Federal Court Cour fédérale

Date: 20211125

Docket: T-1079-20

Citation: 2021 FC 1300

Ottawa, Ontario, November 25, 2021

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

FRANCISCO JOSE RANGEL GOMEZ

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application by the former Governor of the State of Bolivar in Venezuela, Francisco Jose Rangel Gomez [Mr. Rangel Gomez]. Mr. Rangel Gomez first seeks a declaration pursuant to subsection 18(1) of the *Federal Courts Act*, RSC 1985, c F-7 that the *Justice for Victims of Corrupt Foreign Officials Regulations*, SOR/2017-233 [the Regulations] as they apply to him are *ultra vires* the *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)*, SC 2017, c 21 [the Act]. In the alternative, Mr. Rangel Gomez seeks judicial review of the August 13, 2020 decision of the Minister of Foreign Affairs [the Minister] which refused to

remove (or "delist") Mr. Rangel Gomez from the list of persons set out in the Schedule to the Regulations pursuant to section 8 of the Act [collectively, the Application]. Mr. Rangel Gomez argues that the Minister breached the duty of procedural fairness owed to him with respect to his request to be delisted. Mr. Rangel Gomez does not challenge the reasonableness of the Minister's decision.

[2] As a preliminary issue, the Respondent notes that the Attorney General of Canada is the only proper respondent to this Application. As a result, the style of cause is amended to remove *Her Majesty the Queen (as represented by the Minister of Foreign Affairs)* as a respondent.

[3] For the reasons that follow, the Application is dismissed.

[4] The Court declines to exercise its discretion to consider whether the Regulations are *ultra vires* as they apply to Mr. Rangel Gomez. This issue is in essence about statutory interpretation. Mr. Rangel Gomez should have made submissions to the Minister regarding the interpretation of the Act and Regulations, or their *vires,* as the Act and Regulations apply to him, in his application to be delisted [Delisting Application]. Mr. Rangel Gomez could have then sought judicial review of the Minister's decision if unfavourable to him. The Court could have then reviewed the reasonableness of the Minister's decision with the benefit of the Minister's reasons and considered the appropriate remedy. In the present circumstances, the Court finds that there are no compelling reasons that favour the Court's exercise of discretion to consider this issue for the first time on this Application.

[5] The Court finds that the duty of procedural fairness owed by the Minister to Mr. Rangel Gomez in the context of his Delisting Application is at the low end of the spectrum. The Minister did not breach the duty owed in the circumstances. Mr. Rangel Gomez had sufficient information about why he was listed and of the case he had to meet in his Delisting Application and he responded to this information.

[6] The Court notes that the Act provides that an applicant may bring a new application to be delisted if there is a material change in circumstances.

I. Background

[7] From October 31, 2004 to October 15, 2017, Mr. Rangel Gomez was the Governor of the State of Bolivar in Venezuela.

[8] On October 15, 2017, a new governor was elected for the State of Bolivar. Shortly afterward, Mr. Rangel Gomez moved to Mexico. He states that he is now retired and is no longer politically active.

[9] On October 18, 2017, three days after Mr. Rangel Gomez left office, the Act came into force in Canada.

[10] On November 3, 2017, the Governor in Council [GIC], on the recommendation of the Minister of Foreign Affairs, listed Mr. Rangel Gomez in the Schedule of the Regulations

pursuant to paragraph 4(2)(c) of the Act as a foreign public official involved in acts of significant corruption.

[11] An individual listed in the Schedule pursuant to paragraph 4(2)(c) is a "foreign public official" who, in the opinion of the GIC, is responsible for or complicit in ordering, controlling or otherwise directing acts of significant corruption. To date there are 70 foreign nationals listed, including Mr. Rangel Gomez.

[12] On January 5, 2018, the United States [US] Treasury Department sanctioned Mr. Rangel Gomez along with three other Venezuelan government officials associated with corruption and repression in Venezuela. The US press release described Mr. Rangel Gomez as:

> a former Governor of Bolivar State [who] is retired from the National Army, with the rank of Division General. Rangel Gomez has been linked to corruption activities, such as strengthening armed gangs operating in Bolivar and pressuring courts to release gang members that are apprehended, during his time as Governor. Rangel Gomez has also been linked to networks of allegedly corrupt military officials.

[13] On November 23, 2018, counsel for Mr. Rangel Gomez wrote to Global Affairs Canada [GAC] requesting the reasons why he was listed in the Schedule.

[14] On January 24, 2019, GAC responded by letter, stating:

> . . . At the time of listing, the Governor in Council was of the opinion that Mr. Rangel Gomez met the requirements for designation as a listed person under s. 4(2)(c) of the Act.
>
> Information indicates that Mr. Rangel Gomez, as Governor of Bolivar State, was responsible for or complicit in accepting significant bribes in exchange for government contracts, for

> misappropriating public assets for personal gain, for acts of corruption related to extraction of natural resources, and for transferring the proceeds of corruption outside Venezuela. These activities are alleged to have included the granting of government contracts to companies owned by persons close to him without an invitation to tender. These companies allegedly took part in iron and aluminum bar trafficking, which increased under Mr. Rangel Gomez's regional government and may have helped to fund his 2008 election campaign. Mr. Rangel Gomez is also alleged to have taken part in the trafficking of precious metals.

[15] Over a year later, on February 25, 2020, Mr. Rangel Gomez applied to the Minister to be delisted pursuant to section 8 of the Act. Mr. Rangel Gomez provided an 85-page submission, which included his description of the purpose of the sanctions regime, politics in Venezuela, his military and political career, the success he achieved as Governor of Bolivar, his response to possible bribery allegations and corruption allegations, and submissions about why information that may have been provided by particular persons should be doubted.

[16] Mr. Rangel Gomez argued, among other things, that he should be delisted because: during his time as state governor, he was not involved in the federal government under the leadership of Nicolás Maduro; the purpose of the sanctions in the Act is to modify behaviour and he has no current ability to modify any behaviour in that country; there was an insufficient basis to sanction him in the first place; and, the allegations against him are based on dubious sources of information. He also argued that he had been denied procedural fairness because he was not advised of the case he had to meet, including because the reasons for listing did not provide the sources of the information relied on nor the specific acts of corruption alleged. He argued that he was required to refute evidence he was not made aware of.

[17] On April 28, 2020, GAC advised Mr. Rangel Gomez that it would assess his Delisting Application only from the perspective of the Act, not the *Special Economic Measures Act*, SC 1992, c 17 [SEMA], noting that some of his arguments, including that he was not part of the Maduro regime, relate to SEMA and not the Act under which he was listed. GAC provided Mr. Rangel Gomez with an opportunity to submit further information related to the harm that he alleges has resulted from being listed and any additional documentation that, in his view, should be taken into account by the Minister in support of the Delisting Application.

[18] On May 15, 2020, counsel for Mr. Rangel Gomez responded to GAC, noting, "[w]e do not have further information to provide at this time, absent further direction from the Department about any specific concerns that we should be addressing." Counsel reiterated several of the submissions made previously, including the allegation that Canada did not have a basis to list Mr. Rangel Gomez in the first place.

[19] Counsel for Mr. Rangel Gomez did not provide any documents related to the alleged harm, but noted that the listings in both Canada and the US had affected Mr. Rangel Gomez's ability to open a bank account, continue his health insurance, and finance a vehicle in Mexico. Counsel added that the most significant harm was to Mr. Rangel Gomez's reputation. Counsel explained that it was not possible to isolate the harm caused only by the sanctions in Canada. Counsel also offered to meet with GAC officials to address their concerns. No further correspondence was exchanged between the parties.

[20] On August 13, 2020, the Minister refused the Delisting Application.

II. The Decision

[21] Mr. Rangel Gomez's application is the first delisting application submitted to the Minister since the Act came into force in 2017.

