set for February 19, 2020.

15. The applicant's original surrender date has been postponed by order of the court at the joint request of the applicant and the U.S. prosecutor to September 19, 2022. Mr. Elliott remains in Canada, as permitted by court order. He remains released on his own recognizance.

16. Immediately after the imposition of sentence, the applicant moved diligently to retain counsel and prepare an application to have his sentence transferred to Canada under the *Act*.

17. The applicant submitted the Sentence Transfer Application, including all required forms, detailed written submissions, and supporting documents to CSC for processing in January 2020.

18. Submitting the Sentence Transfer Application as soon as possible was important for the applicant because, given the relatively short length of his sentence and the fact that the time between when an application is submitted to CSC and when a prisoner is finally transferred from the United States to Canada can be on the order of years. Had the applicant waited to enter into custody to submit the Sentence Transfer

Application, he may have finished serving his sentence before his application could be processed and his sentence transferred.

19. CSC confirmed receipt of the Sentence Transfer Application, but indicated it could not be processed and submitted to the Minister until the applicant entered into U.S. custody.

20. In correspondence over the ensuing months, CSC officials gave a series of shifting and arbitrary explanations for why CSC could not begin processing the applicant's Sentence Transfer Application until he was in physical custody in a U.S. prison, including the following:

- a. That the applicant was required to be convicted and sentenced and no appeals or other reviews could be pending;
- b. That the applicant needed to complete certain formalities required by the United States and that the forms submitted with the Sentence Transfer Application were incomplete;
- c. That the applicant's signatures on the forms submitted with the Sentence Transfer Application were required to be witnessed by someone in a position of authority;
- d. That official government sources from the foreign jurisdiction must formally view and confirm paperwork; and
- e. That the definition of "Canadian offender" in s. 2 of the *Act* requires an offender to be detained in a foreign jurisdiction for their sentence transfer application to be processed.

21. Even though the applicant's counsel sought to speak to a representative from the CSC Legal Services Unit regarding the processing of the applicant's application, given the applicant's atypical circumstances, CSC indicated that the matter should be dealt with by the frontline Transfers Unit.

22. The U.S. prosecutor remained supportive of the applicant serving his sentence in Canada and this fact was communicated to CSC officials handling the Sentence Transfer Application. The applicant's counsel also offered to facilitate connecting CSC officials to officials from the U.S. Department of Justice, which offer CSC officials did not accept.

E. Escalation of the Matter to the Minister

23. On February 4, 2021, the applicant's counsel wrote to the then-Minister of Public Safety and Emergency Preparedness, the Honourable Bill Blair, regarding CSC's refusal to deal with the applicant's Sentence Transfer Application. In this letter, the applicant's counsel explained that processing the applicant's Sentence Transfer Application without further delay was both required by law and expedient in the circumstances and requested that the Sentence Transfer Application be processed without further delay.

24. On June 21, 2021, the applicant's counsel sent a follow-up letter to Minister Blair reiterating the request for the applicant's Sentence Transfer Application to be processed.

25. On October 6, 2021, the applicant wrote personally to Minister Blair to request that his Sentence Transfer Application be processed and noted that the law does not

require that a person must be in foreign custody before their sentence transfer application can be considered

26. On November 2, 2021, the applicant's counsel sent a letter to the Minister (at that time, newly appointed as the Minister of Public Safety) following up on the earlier letters to Minister Blair, asking that he intercede with CSC, which continued to refused to process the Sentence Transfer Application, and requesting a response to the letter.

27. Finally, on November 30, 2021, the applicant's counsel again wrote to the Minister and requested that he proceed to consider the applicant's Sentence Transfer Application.

F. The Minister's Decision

28. In the first week of April 2022, the applicant received, via regular mail, a letter from Assistant Commissioner Gratton, on behalf of the Minister, acknowledging receipt of the applicant's letter of October 6, 2021. Although Assistant Commissioner Gratton's letter was dated March 22, 2022, it was postmarked April 1, 2022 and received by the applicant sometime in the first week of April 2022.

29. In this letter, Assistant Commissioner Gratton informs the applicant that his Sentence Transfer Application is "not being accepted for processing as [he does] not meet the statutory requirements to be transferred under the [*Act*]" and specifically, does not meet the definition of "Canadian offender" as he is "neither detained by nor under the supervision of a foreign entity."

G. The Minister's Response to the Letters from the Applicant's Counsel

30. Subsequently, on April 5, 2022, Assistant Commissioner Gratton, on behalf of the Minister, wrote to the applicant's counsel in response to counsel's letters of February 4, June 21, and November 2, 2021. In this letter, Assistant Commissioner Gratton set out her understanding that the applicant "was to surrender to serve his sentence but did not." This understanding is incorrect as the applicant's surrender date has been postponed, by order of the sentencing court, to September 19, 2022. While the applicant remains in Canada, this is in accordance with the U.S. court's orders.

