Federal Court  Cour fédérale

Date: 20151112

Docket: T-962-15

Citation: 2015 FC 1266

Ottawa, Ontario, November 12, 2015

PRESENT: The Honourable Madam Justice Gagné

Docket: T-962-15

BETWEEN:

GEORGE WILCOX

Applicant

and

THE MINISTER OF FOREIGN AFFAIRS
AND
THE MINISTER OF JUSTICE AND
ATTORNEY GENERAL OF CANADA

Respondents

JUDGMENT AND REASONS

[1] I am seized of two motions: the first, brought by the Respondents pursuant to Rule 4 of the *Federal Court Rules*, SOR/98-106 [Rules], seeks to dismiss the application filed by the Applicant on June 9, 2015, for judicial review of a decision dated February 2, 1976 by the then Secretary of State for External Affairs, Allan MacEachen. This decision is that of ratification of the *Treaty on Extradition between the Government of Canada and the Government of the United States of America*, 3 December 1971, Can TS 1976/3 (entered into force 22 March 1976)

[Extradition Treaty]. The second motion, brought by the Applicant under subsection 18(1) of the *Federal Courts Act*, RSC 1985, c F-7, is for an interim stay of the surrender order issued against him by the Minister of Justice on March 4, 2014, pursuant to section 40 of the *Extradition Act*, SC 1999, c 18 [Act], until the application for judicial review before this Court is heard on the merits.

[2] Therefore, should I grant the motion to dismiss, the Applicant's motion would necessarily be disposed of.

[3] The Respondents move to dismiss the application for judicial review on the following grounds: (i) it is time-barred by virtue of the limitation period prescribed under subsection 18.1(2) of the *Federal Courts Act*; (ii) the determination of the validity of a treaty is a political matter reserved for the executive and is thus non-justiciable; (iii) in any event, subsection 57(1) of the Act ousts the jurisdiction of the Court over extradition matters and this application for judicial review is an indirect attack on the surrender order upheld by the British Columbia Court of Appeal [BCCA] and; (iv) in the alternative, if ever this Court has residual discretion to exercise jurisdiction, it should decline to exercise it because the appropriate recourse would have been to seek remedies before the BCCA.

[4] As for the Applicant, he argues that it is precisely because he has exhausted all his remedies before the courts of inherent jurisdiction that, in accordance with *Wilson v Canada (Justice)*, 2012 FC 280 [*Wilson*], this Court should exercise residual jurisdiction to deal with the validity of the treaty – an issue arising from the exercise of ministerial discretion. Essentially, he

argues that the application for judicial review is exclusively within the jurisdiction of this Court as an exception to section 57 of the Act, in the same way as is an Authority to Proceed [ATP] issued under section 15 of the Act.

[5] As regards the interim stay pending this Court's review of the underlying application, the Applicant does not provide detailed written submissions on whether the test in *RJR-Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, is met. Rather, he discusses the merits of the application before this Court and focuses on the issue of whether this Court has jurisdiction to hear the application.

[6] For the reasons discussed below, I am of the view that the Respondents' motion to dismiss should be granted on the ground that this application is outside the jurisdiction of this Court.

I. Background

[7] The Applicant is a Canadian citizen and is wanted in the United States for having been convicted *in absentia* of two offences in the state of Arizona, which he committed between 2007 and 2008. He is also wanted for the prosecution of two other offences, as the jury was unable to reach a verdict on those other counts.

[8] On November 13, 2003, the Minister of Justice issued an ATP under section 15 of the Act authorizing the Attorney General of Canada to initiate extradition proceedings on behalf of the United States.

[9] On January 22, 2013, the extradition judge Cullen of the Supreme Court of British Columbia [BCSC] ruled on six preliminary motions or applications brought by the Applicant and found, amongst other things, that it was not in the province of the extradition judge to review allegations of the Minister's non-compliance with the Extradition Treaty.

[10] On August 13, 2013, Cullen ACJ issued an order of committal pursuant to paragraphs 29(1)(*a*) and 29(1)(*b*) of the Act for prosecution of two counts corresponding to the Canadian offence of sexual interference contrary to section 151 of the *Criminal Code*, and for imposition of a sentence with respect to two other counts of the same offence, as set out in the ATP [Committal Order].

[11] The Applicant filed a Notice of Appeal or Application for Leave to Appeal in respect of the judge's Committal Order.

[12] Meanwhile, on November 11, 2013, the Applicant made submissions to the Minister in respect of his potential surrender to the United States and asked to be discharged. Among several other arguments, the Applicant pleaded that the Extradition Treaty was never properly ratified by Canada and that it was therefore invalid.