[22] The Minister's Decision relies on the information and advice set out in the Memorandum from the Deputy Minister [DM's Memo]. The DM's Memo notes, among other information:

- The relevant provisions of the Act under which Mr. Rangel Gomez was listed on November 3, 2017.
- The acts of significant corruption that Mr. Rangel Gomez was allegedly involved in, based on "reliable, credible open source information." These acts include embezzlement, money laundering, and granting favourable mining contracts to his family and friends. Specifically, non-governmental organizations [NGOs] and news media (notably Transparencia Venezuela, InSight Crime, Armando Info, Project Poder, and the Economist) reported that under his governorship he "tolerated, if not encouraged," an association in mining activities between criminal organizations and the state apparatus (i.e., the Venezuelan military), including "smuggling, trafficking in persons, drugs, and arms." These sources also reported that Mr. Rangel Gomez had been directly involved in acts of corruption, leveraging his position as governor to involve close associates in businesses engaged in mineral exploitation in Bolivar.
- The steps that were taken to process the Delisting Application, including "extensive due diligence and numerous exchanges with DLA Piper [counsel for Mr. Rangel Gomez] to seek additional information with respect to his application."
- The process for imposing sanctions under the Act, which requires that each listing meet the legal thresholds of the Act, be supported by credible and reliable open-source information and follow the GIC regulatory process.
- The key arguments advanced by Mr. Rangel Gomez and the DM's response:
    1) The listing was unjustified and violated rights guaranteed by the *Charter* and the *Bill of Rights* (including his right to enjoyment of property). Mr. Rangel Gomez argued that he did not commit any acts of significant corruption and has no influence over the Maduro regime. Response: The department assessed the submissions and engaged in additional due diligence and corroborated the information used to support the listing, including direct communication with a prominent human rights NGO (Transparencia Venezuela) that released a report in

2019 explicitly denouncing Mr. Rangel Gomez's role in the development of mining activities run by criminal organizations.

2) Mr. Rangel Gomez was never part of the Maduro regime and cannot exert influence over the behaviour of the Maduro regime. Response: Mr. Rangel Gomez was not listed under the SEMA, which is a different sanction regime related to sanctioning those who are part of the Maduro regime. Mr. Rangel Gomez was listed under the Act, which only requires credible evidence showing that he was involved in acts of significant corruption during his time as a foreign public official.

3) Mr. Rangel Gomez has always pursued the best interests of the Venezuelans he governed and is supportive of a return to democracy in the country. Response: No corroborative evidence of this was provided nor has the Department found such evidence. Moreover, this is not relevant because any positive impact in Bolivar does not negate the evidence of his acts of significant corruption.

4) Mr. Rangel Gomez and his family have suffered harm as a result of his listing. Response: The Department provided an opportunity to him to file additional information regarding the causal link between the alleged harm and his listing. However, he was unable to demonstrate such a link. Mr. Rangel Gomez provided information on how the listing affected him and his relatives in conducting activities in other foreign jurisdictions (not in Canada). Although he is inadmissible to Canada, his listing under the Act does not restrict his ability to obtain visas or travel in other countries. If that occurred, it would not be the result of Canadian law.

5) Mr. Rangel Gomez has not been prosecuted for corruption by any tribunal in Venezuela or elsewhere. Response: The absence of any legal action against Mr. Rangel Gomez does not exonerate him. Legal action against him is not a requirement for listing under the Act.

- The DM's Memo notes that Mr. Rangel Gomez's submissions were considered, but did not adequately address the evidence regarding the acts of significant corruption for which he was responsible and did not allay the Department's concerns, which were reinforced by ongoing communication with human rights and anti-corruption advocates.

[23] The Minister accepted the recommendation of the DM and refused Mr. Rangel Gomez's Delisting Application. The Minister's reasons note that each listing must meet the legal thresholds set out in the Act, and be supported by credible and reliable open-source information. The Minister reiterated the language of paragraph 4(2)(c), noting, "[c]riteria to decide when acts

rise to the level of significant corruption include, among other things, their impact, the amounts involved, the foreign national's influence or position of authority, or the complicity of the government of the foreign state in question".

[24] The Minister's reasons reflect the considerations set out in the DM's Memo and state that the government has credible information that Mr. Rangel Gomez ordered or was complicit in acts of significant corruption while serving as the Governor of Bolivar from 2004 to 2017. The decision states, "[a]ccording to several reliable sources, Mr. Rangel Gomez was involved in embezzlement and money laundering, granting favourable mining contracts to his family and friends, and developing an association with criminal gangs operating in the state."

[25] The reasons also address the several arguments raised by Mr. Rangel Gomez in his submissions.

[26] With respect to delisting, the Minister states:

> A decision to delist someone under this Act requires that evidence be provided that supports the argument that the individual's listing under the JVCFOA should not be maintained. This may include consideration of a number of factors, including but not limited to, the impacts of the acts, material changes in behaviour, amends for their wrongdoing, formal accountability in their home jurisdiction or elsewhere, or evidence from reliable, credible sources that the corrupt acts did not take place.

III. <u>The Statutory Provisions</u>

[27] The SEMA and the Act are related but distinct regimes that seek to sanction foreign nationals and entities involved in a grave breach of international peace and security, gross and

systematic human rights violations, and acts of significant corruption. The circumstances for listing under each Act overlap but are also different.

[28] The SEMA sanctions with respect to Venezuela were first imposed on September 22, 2017 (i.e., the *Special Economic Measures (Venezuela) Regulations*, SOR/2017-204). As noted in the preamble, these regulations were made “for the purpose of implementing the decision of the Association Concerning the Situation in Venezuela made on September 5, 2017” and sought to target members of the Maduro regime. Mr. Rangel Gomez was not listed under these regulations.

[29] On October 18, 2017, the *Justice for Victims of Corrupt Foreign Officials Act* (the Act’s short title) came into force. The long title is more descriptive: *An Act to provide for the taking of restrictive measures in respect of foreign nationals responsible for gross violations of internationally recognized human rights and to make related amendments to the [SEMA] and the [IRPA].*

[30] The Act allows, among other things, for the sanctioning of foreign public officials responsible for or complicit in acts of significant corruption. It also made related amendments to the SEMA to add human rights violations and acts of significant corruption as additional criteria triggering the measures and to the *Immigration and Refugee Protection Act*, SC 2001, c 27, to add a related ground of inadmissibility to Canada.

[31] The relevant statutory provisions are set out in ANNEX A. Section 2 of the Act sets out definitions. Section 4 provides that the Governor in Council may make orders or regulations to restrict or prohibit the activities of a foreign national where certain circumstances exist. Section 8 provides that a foreign national who is the subject of an order or regulation may apply to the Minister to cease being the subject of the order or regulation.

[32] The Regulatory Impact Analysis Statement [RIAS] describes the main objectives of the Regulations, including:

- to signal Canada's international condemnation of the individuals responsible for or complicit in the gross violations of internationally recognized human rights and acts of significant corruption that occurred in the case of Sergei Magnitsky and that continue to occur in Venezuela and in South Sudan;
- to end impunity for those responsible for or complicit in these acts by denying such individuals the ability to store their wealth in Canada or otherwise use Canada and the Canadian financial system for their benefit; and
- to establish a mechanism to list individuals in the future through amendments to the Regulations.

[33] The RIAS notes, with respect to Venezuela:

> Canada has also expressed concern with respect to the numerous incidents of gross abuses of human rights and acts of significant corruption associated with the current economic and political crises in Venezuela. The Regulations also list individuals in Venezuela who, in the opinion of the Governor in Council, are responsible or complicit in acts of significant corruption including incidents of money laundering and public officials diverting state revenues for personal use.

IV. Overview of the Applicant's Submissions

[34] Mr. Rangel Gomez initially argued that the Regulations were *ultra vires* because he was not a foreign public official at the time he was listed and, alternatively, that the decision-making process was procedurally unfair. In June 2021, Mr. Rangel Gomez sought to amend his Notice of Application and to file a Supplementary Memorandum of Fact and Law. The Respondent consented and the Court granted the motion. As a result, Mr. Rangel Gomez raised the additional argument that the Regulations are also *ultra vires* because Mr. Gomez was not a foreign public official at the time the Act came into force. The hearing of the Application was adjourned to permit the parties to file brief additional submissions.

[35] As a result of the amendment, Mr. Rangel Gomez now argues that the Regulations that listed him are *ultra vires* the Act for two reasons. First, he argues that the Act was not in force at the time he was a foreign public official. Mr. Rangel Gomez notes that the Act does not explicitly state that it applies retrospectively and relies on the presumption that legislation does not operate retrospectively. He also disputes that the Act is retrospective by necessary implication. As a result, he argues that the Regulations made pursuant to the Act are *ultra vires* as they apply to him.

[36] Second, he argues that the provisions of the Act as worded apply only to persons who are foreign public officials at the time of listing. Noting that he left office on October 15, 2017, he submits that he ceased to be a foreign public official before he was listed in the Regulations. He again argues that the Regulations are *ultra vires* the Act as they apply to him. He argues that,

unlike other legislation which seeks to include current or former public officials and uses terms such as "is or was," the Act refers to "a foreign national, who is a foreign public official…" [Emphasis added]. He notes that the Act adopts the definition of foreign public official in the *Corruption of Foreign Public Officials Act*, which means a person who "holds a legislative, administrative or judicial position of a foreign state" or a person "who performs public duties or functions for a foreign state" [Emphasis added].