H. The Minister's Decision Is Unreasonable and Should Be Set Aside

31. The Minister's Decision refusing to accept the applicant's Sentence Transfer Application for processing is unreasonable for the following reasons:

- a. The Minister's interpretation of the definition of "Canadian offender" in s. 2 of the *Act* is unreasonable as it is inconsistent with the governing principles of statutory interpretation and the text of the provision, its statutory context, and the purpose of the *Act*.
- b. The Minister's interpretation of the definition of "Canadian offender" in s. 2 of the *Act* and its application to the applicant is unreasonable, as it ignores or is inconsistent with evidence before the Minister, including that the applicant is under the supervision of the U.S. government as he was released on his own recognizance and has an obligation to surrender into U.S. custody on his surrender date.

- c. The Minister's Decision, including his interpretation of the definition of "Canadian offender" in s. 2 of the *Act* and its application to the applicant, is unreasonable in light of the impact of the Decision on the applicant and other Canadian offenders in similar circumstances.
- d. The Minister's Decision is unreasonable because it fails to account for or address the submissions made to the Minister, and his predecessor Minister Blair, by the applicant's counsel in correspondence sent in February, June, and November 2021.
- e. The Minister's Decision is unreasonable because it is based in part on a misapprehension that the applicant is unlawfully at large in Canada, rather than, as is in fact the case, that the applicant continues to reside in Canada in accordance with orders of the sentencing court.
- f. Even if the Minister's interpretation of the definition of "Canadian offender" in s. 2 of the *Act* and its application to the applicant were reasonable, the Minister's decision not to accept the applicant's Sentence Transfer Application in anticipation of his surrender into U.S. custody is unreasonable in light of the relevant text, context, and purpose of the *Act*, the practical realities of the sentence transfer process, and the impact on the applicant of the refusal to process his Sentence Transfer Application. The refusal to accept his application for processing is arbitrary and irrational.

- g. The Minister's Decision is unreasonable as it disregards or fails to appropriately take into account the applicant's rights under ss. 6 and 7 of the *Canadian Charter of Rights and Freedoms*.
 - h. The shifting and arbitrary reasons given by CSC for refusing to process the Sentence Transfer Application indicate bad faith with respect to CSC's and the Minister's treatment of the applicant's matter.
 - i. The Minister's Decision to refuse the applicant's Sentence Transfer Application for processing is unreasonable in light of past practice.
32. The Minister's Decision should be quashed and the Minister directed to accept the Sentence Transfer Application for processing and consideration without further delay.
33. The *International Transfer of Offenders Act*.
34. Sections 2 and 18.1 of the *Federal Courts Act*.
35. Sections 6 and 7 of the *Canadian Charter of Rights and Freedoms*.
36. Such other grounds as counsel may advise and this Court may permit.

The application will be supported by the following material:

- 1. Supporting affidavits and exhibits thereto; and
- 2. Such other evidence as counsel may advise and this Court may deem just.

Pursuant to Rule 317, the applicant requests the Minister send a certified copy of the following material that is not in the possession of the applicant, but is in the possession of the Minister, or his delegates, to the applicant and to the Registry:

1. Any documents that relate to the applicant's Sentence Transfer Application in the possession of the Minister, the former Minister of Public Safety and Emergency Preparedness, or CSC.

May 2, 2022

STOCKWOODS LLP

Barristers

Toronto-Dominion Centre

TD North Tower, Box 140

77 King Street West, Suite 4130

Toronto ON M5K 1H1

Nader R. Hasan (54693W)

Tel: 416-593-1668

naderh@stockwoods.ca

Dragana Rakic (73015K)

Tel: 416-593-3496 (Direct)

draganar@stockwoods.ca

Tel: 416-593-7200

Fax: 416-593-9345

ALAN D. GOLD

Professional Corporation

Barristers

20 Adelaide Street East, Suite 210

Toronto, ON M5C 2T6

Alan D. Gold (13547H)

Tel: (416) 368-1726

Fax: (416) 368-6811

info@alangoldlaw.com

Lawyers for the Applicant

TO: **The Chief Administrator**
Federal Court
180 Queen Street West, Suite 200
Toronto ON M5V 3L6

AND TO: **MINISTER OF PUBLIC SAFETY**
c/o Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Tel: 613-670-6214
Fax: 613-954-1920
AGC_PGC_OTTAWA@JUSTICE.GC.CA

Respondent

I HEREBY CERTIFY that the above document is a true copy of
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Dated this _____ day of MAY 2 2022 20 _____

M. J. J. J.

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