[13] On March 4, 2014, the Minister informed the Applicant that he signed warrants ordering for his surrender pursuant to section 40 of the Act [Order for Surrender]. He responded to the Applicant's submission that his surrender should be refused on the basis that the Extradition Treaty was not ratified (p 139, Respondents' Motion Record):

…[y]ou argue that, although the *Treaty*, "purported to have come into force on 22 March 1976" was ratified by the U.S. Senate after "long debate and modifications." neither the *Treaty* nor its supplements have ever been ratified in Canada by Parliament by Order-in-Council or by any other democratic process.

You further argue that, in 1971, an Order-in-Council allowed the Secretary of State for External Affairs, Mitchell Sharp, to sign the draft *Treaty* "subject to ratification." You submit that the *Treaty* was not ratified by any democratic body before the Secretary of State for External Affairs "purported of his own initiative to ratify the treaty by signing a four line "instrument of ratification" in 1976. You submit that this action has no force of law without actual ratification and there is no record of an Order of Ratification in the Canadian archives, at the Department of Foreign Affairs International Trade and Development, in Justice libraries, or anywhere else.

It is for the executive to maintain Canada's extradition relationship and to determine which agreements are in force (See e.g. *Attorney General (Canada) v Kerfoot*, 2013 BCSC 122; *Czech Republic v Ganis*, 2006 BCCA 542; *Kingdom of Thailand v Karas*, 2001 BCSC 72; *Czech Republic v Moravek*, 2004 MBCA 174; *United States of America v Wilson*, 2011 BCCA 96; *McVey v United States of America*, [1992] 3 S.C.R. 475).

Neither Canada nor the United States, the two contracting parties to the *Treaty*, has ever called into question its existence….the fact that both Canada and the United States have maintained this treaty relationship for more than 25 years fully supports the conclusion that the *Treaty* is in force. In addition, a reading of the published agreement in the *Canada Gazette* of April 3, 1976, confirms that Instruments of Ratification were exchanged between Canada and the United States on March 22, 1976, in Ottawa, Ontario.

I also note that, when the *Treaty* was ratified, it was referentially implemented into domestic law by the *Extradition Act*, R.S.C. 1970 c. E-21 (the *Extradition Act* (1970)), which was in force at the time. There was no Parliamentary process for ratification, nor was this a requirement. Once the *Treaty* came into force, the *Extradition Act (1970)* operated to immediately implement Canada's international obligations under the Treaty (*Re Stuckey* (1999), 181 DLR (4^{th}) 144 (BCSC)).

[14] On March 24, 2014 the Applicant filed for judicial review of the Minister's Order for Surrender under section 57 of the Act, with the BCCA.

[15] On February 4, 2015, the BCCA considered and dismissed both the appeal of the Committal Order and the judicial review of the Minister's Order for Surrender.

[16] The application for leave to appeal to the Supreme Court of Canada was dismissed without reasons on June 11, 2015.

[17] However, two days prior, on June 9, 2015 the Applicant filed before this Court an application for judicial review of the February 2, 1976 decision of the Secretary of State of External Affairs, Allan MacEachen, to ratify the Extradition Treaty, seeking the following relief:

- declaratory relief that the Extradition Treaty remains unratified and is of no force and effect;
- an injunction or writ of prohibition preventing the Minister from removing the Applicant from Canada until this matter is resolved in this Court;
- a writ of prohibition also prohibiting the Minister from using the unratified Treaty until the time as it is ratified;
- a writ of quo warranto demanding to know the justification of the Secretary of State for External Affairs for endorsing the unratified Treaty as "ratified" when he knew or ought to have known that the Treaty was unratified and his predecessor had been informed in his presence that the draft treaty was "subject to ratification".

II. Issues

[18] The motions presently before the Court raise the following issues for consideration:

(1) Is the application barred due to the expiry of the limitation period?

(2) Is the matter under review justiciable?

(3) Does this Court have the jurisdiction to hear the application and grant the relief requested?

(4) If answered in the affirmative, should an interim stay be granted to the applicant?

III. Analysis

[19] As I am of the view that issues (2) and (3) above are determinative, I will limit my reasons accordingly.

Justiciability

[20] Article 18 of the Extradition Treaty states that "this treaty shall be ratified and the instrument of ratification shall be exchanged at Ottawa as soon as possible". On December 11, 1975, the Governor in Council authorized the Secretary of State for External Affairs to execute and issue, on behalf of Canada, an instrument of ratification and to cause the instruments to be exchanged in Ottawa (Exhibit 2 filed at the hearing). On February 2, 1976, the Secretary of State signed the instrument of ratification and a Protocol of exchange was signed by the parties on March 22, 1976 (Exhibit 1 filed at the hearing). The Extradition Treaty entered into force the same day and was subsequently published in the *Canada Gazette*.