[37] More generally, Mr. Rangel Gomez submits that the Act and Regulations are intended to apply to persons who were foreign public officials at the time the Act and Regulations came into force and continue to be foreign public officials. He submits that listing former foreign public officials does not serve the purpose of modifying the behaviour targeted by the sanctions.

[38] In response to the issue of why the *vires* argument is being raised for the first time on judicial review without first being raised with the Minister in his submissions to be delisted, Mr. Rangel Gomez submits that it would have been pointless to do so because the Minister does not have particular expertise in interpreting the Act and does not have the authority to declare the Regulations invalid.

[39] Mr. Rangel Gomez alternatively argues that if the Regulations are valid, the Minister's decision must be quashed because he was denied procedural fairness in his delisting application. He argues that he did not know the case to be met. He submits that, although he made lengthy submissions to the Minister, these were based in large part on guesswork about the information relied on by the Minister to list him in the first place. Mr. Rangel Gomez submits that the generic

letter from GAC merely parroted the wording of the Act. He submits that he could not possibly address vague allegations about his twenty years as a state governor. Mr. Rangel Gomez submits that the public reports of NGOs considered by the Minister should have been disclosed to him. He also generally disputes the allegations of corruption and suggests that these are based on information from political opponents, who should not be relied on.

V. Overview of the Respondent's Submissions

[40] The Respondent submits that the Court should not consider Mr. Rangel Gomez's arguments regarding the *vires* of the Regulations, which are statutory interpretation issues, given that this issue was not raised by him in his 85-page Delisting Application, his supplementary submissions, nor in any other correspondence with GAC or the Minister. The Respondent submits that the jurisprudence is clear that arguments which were not made before an administrative decision-maker should generally not be entertained on judicial review.

[41] The Respondent adds that in the event that the Court decides to exercise its discretion to consider the *vires* argument, it is in essence a statutory interpretation issue. The Respondent submits that applying the principles of statutory interpretation, the only logical interpretation is that the Act applies to current and former foreign public officials. The Respondent notes, among other things, that it would be absurd to exempt a foreign public official who resigns or retires before being listed, yet is responsible for the corruption that has occurred. With respect to the presumption against retrospectivity, the Respondent submits, among other things, that the reason for the presumption—which is to avoid unfairness and protect acquired rights—is not at play

because Mr. Rangel Gomez has no acquired rights in Canada and corrupt public officials were already sanctioned by the international community before the Act came into force.

[42] The Respondent notes that Mr. Rangel Gomez was a foreign public official at the relevant time and would have been aware of the international instruments, including the Inter-American Convention Against Corruption, to which Venezuela, Canada, the United States were parties, to hold corrupt officials to account even before the Act was proclaimed in force. He would also have known of international concerns and efforts to combat corruption, including money laundering.

[43] The Respondent submits that the Act seeks to address past violations of human rights and is by its very nature retrospective. In addition, it is retrospective by necessary implication because the purpose of the Act and related anti-corruption policies would be undermined if sanctions could not be imposed for conduct that took place before its enactment.

[44] The Respondent disputes Mr. Rangel Gomez's characterization of the Act as being for the purpose of modifying current behaviour and his submission that it is too late to modify his behaviour as a foreign public official. The Respondent submits that the purpose of the Act is set out in the preamble and informed by several international instruments; it is intended to deter conduct, protect the public from engaging with listed persons, hold current and former foreign public officials who are responsible for or complicit in acts of significant corruption accountable, and prohibit them from taking advantage of the Canadian financial system.

[45] The Respondent further argues that there was no breach of procedural fairness in the Delisting Application. The Respondent submits that Mr. Rangel Gomez knew the case he had to meet, noting that the Act and the Regulatory Impact Analysis Statement provided the general reasons for listing foreign nationals, and that Mr. Rangel Gomez was provided with the reasons why he was listed. The Respondent argues that Mr. Rangel Gomez's extensive submissions to the Minister belie his contention that he did not know what the Minister relied on in refusing to delist him. Mr. Rangel Gomez was also given an additional opportunity to make further submissions about how the sanctions had caused him harm, but did not elaborate.

VI. Issues

[46] The Application raises the following issues:

1. Whether the Court should consider the *vires* argument (which is in essence a statutory interpretation argument) given that Mr. Rangel Gomez did not raise this issue with the Minister in the context of his Delisting Application;

2. If the Court exercises its discretion to consider the *vires* issue, whether the Regulation listing Mr. Rangel Gomez is *ultra vires* the Act because at the time the Act came into force, he was no longer a foreign public official, and/or because at the time he was listed in the Regulations, he was no longer a foreign public official; and

3. Whether the Minister breached the duty of procedural fairness owed to Mr. Rangel Gomez with respect to the Delisting Application.

VII. Standard of Review

[47] If the Court considers the statutory interpretation and *vires* arguments, the issues are whether the Regulations listing Mr. Rangel Gomez have been enacted within the scope of the Act and whether the Act captures Mr. Rangel Gomez. These issues are reviewed on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 65 [*Vavilov*]).

[48] In *Portnov v Canada (Attorney General)*, 2019 FC 1648, a foreign national who was designated under the *Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations* argued that the GIC lacked jurisdiction to issue an order extending the application of the regulations for a further five years. On judicial review, Justice Fothergill found that the reasonableness standard applied, citing *Vavilov*, and noting, at para 23:

> In *Vavilov*, a majority of the Supreme Court of Canada held that it would "cease to recognize jurisdictional questions as a distinct category attracting correctness review" (para 65). The categories of decision that remain subject to correctness review are now confined to those delineated by clear legislative intent (paras 34-52), or where this is required by respect for the rule of law, i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies (paras 55-68). None of these exceptions apply here.

[49] The Federal Court of Appeal agreed that the standard of review is reasonableness (*Portnov v Canada (Attorney General)*, 2021 FCA 171 at paras 10–17). The Court of Appeal concluded that the issue was one of statutory interpretation; the issue did not raise any constitutional or quasi-constitutional principle and did not qualify as a question of central

importance to the legal system. As such, none of the exceptions to reasonableness review set out in *Vavilov* applied.

[50] The correctness standard applies to issues of procedural fairness. In *Canadian Pacific Railway Company v Canada (Attorney Gereral)*, 2018 FCA 69, the Court of Appeal noted that judicial review for procedural fairness is "'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (para 54). The Court of Appeal explained that the question is whether "the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed."

VIII. Should the Court Consider Whether the Regulations Are *Ultra Vires* as They Apply to Mr. Rangel Gomez?

A. *The Respondent's Submissions*

[51] The Respondent submits that arguments which were not made before an administrative decision-maker should not be considered on judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*]; *Hughes v Canada (Attorney General)*, 2021 FC 147 [*Hughes*]). The Respondent's position is that none of the factors noted in *Alberta Teachers* and other jurisprudence would favour the Court's exercise of discretion to consider the *vires* issue.

[52] The Respondent submits that if Mr. Rangel Gomez had raised the *vires* or statutory interpretation issues with the Minister, the Minister would certainly have had the expertise to interpret this statute given that the Minister is responsible for international relations and has the highest level of expertise with respect to the purpose of the Act and Regulations and the scope of who may be listed. The Respondent adds that the Court should have the benefit of the Minister's decision and reasons for the purpose of any judicial review of that decision.

[53] The Respondent suggests that Mr. Rangel Gomez now seeks a declaration from the Court as a means to get around the fact that he never sought judicial review of the Regulations that listed him in the first place and he did not raise the statutory interpretation argument in his Delisting Application. The Respondent submits that an application for a declaration is not a way to circumvent the Minister's role as decision-maker.

B. *The Applicant's Submissions*

[54] Mr. Rangel Gomez submits that the Court has the discretion to consider an issue raised for the first time on judicial review (*Alberta Teachers* at paras 22–24). He notes that in *Alberta Teachers* the Supreme Court of Canada found that, in the circumstances of that case, the Court did not err in considering an issue raised for the first time on judicial review. He submits that similar factors exist in his case.

[55] Mr. Rangel Gomez argues that the Court should consider the *vires* issue because the Minister has no authority to determine the validity of the Regulations; the Minister may only make a recommendation to the GIC. He notes that subsection 18(1) of the *Federal Courts Act*

gives this Court jurisdiction to issue extraordinary remedies, including a declaration that the Regulations, as they relate to him, are invalid or unlawful.

[56] Mr. Rangel Gomez further argues that the Minister has no greater expertise with respect to interpreting the Act or in determining whether it applies retrospectively.

[57] Mr. Rangel Gomez also submits that the Respondent has not been prejudiced by his raising this issue on judicial review because the initial hearing date was adjourned to permit additional submissions.

