SUPREME COURT OF CANADA

CITATION: Gavrila *v.* Canada (Justice), 2010 SCC 57

DATE: 20101125
DOCKET: 33313

BETWEEN:

Tiberiu Gavrila
Appellant
and
Minister of Justice of Canada
Respondent
- and -
Amnesty International (Canada Section),
Québec Immigration Lawyers Association
and Canadian Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 13)

Cromwell J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

GAVRILA *v.* CANADA (JUSTICE)

Tiberiu Gavrila *Appellant*

v.

Minister of Justice of Canada *Respondent*

and

Amnesty International (Canada Section), Québec Immigration Lawyers Association and Canadian Civil Liberties Association *Interveners*

Indexed as: Gavrila *v.* Canada (Justice)

2010 SCC 57

File No.: 33313.

2010: January 13; 2010: November 25.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Extradition — Surrender — Convention refugees — Principle of "non-refoulement" — Minister of Justice ordered extradition of Convention refugee to Romania — Whether Minister of Justice had legal authority to surrender for extradition refugee whose refugee status had not ceased or been revoked — If so, whether Minister reasonably exercised his authority to surrender — Extradition Act, S.C. 1999, c. 18, s. 44 — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 115.

Extradition — Surrender — Evidence — Burden of proof — Convention refugees sought for extradition — Statutory grounds justifying Minister of Justice's refusal to make surrender order — Whether s. 44(1)(b) of Extradition Act makes risk of persecution mandatory ground of refusal of surrender — Whether Minister of Justice erred by imposing on refugees the burden of showing that they would suffer persecution if extradited — Extradition Act, S.C. 1999, c. 18, s. 44(1)(b).

G came to Canada in 2004 and successfully made a claim for refugee protection, alleging that he had been persecuted in Romania because of his ethnic origin and activities in a Roma advocacy association. The Romanian authorities later requested that G be extradited to serve a prison sentence on a conviction for forging visas. G had allegedly been convicted in Romania for participating in the forging of visas for two people in exchange for US$1,800. In 2008, the Minister of Justice

ordered that G be extradited to his country of origin to serve his prison sentence. The Court of Appeal dismissed the application for judicial review.

Held: The appeal should be allowed and the matter remitted to the Minister of Justice for reconsideration.

For the reasons given in *Németh v. Canada (Justice)*, the Minister did not apply the correct legal principles given that at the time the surrender decision was made, G's refugee status had not ceased or been revoked. The Minister ought to have considered the application of s. 44(1)(*b*) of the *Extradition Act*. The Minister's decision having been founded on wrong legal principles was unreasonable and must be set aside. While the decisions taken under the *Immigration Refugee Protection Act* are not binding on the Minister, G should not have been required to prove that persecution would in fact occur and that it would either shock the conscience or be fundamentally unacceptable to Canadians and should not have had his case evaluated only on the basis of s. 44(1)(*a*) considerations.

Cases Cited

Applied: *Németh v. Canada (Justice)*, 2010 SCC 56.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7

Extradition Act, S.C. 1999, c. 18, s. 44(1)(*a*), (*b*).

Immigration and Refugee Protection Act, S.C. 2001, c. 27.

Penal Code (Romania).

International Documents

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221.

Convention Relating to the Status of Refugees, Can. T.S. 1969 No. 6, Article 1F(b)

APPEAL from a judgment of the Quebec Court of Appeal (Beauregard, Gendreau and Côté JJ.A.), 2009 QCCA 1288, [2009] J.Q. n^{o} 6686 (QL), 2009 CarswellQue 6650, dismissing an application for judicial review of a decision by the Minister of Justice of Canada ordering the appellant's surrender. Appeal allowed.

Stéphane Handfield and *Dimitrios Strapatsas*, for the appellant.

Ginette Gobeil and *Janet Henchey*, for the respondent.

Johanne Doyon, *Elaine Doyon and Dan Bohbot*, for the intervener Québec Immigration Lawyers Association.

Lorne Waldman and *Jacqueline Swaisland*, for the intervener Amnesty International (Canada Section).

Sukanya Pillay, for the intervener Canadian Civil Liberties Association.

The judgment of the Court was delivered by

Cromwell J. —

I. Introduction

[1] This case, like its companion case *Németh v. Canada (Minister of Justice)*, 2010 SCC 56, released concurrently, raises questions about the interplay between extradition and refugee protection. Applying the principles developed in *Németh*, I would allow the appeal and remit the matter to the Minister of Justice for reconsideration of his decision to surrender the appellant for extradition.

II. Facts and Proceedings

[2] The appellant came to Canada in 2004 and made a claim for refugee protection, alleging that he had been persecuted in Romania because of his ethnic

origin and his activities in a Roma advocacy association. The Immigration and Refugee Board ("IRB") allowed the appellant's claim for refugee protection.

[3] The Romanian authorities later requested that he be extradited to serve a prison sentence on a conviction for forging visas. The appellant had allegedly been convicted in Romania for participating in the forging of Schengen visas for two persons in exchange for US$1,800. The appellant did not reveal in his refugee claim that he was wanted by the Romanian police or that he had been convicted of forging visas. He had not appeared at his trial or at the hearing of his appeal, even though he was still residing in Romania at the time. He had therefore been convicted *in absentia*. But he had been represented by counsel at every stage of the proceedings, both at trial and on appeal. He left his country on December 18, 2003, a week after his appeal was dismissed.

[4] In May 2005, the appellant's spouse joined him in Canada without their children. Their two sons were left in the care of their grandparents until July 2008, when they joined their parents here. Ms. Gavrila has been a permanent resident of Canada since December 2007. On May 4, 2006, she gave birth to a third child in Quebec.