C. *The Jurisprudence*

[58] In *Alberta Teachers,* the Supreme Court of Canada addressed the question of whether an issue not raised before the administrative decision-maker (in that case, an adjudicator), and raised for the first time on judicial review, should be considered by the court (at paras 22–28).

[59] The Supreme Court of Canada noted, at para 22:

> Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies."

[60] The Supreme Court explained that the discretion to consider the new issue will generally not be exercised where the issue could have been, but was not, raised before the decision-maker (para 23). The Court noted that there were several rationales for this rule, including that the "legislature has entrusted the determination of the issue to the administrative tribunal," and that courts should avoid undue interference with the discharge of administrative functions delegated to administrative bodies by Parliament (at para 24). The Supreme Court noted that "courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and make its views known."

[61] The Supreme Court added, at para 25, that respecting the legislative choice is particularly true where the issue raised for the first time on judicial review relates to the decision-maker's specialized functions or expertise. In such cases, the Court should not overlook the loss of the benefit of the decision-maker's views.

[62] The Court further noted, at para 26, that "raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue."

[63] In *Alberta Teachers*, upon considering the rationale for the principles and the particular facts, the Supreme Court of Canada agreed with the Alberta Court of Appeal that the judge had not erred in exercising their discretion to consider the new issue for the first time on judicial review. The Supreme Court noted, among other considerations, that the decision-maker had decided the same issue and had expressed their views at first instance in other cases, no evidence

was required to decide the issue, no prejudice was alleged, and the issue had also been implicitly decided by the adjudicator in proceeding with the adjudication.

[64] In *Canada (Attorney General) v Public Alliance of Canada*, 2014 FC 688 [*Public Alliance of Canada*], Justice Strickland applied the Supreme Court's guidance in *Alberta Teachers* and also exercised her discretion to consider an issue that was not raised before the labour adjudicator about the meaning and scope of a term in a collective agreement. Justice Strickland found, upon review of the record, that the issue raised was not a new issue, but rather one that was related to the focus of the submissions and that she also had the benefit of the adjudicator's reasoning on the interpretation of the disputed term (at paras 22–23).

[65] In *Hughes*, Justice Diner relied on the rationale and principle set out in *Alberta Teachers* and refused to exercise his discretion to hear the *res judicata* and issue estoppel arguments that were not raised before the Canadian Human Rights Tribunal. Justice Diner noted, among other things, at para 75, that the applicant was represented by the same counsel who represented him at the Tribunal and could have raised the issues which he sought to raise for the first time on judicial review, but failed to do so.

[66] With respect to Mr. Rangel Gomez's argument that it would have been pointless to raise the *vires* issue with the Minister because the Minister has no power to make a declaration of invalidity, the Federal Court of Appeal's decision in *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 37–47 [*Forest Ethics*] is instructive.

[67] In *Forest Ethics*, the Court of Appeal found that the applicant could have raised a *Charter* issue with the decision-maker, noting that in accordance with the governing legislation, the National Energy Board could hear and decide questions of law, including *Charter* issues.

[68] The Court of Appeal noted that the National Energy Board "never had a chance to consider the constitutional issues the applicants now place before this Court" (para 41). The Court of Appeal explained why this matters, at paragraphs 42–43, including that, if the issue had been raised with the National Energy Board, it would have received relevant evidence, reflected on the issue and expressed its views in its reasons. With the benefit of a fully developed record, a party could then seek judicial review. The Court of Appeal added that this approach would respect the difference between administrative decision-makers and the reviewing court and Parliament's choice in assigning the determination of factual and legal issues to the decision-maker.

[69] The Court of Appeal emphasized the importance of not bypassing the administrative decision-maker, noting at para 45:

> If administrative decision-makers could be bypassed on issues such as this, those appreciations, insights and understandings would never be placed before the reviewing court. In constitutional matters, this is most serious. Constitutional issues should only be decided on the basis of a full, rich factual record: *Mackay v. Manitoba*, [1989] 2 S.C.R. 357 at pages 361-363. Within an important regulatory sector such as this, a record is neither full nor rich if the insights of the regulator are missing.

[70] Although *Forest Ethics* addressed a *Charter* issue raised for the first time on judicial review, the considerations which supported the Court of Appeal's conclusion are relevant to the

issue of whether Mr. Rangel Gomez's arguments about the statutory interpretation and *vires* of the Act and Regulations as they apply to him should be considered by this Court.

[71] In *Forest Ethics*, the Court of Appeal considered the argument that the Court should hear and determine the issue because the decision-maker did not have the power to declare the provision at issue to be invalid. The Court of Appeal noted that this argument was rejected by the Supreme Court of Canada in *Okwuobi v Lester B Pearson School Board; Casimir v Quebec (Attorney General); Zorrilla v Quebec (Attorney General)*, 2005 SCC 16 [*Okwuobi*]. At para 50, the Court of Appeal stated:

> Next, counsel for the applicants submitted that the Board does not have the power to declare section 55.2 of no force or effect. That is true. But in *Okwuobi* the Supreme Court gave a full answer to that point, rejecting it (at paragraphs 45-46):
>
>> On the question of remedies, the appellants correctly point out that the [Tribunal] cannot issue a formal declaration of invalidity. This is not, in our opinion, a reason to bypass the exclusive jurisdiction of the Tribunal. As this Court stated in *Martin*, the constitutional remedies available to administrative tribunals are indeed limited and do not include general declarations of invalidity (para. 31). Nor is a determination by a tribunal that a particular provision is invalid pursuant to the *Canadian Charter* binding on future decision makers. As Gonthier J. noted, at para. 31: "Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases."
>>
>> That said, a claimant can nevertheless bring a case involving a challenge to the constitutionality of a provision before the [Tribunal]. If the [Tribunal] finds a breach of the *Canadian Charter* and concludes that the provision in question is not saved under s. 1 it may disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in force (*Martin*,

> at para. 33). Such a ruling would, however, be subject to judicial review on a correctness standard, meaning that the Superior Court could fully review any error in interpretation and application of the *Canadian Charter*. In addition, the remedy of a formal declaration of invalidity could be sought by the claimant at this stage of the proceedings.

[72] In *Forest Ethics*, the Court of Appeal also addressed the applicant's argument that *Alberta Teachers* set out a more flexible approach to the exercise of the court's discretion to consider issues for the first time on judicial review. The Court of Appeal doubted that *Alberta Teachers* applied to constitutional issues, noting that "*Okwuobi* remains on the books, unaffected by *Alberta Teachers*" (para 54).

[73] However, the Court of Appeal found that even if it applied *Alberta Teachers*, it would still not exercise its discretion to consider the *Charter* issue for the first time on judicial review. The Court noted that in *Alberta Teachers*, the Supreme Court of Canada relied on many of the same considerations, including the role of the administrative decision-maker as "fact-finder and merits-decider" and its appreciation of policy considerations and the possible prejudice to the other party, in support of the general rule that issues not raised before the administrative decision-maker should not be raised for the first time on judicial review.

D. *The Court Declines to Exercise Its Discretion to Consider This Issue for the First Time on Judicial Review*

[74] The Court finds that it would not be appropriate to exercise its discretion to consider the *vires* or statutory interpretation of the Act and Regulations as they apply to Mr. Rangel Gomez for the first time on judicial review. Applying *Alberta Teachers* and *Forest Ethics*, the

circumstances of the present case do not support a departure from the general rule. As a result, the extensive submissions of the parties on this issue will not be considered.

[75] Mr. Rangel Gomez's characterization of the remedy as seeking a declaration from the Court and his argument that only the Court can order this remedy does not provide a route to bypass what is at its core an issue of statutory interpretation that should have been raised with the Minister as decision-maker.

[76] In his Delisting Application made pursuant to subsections 8(1) and (2) of the Act, Mr. Rangel Gomez could have raised, as a ground for the Minister to recommend to the GIC that he be delisted, the statutory interpretation arguments that he now seeks to raise—i.e., his assertion that the Act and Regulations apply only to foreign public officials who meet that definition at the time of listing and that the Act does not apply retrospectively. He did not.

[77] Although the Minister would not have the authority to declare the Regulations, as they apply to Mr. Rangel Gomez, to be invalid, the Minister could and would have considered whether the Act and Regulations apply to Mr. Rangel Gomez. This approach would provide both Mr. Rangel Gomez and the Court with the Minister's reasons and an evidentiary record for the purpose of judicial review. On judicial review, Mr. Rangel Gomez could challenge any decision of the Minister that found that the Act and Regulations were applicable to him. If the Court found that the Minister erred, the Court could grant the appropriate remedy in accordance with subsection 18(1) of the *Federal Courts Act*, which could include a declaration.

[78] Parliament entrusted the Minister to determine whether a person should be listed in accordance with section 4 of the Act or delisted in accordance with section 8 and to make the recommendation to the GIC. Given that the Minister has responsibility and expertise in matters of international relations and policy, including the international instruments to which Canada is a party, as well as other legislation (and more importantly, this Act), the Minister's role as "fact-finder and merits-decider" in a delisting application pursuant to section 8(2) of the Act should be respected and should not have been bypassed by Mr. Rangel Gomez. As noted in *Alberta Teachers*, courts should avoid undue interference with administrative functions delegated to others and should respect the legislature's choice.

[79] The Minister has not had any opportunity to consider the interpretation of the Act or its application to Mr. Rangel Gomez. Unlike *Alberta Teachers* or *Public Alliance of Canada*, there was no previous consideration of this issue or implied decision. Both parties note that this is the first application for delisting and that there were no previous decisions about the interpretation of the Act. The Minister's decision does not allude to any consideration of whether Mr. Rangel Gomez is subject to the Act and the Regulations. The decision, informed by the DM's Memo, set out the considerations for the Minister and responded to the arguments made by Mr. Rangel Gomez, which did not raise the statutory interpretation or *vires* issue.

[80] Although Mr. Rangel Gomez has not raised a *Charter* issue, he makes the same arguments that were addressed and rejected in *Forest Ethics,* where the Court of Appeal relied on both *Okwuobi* and *Alberta Teachers* and found that the decision-maker's inability to issue a declaration of invalidity was not a reason to bypass the jurisdiction of the decision-maker.

[81] Mr. Rangel Gomez's submission—that the Respondent has not been prejudiced by addressing this issue for the first time on judicial review because he sought to amend his Notice of Application to raise the retrospectivity argument, the hearing of the Application was adjourned, and both parties were permitted to make additional submissions—mischaracterizes the reason for the adjournment.

[82] The adjournment was not for the purpose of addressing the prejudice to the Respondent of raising this issue for the first time on judicial review. Rather, Mr. Rangel Gomez sought to expand the *vires* issue raised for the first time in his initial Notice of Application by also raising the retrospectivity of the Act. At that point, the Respondent had already made written submissions that flagged their opposition to raising the *vires* and statutory interpretation issues for the first time on judicial review.

[83] Mr. Rangel Gomez also suggests that he had "demonstrated" that the Regulations did not apply to him in his Delisting Application. However, this "demonstration" was only his submission that he should not have been listed in the Regulations because he was not part of the Maduro regime, because at the time the sanctions were imposed he did not hold political office and could not exert any influence to combat corruption, and more generally, because he was not like the other persons listed. Mr. Rangel Gomez did not raise the statutory interpretation or *vires* of the Act and Regulations at any point in his 85-page submissions or in the links included.

[84] To conclude, the reasons for the general rule that the Court should not consider an issue raised for the first time on judicial review exist in the present case: the issue could have been

raised with the Minister in the Delisting Application; Parliament entrusted the Minister with determining whether to list and delist persons in accordance with the Act and to make the recommendation to the GIC, and this legislative choice should be respected; the Minister is not lacking in expertise with respect to the legislation for which the Minister is responsible; and the Court and Mr. Rangel Gomez should have the benefit of the Minister's reasons, as this would provide an evidentiary record for judicial review. There is no reason that favours the exercise of the Court's discretion to consider the issue; there is no implied decision or previous decisions of the Minister about the interpretation of the Act and there was no impediment to Mr. Rangel Gomez raising the issue in his Delisting Application.

IX. Did the Minister Breach the Duty of Procedural Fairness in the Delisting Application?

A. *The Applicant's Submissions*

[85] Mr. Rangel Gomez submits that applying the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 [*Baker*], a higher level of procedural fairness is called for in the context of his Delisting Application.

[86] Mr. Rangel Gomez submits that regardless of the level of the duty of procedural fairness owed to him, the Minister did not meet even the most basic requirements of procedural fairness. Mr. Rangel Gomez does not dispute that he was granted a right to be heard, but argues that this was meaningless because he could not effectively respond to or rebut vague allegations. He submits that no specific information about why he was listed in the first place was disclosed to him prior to his Delisting Application.

[87] Mr. Rangel Gomez submits that the January 24, 2019 letter from GAC provided only generic reasons and the Minister's decision merely parroted the provisions of the Act.

[88] Mr. Rangel Gomez argues that his listing is a punitive measure and he must have an opportunity to defend specific allegations of bribery and corruption. He submits that it is impossible for him to prove he was not complicit in or responsible for the acts alleged because of the lack of specificity of the allegations and adds that he was not directed to the source of the information relied on by the Minister to sanction him.

[89] Mr. Rangel Gomez further submits that the reasons provided to him by GAC in January 2019 were vague and did not provide any particulars, such as which contracts he allegedly sole sourced, which bribes he allegedly received, which precious metals he allegedly trafficked, the level of influence or complicity alleged, or the dates the alleged conduct occurred. He adds that not all open-source information is reliable and that these sources should have been disclosed to him.

[90] Mr. Rangel Gomez generally denies all the allegations and notes that he could not have done much of what is alleged as a state governor given the division of powers between state and federal governments. He notes that he attested to the truth of the facts in his Delisting Application and denied the broad allegation of corruption. He submits that, in contrast, the Minister relied on vague and unsworn evidence.

[91] Mr. Rangel Gomez submits that the Minister's decision, which refused to delist him, provided the first and only indication of what he would be required to address in a delisting application to be successful.

[92] Mr. Rangel Gomez notes that the DM's Memo cited reports released by Transparencia Venezuela and InSight Crime; however, these reports were issued in 2019 and 2020 after Mr. Rangel Gomez was listed. He submits that he could not address concerns that were not even reported at the relevant time.

[93] Mr. Rangel Gomez disputes the Respondent's contention that he must have known the case to meet because he filed 85 pages of submissions that thoroughly addressed many sources of information.

[94] Mr. Rangel Gomez submits that the Minister cannot meet its duty of procedural fairness just because he may have guessed correctly and responded to possible allegations and sources of information relied on. He notes that he had to search the internet for any references to him in order to make his submissions. He submits that he had no indication about the information relied on by the Minister and could not respond to the Transparencia and Insight Crime reports, which postdate his listing and, in the case of the Insight Crime report, his submissions to the Minister. Mr. Rangel Gomez submits that the Minister "back-filled" the evidence relied on to list him only after he made his Delisting Application. He argues that the onus was on the Minister to disclose the information it relied on in the first place.

B. *The Respondent's Submissions*

[95] The Respondent submits that the *Baker* factors support that the duty of procedural fairness owed in the circumstances is at the low end of the spectrum. The Respondent argues that Mr. Rangel Gomez was aware of the case he had to meet given the extensive record he filed in support of his Delisting Application (including 85 pages of submissions with hyperlinks). In addition, he had the opportunity to file additional documents. The Respondent submits that Mr. Rangel Gomez's real concern is not about the fairness of the process, but rather its outcome.

[96] The Respondent notes that Mr. Rangel Gomez is listed pursuant to subsection 4(2) based on reliable open-source information. The Respondent adds that Mr. Rangel Gomez did not seek judicial review of his listing pursuant to section 4 of the Act. Had he done so, he could have requested material in the possession of the decision-maker pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106. The Respondent notes that Mr. Rangel Gomez is only challenging the decision on his Delisting Application.

[97] The Respondent submits that information to support a delisting application would include objective third-party evidence that the allegations are false or unsubstantiated or that other countries have lifted similar sanctions. The Respondent adds that Mr. Rangel Gomez's denial of all allegations is simply a general statement. If he had credible evidence that the alleged acts did not take place, he could have raised it in his Delisting Application, but did not.

[98] The Respondent acknowledges that the US provided more detail to Mr. Rangel Gomez regarding the reasons for the US sanctions. The Respondent adds that Mr. Rangel Gomez's submissions to the Minister noted the US allegations and his submissions addressed those allegations, which demonstrates that he was aware that the same allegations of bribery and corruption were of concern to Canada.

[99] The Respondent notes that GAC's letter responded to Mr. Rangel Gomez's request for information about why he was listed. The letter reflects the relevant provisions of the Act and provides additional details, including that Mr. Rangel Gomez let contracts without tender, trafficked in iron and aluminum, the proceeds of which may have helped to fund his election campaign, and accepted bribes in exchange for government contracts. The Respondent submits that this was sufficient detail for Mr. Rangel Gomez to understand the allegations and that he responded.

[100] The Respondent notes that Mr. Rangel Gomez did not ask the Minister to provide more details of the allegations as he now argues should have been provided.

C. *The Minister Met the Duty of Procedural Fairness Owed to Mr. Rangel Gomez*

(1) The *Baker* factors

[101] In *Baker,* the Supreme Court of Canada established that the duty of procedural fairness varies depending on the context.