[5] The appellant was never able to acquire permanent resident status, because he was inadmissible to Canada on grounds of serious criminality. Between his arrival in Canada and the time he was taken into custody pursuant to an order made under the *Extradition Act*, S.C. 1999, c. 18 ("EA"), the appellant was convicted

of several indictable offences, including theft, fraud, possession and use of forged documents (credit card), obstruction of a peace officer, possession of break-in instruments, and conspiracy.

[6] In May 2006, the Minister of Citizenship and Immigration Canada applied to the IRB to vacate the decision to allow the appellant's claim for refugee protection. The issue was whether the decision in question had been obtained as a result of directly or indirectly misrepresenting material or relevant facts. The IRB rejected the application to vacate the decision. In its decision, the IRB found that the INTERPOL notice seemed to have been fabricated, as it was unlikely that INTERPOL would issue a wanted notice without fingerprints for a person who has allegedly been arrested, tried and convicted.

[7] The Quebec Superior Court ordered that the appellant be committed into custody to await his extradition. The appellant contested his extradition, alleging, *inter alia*, that he was at risk of being mistreated and that he would be unable to have the verdict and the sentence reviewed. On July 2, 2008, the Minister of Justice ("the Minister") ordered that the appellant be extradited to his country of origin to serve his prison sentence.

[8] In his July 2, 2008 decision to surrender the appellant for extradition, the Minister applied the same test that he had in *Németh*, namely whether the person sought had established on the balance of probabilities that he would be persecuted and that the persecution would sufficiently shock the conscience or be fundamentally

unacceptable to Canadian society. The Minister stated that Romania had joined the European Union and therefore had to meet that organization's requirements regarding, in particular, the rule of law as well as respect for, and the protection of, minorities. The fact that it had become a member of the European Union also meant that its citizens are now afforded the protection and guarantees of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221. The Minister concluded that the appellant had not satisfied him that his surrender would be unjust, oppressive or contrary to the *Canadian Charter of Rights and Freedoms*. The Minister expressed the view that granting refugee status does not preclude extraditing a person if doing so is otherwise justified. Finally, he noted that the Romanian authorities had informed him that that country's *Penal Code* provides for a right to a new trial in certain circumstances. The appellant applied to the Court of Appeal for judicial review of the order of surrender.

[9] The Court of Appeal dismissed the application for judicial review (2009 QCCA 1288 (CanLII)), holding that the objective and purpose of the EA differ from those of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"). Therefore, the principle of *non-refoulement* with respect to an individual who has been granted refugee protection does not bar a request for the extradition of that individual to be tried or to serve a sentence imposed following a guilty verdict. Moreover, the IRB may vacate a decision to allow a claim for refugee protection if it is shown that the decision was obtained as a result of a misrepresentation, which was

the case here. Finally, the Court of Appeal held that the impugned decision was not unreasonable from the standpoint of s. 7 of the *Charter*.

III. Issue

[10] The appellant raises a number of issues, but it is only necessary for me to deal with one of them, namely whether the Minister's decision to order the appellant's surrender was reasonable.

IV. Analysis

[11] Responding to the submissions made to him by the appellant, the Minister viewed the case through the lens of s. 44(1)(*a*) of the EA and asked himself whether he was satisfied that the appellant had shown on the balance of probabilities that his surrender for extradition would be oppressive or unjust. As noted, the Minister stated the test to be whether the appellant had shown on the balance of probabilities that he would be subjected to persecution in the requesting state and that the persecution would shock the conscience or be fundamentally unacceptable to Canadian society. For the reasons given in *Németh*, this was not the correct legal principle to apply given that at the time the surrender decision was made, the appellant's refugee status had not ceased or been revoked. The Minister ought to have considered the application of s. 44(1)(*b*) of the EA, the most relevant provision in this case, in light of the principles set out in *Németh.* His decision having been founded on wrong legal principles, it was unreasonable and must be set aside. While

as discussed in *Németh*, the decisions taken under the *IRPA* (i.e. the decisions to grant refugee status and not to vacate that status) are not binding on the Minister, the appellant should not have been required to prove that persecution would in fact occur and that it would either shock the conscience or be fundamentally unacceptable to Canadians and should not have had his case evaluated only on the basis of s. 44(1)(*a*) considerations.

[12] I should add that the Minister did not base his decision to surrender on, and appears not to have addressed, whether the appellant was no longer entitled to refugee (and therefore *non-refoulement*) protection by virtue of the serious non-political crimes exception under Article 1F(b) of the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 or of his extensive criminal conduct in Canada. While not the subject of argument in this Court, it seems clear from the record that the extradition offence would constitute serious criminality for the purposes of the IRPA and it is open to the Minster to consider the possible application of Article 1F(b) of the Refugee Convention in deciding whether the appellant is entitled to refugee protection. I do not find it necessary to address the appellant's submissions relating to the impact of extradition on his spouse and children.

V. Disposition

[13] I would allow the appeal, set aside the decision of the Court of Appeal and the Minister's order of surrender and remit the matter to the Minister for

reconsideration in accordance with the law. The appellant did not request costs and I would order none.

Appeal allowed.

Solicitors for the appellant: Lapointe & Associés, Montréal.

Solicitor for the respondent: Attorney General of Canada, Montréal.

Solicitors for the intervener Québec Immigration Lawyers Association: Doyon et Associés, Montréal.

Solicitors for the intervener Amnesty International (Canada Section): Waldman & Associates, Toronto.

Solicitor for the intervener the Canadian Civil Liberties Association: Canadian Civil Liberties Association, Toronto.