[102] Justice L'Heureux-Dubé provided a non-exhaustive list of factors and emphasized that the scope or content of the duty of procedural fairness must be determined in the specific context of each case. Justice L'Heureux-Dubé reiterated that procedural fairness is based on the principle that individuals affected by decisions should have the opportunity to present their case and to have decisions affecting their rights and interests made in a fair, impartial and open process "appropriate to the statutory, institutional, and social context of the decision" (*Baker* at para 28).

[103] The factors informing the scope of the duty owed include the nature of the decision, the nature of the statutory scheme, the importance of the decision to the person affected, the legitimate expectations of that person and the choice of procedure made by the decision-maker.

[104] With respect to the nature of the decision and the process followed in making it, *Baker* guides that the more the process resembles judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required (*Baker* at para 23).

[105] With respect to the nature of the statutory scheme, greater procedural protections will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted (*Baker* at para 24).

[106] The more important the decision and the greater the impact on the person affected, the greater the procedural protections required (*Baker* at para 25).

[107] If the person has a legitimate expectation that a certain procedure will be followed, the duty of procedural fairness requires that procedure (*Baker* at para 26).

[108] In *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 94–95, the Supreme Court of Canada elaborated on the doctrine of legitimate expectations. The Court cited D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf) at §7:1710 and relevant jurisprudence, noting at para 95 that a legitimate expectation must arise from some conduct by the decision-maker or may result from an official practice or assurance that certain procedures would be followed in the decision-making process. The Court also noted that the practice or conduct giving rise to the reasonable expectation must be clear, unambiguous and unqualified.

[109] An additional factor informing the duty of procedural fairness is the choice of procedure made by the decision-maker, which should be considered and respected. This is particularly so when the statute leaves the decision-maker the ability to choose its own procedures, or when the decision-maker has an expertise in determining what procedures are appropriate in the circumstances (*Baker* at para 27).

[110] In the present case, with respect to the nature and process of the decision, Mr. Rangel Gomez argues that because section 8 does not set out a process or factors for the Minister to consider, a higher level of procedural fairness is required. I disagree. The Minister is an administrative decision-maker and exercises a discretion in a manner not akin to judicial decision-making. This factor does not support a higher level of procedural fairness.

[111] With respect to the nature of the statutory scheme, Mr. Rangel Gomez argues that, because there is no right of appeal, greater procedural safeguards are necessary. As noted by the Respondent, there is a right to judicial review of the Minister's decision and an applicant may also bring a new application for delisting in accordance with section 8(5). This factor does not support a higher level of procedural fairness, as the decision is not immune from review or reconsideration.

[112] With respect to the importance of the decision, Mr. Rangel Gomez submits that the sanctions have affected his ability to engage in trade and commerce in and outside of Canada, to own property in Canada, and to enter Canada. He notes that he lost his health insurance and was unable to finance a car in Mexico as a result of the sanctions. He also points to the harm to his reputation and integrity as calling for a higher level of procedural fairness.

[113] The importance of the decision as a factor does not support a higher level of procedural fairness. Although the decision has an impact on Mr. Rangel Gomez, he acknowledged that he has no business or property interests in Canada nor any intention to do business in Canada. His submission that the sanctions are a "life sentence" is an exaggeration. He has not shown how his loss of health insurance and inability to finance a car in Mexico are the consequence of being listed by Canada. Contrary to his submission, he has no acquired rights in Canada and was unable to point to any authority for his proposition that everyone has a right to do business in Canada.

[114] Mr. Rangel Gomez also argues that listed persons have a legitimate expectation that they will receive a fair hearing and be provided with the details of the case against them, that the Government of Canada has an interest in ensuring that only those people who warrant sanctions actually receive them, and that the Minister should want listed persons to know why they are sanctioned in order to modify their behaviour. He argues that this calls for a higher level of procedural fairness. However, these submissions are about the application of a duty of procedural fairness and not about a legitimate expectation that could inform the level of procedural fairness owed. As noted above, a legitimate expectation refers to whether there was a departure from an official practice or a clear undertaking of what the process would be. In the present case there is no official practice and no undertakings were made to him regarding the process to be followed. Mr. Rangel Gomez acknowledged that he had the opportunity to make extensive submissions and a second opportunity to make additional submissions. The DM’s Memo and Minister’s decision demonstrate that his submissions were thoroughly considered. Mr. Rangel Gomez focusses his argument on not knowing the case to meet.

[115] With respect to the choice of procedure of the Minister, Mr. Rangel Gomez submits that because no procedure is set out in the Act, there is no need to defer to the Minister’s choice of procedure. However, the Act leaves the procedure to be followed in a delisting application up to the Minister and this choice should be respected. The Minister is only required to decide whether there are reasonable grounds to recommend delisting (subsection 8(2)), make a decision within 90 days after the application is received (subsection 8(3)), and give notice without delay to the applicant of the refusal to delist (subsection 8(4)). This factor does not support a higher level of procedural fairness.

[116] In summary, the application of the *Baker* factors does not support finding that a high level of procedural fairness was owed in the context of Mr. Rangel Gomez's Delisting Application. The Minister is not engaged in judicial decision-making, there is an opportunity for judicial review and an opportunity to bring a new application where there is a material change in circumstances, Mr. Rangel Gomez had no legitimate expectation about the process that would be followed, and the choice of process is within the discretion of the Minister.

[117] However, regardless of the scope of the duty of procedural fairness owed in particular circumstances, the basic or minimal procedural protections must be provided. A person that will be adversely affected by a decision is entitled to know the case to meet, which requires that they have sufficient information about what will be relied on to make the decision—and that they have this information before the decision is made and in time for them to respond.

(2) The duty of procedural fairness in the Delisting Application

[118] The issue before the Court is whether the Minister breached the duty of procedural fairness owed to Mr. Rangel Gomez in the context of his Delisting Application. The Minister's initial decision to recommend that Mr. Rangel Gomez be listed pursuant to paragraph 4(2)(c) is not the subject of this Application. However, the information relied on by the Minister to recommend to the GIC to list Mr. Rangel Gomez is linked to his ability to make submissions to be delisted.

[119] I find that Mr. Rangel Gomez had sufficient information about why he was listed to permit him to make submissions that his listing should not be maintained (i.e., his Delisting Application). In other words, he knew the case to meet.

[120] Mr. Rangel Gomez was listed in November 2017. At that time, he had the information provided by the Act, which set out, at paragraph 4(2)(c), the circumstances for listing a foreign public official who is:

> responsible for or complicit in ordering, controlling or otherwise directing acts of corruption — including bribery, the misappropriation of private or public assets for personal gain, the transfer of the proceeds of corruption to foreign states or any act of corruption related to expropriation, government contracts or the extraction of natural resources — which amount to acts of significant corruption when taking into consideration, among other things, their impact, the amounts involved, the foreign national's influence or position of authority or the complicity of the government of the foreign state in question in the acts.
>
> [Emphasis added]

[121] Mr. Rangel Gomez also had the information included in the RIAS, which noted Canada's "concern with respect to the numerous incidents of gross abuses of human rights and acts of significant corruption associated with the current economic and political crises in Venezuela" and noted that the Regulations listed "individuals in Venezuela who, in the opinion of the Governor in Council, are responsible for or complicit in acts of significant corruption including incidents of money laundering and public officials diverting state revenues for personal use."

[122] Over a year later, Mr. Rangel Gomez inquired about why he was listed. The January 2019 letter from GAC provided further information. Although the letter does not provide details of

specific bribes, specific government contracts or the extraction of minerals, Mr. Rangel Gomez understood the significance of the allegations—i.e., it was not a single incident of bribery or corruption relied on by the Minister.

[123] In the submissions, Mr. Rangel Gomez stated:

> We appreciate that neither the Act nor the Regulations expressly require Global Affairs to provide <u>any</u> explanation for sanctions listing at all (a notable and problematic defect in the legislation), and therefore we are grateful for this direction [referring to the January 2019 letter] [emphasis in the original].

Mr. Rangel Gomez added that it was difficult to investigate and make an application given his over 20 years in public life "absent some direction." Mr. Rangel Gomez appears to have accepted that the January 2019 letter provided some direction.

[124] Mr. Rangel Gomez's submissions to the Minister in support of his Delisting Application do belie his allegation that he did not know what the Minister relied on or that he was unable to respond.

[125] Mr. Rangel Gomez noted that the reasons for his listing provided by GAC were taken as a general guide and that he supplemented the reasons with the details provided by the US government, details from public news and other sources that fit the "general category of issues raised" in the reasons. Moreover, the Minister's grounds for recommending that Mr. Rangel Gomez be listed pursuant to paragraph 4(2)(c) of the Act were based on reliable open-source information, which Mr. Rangel Gomez had similar access to and which he acknowledged that he

consulted in order to make his submissions. The Minister and GAC were not obliged to disclose open-source information that Mr. Rangel Gomez would have had access to (see, for example, *Azizian v Canada (Minister of Citizenship and Immigration)*, 2017 FC 379 at para 29; *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, 1998 CanLII 9066).

[126] In his Delisting Application, in addition to setting out his submissions (noted above) and background information, including about politics in Venezuela and his career, Mr. Rangel Gomez also responded to the allegations. He noted that he had not held a position in the national government since 2000. He explained that he was directed to leave his position as Minister of the Secretariat Office of the Presidency in 2000 to take on the position as president of Corporación Venezolana de Guayana [CVG], a state-owned corporation. He explained that CVG was an autonomous enterprise in charge of coordinating infrastructure projects. He noted that he completed major projects while at CVG and that his success at CVG led to his running for public office in Bolivar.

[127] With respect to bribery allegations, Mr. Rangel Gomez stated that several politicians and others had been prosecuted, yet he was not among them. He noted that he was aware of only one bribery allegation, relating to Odebrecht SA, a Brazil-based construction conglomerate prosecuted in several countries for having bribed government officials and politicians for contracts. He stated that the US prosecution did not include allegations against him. He explained that the only connection to him would be based on a statement made by a Director who claimed that he contributed twice to Mr. Rangel Gomez's election campaign and claimed that Mr. Rangel Gomez promised that the government would prioritize the development of the

company's projects. Mr. Rangel Gomez stated that Odebrecht had no contracts with the state of Bolivar and that he did not recall any discussions or any contributions. He argued that there is no credible evidence of his being involved in any bribery scheme.

[128] With respect to the corruption allegations related to natural resources, Mr. Rangel Gomez noted that due to the lack of details, he was guided by the US press release, which referred to his dealings with Ferrominera del Orinoco [FdO]—a subsidiary of CVG responsible for the extraction, processing and marketing of iron ore—and alleged that Diosdado Cabello and Mr. Rangel Gomez mined and extracted iron and exported it through FdO and that they had "frontmen" in the company who facilitated the illegal extraction and exportation. Mr. Rangel Gomez noted that there was an investigation and criminal proceedings against several officials, which were highly publicized. Mr. Rangel Gomez stated that his only connection to this scandal was because he was a friend of the owner of one of the newspapers that covered the arrests of FdO officers and others. Mr. Cabello was also one of the persons investigated regarding the iron ore trafficking network and was arrested. Mr. Rangel Gomez submitted that there were no allegations relating to FdO ever made directly against him. He referred to the Economist article (also noted in the DM's Memo) which, he argued, did not explicitly suggest he was involved, and noted that it would have if such evidence existed.

[129] Mr. Rangel Gomez stated that the only allegations that related to him emerged from the US in May 2018. The US alleged that Mr. Cabello had conducted a significant amount of illicit business with others, including Mr. Rangel Gomez, and that they and their associates had laundered money from the embezzlement of Venezuelan state funds and their dealings with drug

traffickers through a series of apartment buildings and commercial shopping centres. The allegations included the extraction of iron and further money laundering activities in that context. The allegations referred to Mr. Rangel Gomez as having directed the president of a state-owned enterprise to use boats to move the minerals to Costa Rica.

[130] Mr. Rangel Gomez denied all the US allegations. He stated that he is not a friend of Mr. Cabello and has never had business dealings with him. He added that he had no control or influence at CVG or FdO during his tenure as Governor, as these were national entities. He noted that despite these allegations, the US did not pursue criminal or other proceedings against him.

[131] Mr. Rangel Gomez also denied other reported allegations as being unrelated to him, including any involvement in drug trafficking or money laundering involving FdO, Venalum (a subsidiary of CVG) or Alunasa (a Costa Rican company that manufactures aluminum products and is also owned by CVG). He again noted that as state governor, he had no role or influence over national companies.

[132] Overall, Mr. Rangel Gomez's submissions responded to issues of corruption and bribery with reference to several scenarios and to his role as state governor and as responsible for CVG. Contrary to his submission, he did not appear to be guessing at the information that supported the reasons set out in the GAC letter.

[133] For example, with respect to the allegation that he was responsible for or complicit in accepting significant bribes in exchange for government contracts, he addressed the allegation

related to Odebrecht SA. With respect to the allegation that he was involved in acts of corruption related to extraction of natural resources, and for transferring the proceeds of corruption outside Venezuela, he relied on the information he had from the US and responded, denying the more specific allegations. Similarly, with respect to the allegation that he was engaged in granting government contracts to companies engaged in iron and aluminum bar trafficking and that these companies may have helped fund his 2008 election campaign, he responded denying his role with respect to FdO, Venalum, Alunasa and CVG.

[134] With respect to his submission that he could not address the InSight Crime and Transparencia Venezuela reports because these postdate his listing and/or submissions, the Minister's reference to or reliance on these more recent reports is not a breach of a duty of procedural fairness. On a delisting application, the Minister is tasked with deciding whether there are reasonable grounds to recommend that an applicant cease to be listed. In making that decision, the Minister would be required to consider all relevant information. Transparencia and InSight and other recent publications were noted in the DM's Memo. This is not "backfilling" of the evidence relied on to list him, as alleged by Mr. Rangel Gomez; rather, this would inform the Minister's decision whether there are reasonable grounds to recommend that the Regulations setting out the original listing be repealed or amended. The Minister found that the submissions did not allay the Minister's concerns about significant corruption that Mr. Rangel Gomez was responsible for.

[135] Mr. Rangel Gomez's denials demonstrate his awareness of the several allegations, of which any could provide the basis for listing in accordance with subsection 4(2)(c) of the Act.

The Minister's decision that there were no reasonable grounds to recommend that the Regulations be amended to delist Mr. Rangel Gomez is not the issue; although Mr. Rangel Gomez denied the allegations in his submissions, he did not challenge the reasonableness of the decision.

[136] In conclusion, I find that the duty of procedural fairness owed to Mr. Rangel Gomez in the context of the Delisting Application was met. As a result, there is no basis to quash the Minister's refusal to recommend that he be delisted. As noted at subsection 8(5) of the Act, an applicant may bring a new application to be delisted based on a material change in circumstances.

[137] With respect to costs, the parties agreed that in the event that the Respondent is successful, Mr. Rangel Gomez would pay $7000 in costs

JUDGMENT in file T-1079-20

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to remove Her Majesty the Queen (as represented by the Minister of Foreign Affairs) as a respondent.
2. The Application for Judicial Review is dismissed.
3. The Applicant shall pay the Respondent's costs in the amount of $7000.

"Catherine M. Kane"

Judge

ANNEX A

The relevant statutory provisions of the Justice for Victims of Corrupt Foreign Officials Act are:

2 The following definitions apply in this Act.	**2** Les définitions qui suivent s’appliquent à la présente loi.
foreign national means an individual who is not	***étranger*** Individu autre :
(a) a Canadian citizen; or	**a)** qu’un citoyen canadien;
(b) a permanent resident under the Immigration and Refugee Protection Act.	**b)** qu’un résident permanent au sens de la *Loi sur l’immigration et la protection des réfugiés.*
foreign public official has the same meaning as in section 2 of the *Corruption of Foreign Public Officials Act.*	***agent public étranger*** S’entend au sens de l’article 2 de la *Loi sur la corruption d’agents publics étrangers.*
4 (1) The Governor in Council may, if the Governor in Council is of the opinion that any of the circumstances described in subsection (2) has occurred,	**4 (1)** S’il juge que s’est produit l’un ou l’autre des faits prévus au paragraphe (2), le gouverneur en conseil peut
(a) make any orders or regulations with respect to the restriction or prohibition of any of the activities referred to in subsection (3) in relation to a foreign national that the Governor in Council considers necessary; and	**a)** prendre tout décret ou règlement qu’il estime nécessaire concernant la restriction ou l’interdiction, à l’égard d’un étranger, des activités énumérées au paragraphe (3);
(b) by order, cause to be seized, frozen or sequestrated in the manner set out in the order any of the foreign national’s property situated in Canada.	**b)** par décret, saisir, bloquer ou mettre sous séquestre, de la façon prévue par le décret, tout bien situé au Canada et détenu par l’étranger.

(2) The circumstances referred to in subsection (1) are the following:

(a) a foreign national is responsible for, or complicit in, extrajudicial killings, torture or other gross violations of internationally recognized human rights committed against individuals in any foreign state who seek

(i) to expose illegal activity carried out by foreign public officials, or

(ii) to obtain, exercise, defend or promote internationally recognized human rights and freedoms, such as freedom of conscience, religion, thought, belief, opinion, expression, peaceful assembly and association, and the right to a fair trial and democratic elections;

(b) a foreign national acts as an agent of or on behalf of a foreign state in a matter relating to an activity described in paragraph (a);

(c) a foreign national, who is a foreign public official or an associate of such an official, is responsible for or complicit in ordering, controlling or otherwise directing acts of corruption — including bribery, the misappropriation of private or public assets for

(2) Sont visés au paragraphe (1) les faits suivants :

a) l'étranger est responsable ou complice de meurtres extrajudiciaires, de torture ou d'autres violations graves de droits de la personne reconnus à l'échelle internationale contre des personnes dans un État étranger qui tentent, selon le cas :

(i) de dénoncer des activités illégales commises par des agents publics étrangers,

(ii) d'obtenir, d'exercer, de défendre ou de promouvoir des droits de la personne et des libertés reconnus à l'échelle internationale, notamment la liberté de conscience, de religion, de pensée, de croyance, d'opinion, d'expression, de réunion pacifique et d'association et le droit à un procès équitable et à des élections démocratiques;

b) l'étranger, sur mandat ou au nom d'un État étranger, est impliqué dans une activité visée à l'alinéa a);

c) l'étranger qui est un agent public étranger ou une personne qui est associée à un tel agent est responsable ou complice d'avoir ordonné, supervisé ou dirigé d'une façon quelconque des actes de corruption — notamment le versement de pots-de-vin, le

personal gain, the transfer of the proceeds of corruption to foreign states or any act of corruption related to expropriation, government contracts or the extraction of natural resources — which amount to acts of significant corruption when taking into consideration, among other things, their impact, the amounts involved, the foreign national's influence or position of authority or the complicity of the government of the foreign state in question in the acts; or

détournement de biens publics ou privés pour son propre bénéfice, le transfert de produits de la corruption à l'extérieur de l'État étranger ou tout acte de corruption en matière d'expropriation ou visant des marchés publics ou l'extraction de ressources naturelles — qui constituent, compte tenu notamment de leurs effets, de l'importance des sommes en jeu, du degré d'influence ou de la position d'autorité de l'étranger ou du fait que le gouvernement de l'État étranger en cause en est complice, des actes de corruption à grande échelle;

(d) a foreign national has materially assisted, sponsored, or provided financial, material or technological support for, or goods or services in support of, an activity described in paragraph (c).

d) l'étranger a substantiellement appuyé ou parrainé une activité visée à l'alinéa c) ou y a activement participé en fournissant de l'aide financière ou matérielle, du soutien technologique ou des biens ou services.

(3) Orders and regulations may be made under paragraph (1)(a) with respect to the restriction or prohibition of any of the following activities, whether carried out in or outside Canada:

(3) Les activités qui peuvent être visées par le décret ou règlement pris en vertu de l'alinéa (1)a) sont les suivantes, qu'elles se déroulent au Canada ou à l'étranger :

(a) the dealing, directly or indirectly, by any person in Canada or Canadian outside Canada in any property, wherever situated, of the foreign national;

a) toute opération effectuée, directement ou indirectement, par une personne se trouvant au Canada ou par un Canadien se trouvant à l'étranger portant sur un bien de l'étranger, indépendamment de la situation du bien;

(b) the entering into or facilitating, directly or indirectly, by any person in Canada or Canadian outside Canada, of any financial transaction related to a dealing referred to in paragraph (a); and

b) le fait pour une personne se trouvant au Canada ou pour un Canadien se trouvant à l'étranger de conclure, directement ou indirectement, toute opération financière liée à une opération visée à l'alinéa a) ou d'en faciliter, directement ou indirectement, la conclusion;

(c) the provision by any person in Canada or Canadian outside Canada of financial services or any other services to, for the benefit of or on the direction or order of the foreign national;

c) la prestation par une personne se trouvant au Canada ou par un Canadien se trouvant à l'étranger de services, notamment de services financiers, à l'étranger, pour le bénéfice de celui-ci ou en exécution d'une directive ou d'un ordre qu'il a donné;

(d) the acquisition by any person in Canada or Canadian outside Canada of financial services or any other services for the benefit of or on the direction or order of the foreign national; and

d) l'acquisition par une personne se trouvant au Canada ou par un Canadien se trouvant à l'étranger de services, notamment de services financiers, pour le bénéfice de l'étranger ou en exécution d'une directive ou d'un ordre qu'il a donné;

(e) the making available by any person in Canada or Canadian outside Canada of any property, wherever situated, to the foreign national or to a person acting on behalf of the foreign national.

e) le fait pour une personne se trouvant au Canada ou pour un Canadien se trouvant à l'étranger de rendre disponible des biens, où qu'ils soient, à l'étranger ou à une personne agissant pour son compte.

(4) The Governor in Council may, by order, authorize the Minister to

(4) Le gouverneur en conseil peut, par décret, conférer au ministre le pouvoir :

(a) issue to any person in Canada or Canadian outside Canada a permit to carry out a specified activity or transaction, or class of activity or transaction, that is restricted or prohibited under this Act or any order or regulations made under this Act; or	**a)** de délivrer à une personne se trouvant au Canada ou à un Canadien se trouvant à l'étranger un permis l'autorisant à mener une opération ou une activité, ou une catégorie d'opérations ou d'activités, qui fait l'objet d'une interdiction ou d'une restriction au titre de la présente loi ou d'un décret ou règlement pris en vertu de celle-ci;
(b) issue a general permit allowing any person in Canada or Canadian outside Canada to carry out a class of activity or transaction that is restricted or prohibited under this Act or any order or regulations made under this Act.	**b)** de délivrer un permis d'application générale autorisant toute personne se trouvant au Canada ou tout Canadien se trouvant à l'étranger à mener une opération ou une activité, ou une catégorie d'opérations ou d'activités, qui fait l'objet d'une interdiction ou d'une restriction au titre de la présente loi ou d'un décret ou règlement pris en vertu de celle-ci.
(5) The Minister may issue a permit or general permit, subject to any terms and conditions that are, in the opinion of the Minister, consistent with this Act and any order or regulations made under this Act.	**(5)** Le ministre peut délivrer un permis ou un permis d'application générale sous réserve des modalités qu'il estime compatibles avec la présente loi et les décrets et règlements pris en vertu de celle-ci.
(6) The Minister may amend, suspend, revoke or reinstate any permit or general permit issued by the Minister.	**(6)** Le ministre peut modifier, annuler, suspendre ou rétablir un permis visé au présent article.
[…]	[…]

8 (1) A foreign national who is the subject of an order or regulation made under section 4 may apply in writing to the Minister to cease being the subject of the order or regulation.	**8 (1)** L’étranger visé par un décret ou règlement pris en vertu de l’article 4 peut demander par écrit au ministre de cesser d’être visé par le décret ou règlement.
(2) On receipt of the application, the Minister must decide whether there are reasonable grounds to recommend to the Governor in Council that the order or regulation be amended or repealed, as the case may be, so that the applicant ceases to be the subject of it.	**(2)** Sur réception de la demande, le ministre décide s’il existe des motifs raisonnables de recommander au gouverneur en conseil de modifier ou d’abroger, selon le cas, le décret ou le règlement afin que le demandeur cesse d’y être visé.
(3) The Minister must make a decision on the application within 90 days after the day on which the application is received.	**(3)** Il rend sa décision dans les quatre-vingt-dix jours suivant la réception de la demande.
(4) The Minister must give notice without delay to the applicant of any decision to reject the application.	**(4)** S’il rejette la demande, il en donne sans délai avis au demandeur.
(5) If there has been a material change in the applicant’s circumstances since their last application under subsection (1) was submitted, he or she may submit another application.	**(5)** Si la situation du demandeur a évolué de manière importante depuis la présentation de sa dernière demande, il peut en présenter une nouvelle.

Section 2 of the *Corrupt Foreign Officials Act*, SC 1998, c 34, reads:

foreign public official means	***agent public étranger***
(a) a person who holds a legislative, administrative or judicial position of a foreign state;	Personne qui détient un mandat législatif, administratif ou judiciaire d’un État étranger ou qui exerce une fonction publique d’un État

(b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and

(c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

étranger, y compris une personne employée par un conseil, une commission, une société ou un autre organisme établi par l’État étranger pour y exercer une telle fonction ou qui exerce une telle fonction, et un fonctionnaire ou agent d’une organisation internationale publique constituée par des États, des gouvernements ou d’autres organisations internationales publiques

FEDERAL COURT

SOLICITORS OF RECORD

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