[21] The Applicant contends before this Court, as he did in his submissions to the Minister, that since the Extradition Treaty was not democratically ratified by Canada, it is invalid and the Order for Surrender could not stand.

[22] In *Chateau-Gai Wines Ltd v Institut National des Appellations d'Origine des Vins et Eaux-de-Vie*, [1975] 1 SCR 190 at 199 [*Chateau-Gai Wines*], the Supreme Court of Canada held that "the question of whether the treaty is in force, as opposed to what its effect should be, is … wholly within the province of the public authority…". A similar finding was made by the BCCA in *Ganis v Canada (Minister of Justice)*, 2006 BCCA 543 [*Ganis*]. The following paragraphs are of note:

> [17] The case law is clear that "barring statutory provision, the task of dealing with international treaty obligations is for the political authorities, and is performed by the Ministers and departments in the course of fulfilling their appropriate mandates": McVey v. United States of America, [1992] 3 S.C.R. 475 (S.C.C.), at 519.
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> […]
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> [20] In my view, however, the existence of a treaty is not a justiciable question and therefore it is not open to this Court to review the Minister's finding on any standard.
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> [21] In determining whether a subject matter is justiciable, the court must decide "whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch": Reference re Canada Assistance Plan (Canada), [1991] 2 S.C.R. 525 (S.C.C.), at 545.
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> [22] In this case, the evidence discloses that Canada and the Czech Republic knew the agreement relied upon, and conducted themselves as acting pursuant to it. It should also be remembered that extradition does not require a formalized treaty. Rather, it can be carried out pursuant to a specific agreement designed to address a 'one-off' situation, or in the absence of an agreement but where the requesting state is named in the Act as an extradition partner:

see ss. 2, 3, 9 and 10 of the Act. These other routes are consistent with the principle that extradition relationships are within the realm of the executive and may arise in a variety of ways.

[23] Matters of foreign affairs, including treaty-making, are part of the Crown's Prerogative powers. While this classification alone will not always put a matter beyond the scope of judicial review there are some powers which, because of their nature and subject matter, will not be amenable to the judicial process: Black v. Canada (Prime Minister) (2001), 54 O.R. (3d) 215 (Ont. C.A.). In Council of Civil Service Unions v. Minister for Civil Service (1984), [1985] 1 A.C. 374, [1984] 3 All E.R. 935 (U.K. H.L.) (cited with approval by Laskin J.A. for the Court in Black , supra, at para. 36), Lord Roskill identified the Prerogative powers related to treaty-making as falling within that category. Apart from Charter issues which might arise on the facts of another case, and apart from the exception below relating to jurisdiction, it appears that the question of a treaty's validity is purely political, and that there is no legal component in these circumstances that would warrant the court's interference.

[24] Our courts are sometimes asked to interpret a treaty's provisions and determine its domestic effect; that task, involving legal questions, is within the judiciary's expertise. A treaty's existence, however, is not an ordinary question of law but a highly political matter as between the executive of two contracting states. The Supreme Court of Canada has recognized this distinction, holding that "whether a treaty is in force, as opposed to what its effect should be, [is] wholly within the province of the public authority": Chateau-Gai Wines Ltd. v. Institut national des appellations d'origine des vins & eaux-de-vie (1974), [1975] 1 S.C.R. 190 (S.C.C.), per Pigeon J. at 199.

[25] If a treaty's existence is called into question by one of the contracting parties, that dispute might be for resolution at the political level, or failing that, in some other forum. The existence of a treaty, however, cannot be for adjudication in a domestic court, in a dispute between an individual and one of the contracting states. Such a process might have untold political and diplomatic consequences, well beyond the issue of whether one individual should be extradited. A ruling on a treaty's existence or validity could not properly be made in the absence of both parties to it.

[26] As the Treaty's existence is not a justiciable issue in our Courts it is not open to us to review the Minister's determination that the Treaty validly exists and applies to the appellant…

[23] In both his written and oral submissions, the Applicant confuses the question of the justiciable nature of the validity of an international treaty and that of the jurisdiction of the extradition court. He contends that in his application for judicial review of the Minister's Order for Surrender before the BCCA, he chose not to pursue the issue of whether the Extradition Treaty was validly ratified, as it and other extradition courts have stated on numerous occasions that the validity of a treaty was not a justiciable question. That would explain why he exhausted his remedies before the extradition courts prior to raising the issue before this Court.

[24] However, that is not a matter of the respective jurisdictions of the extradition courts and that of this Court but rather a matter of separation of powers between the executive and the judiciary.

[25] Ratification of a treaty expresses a state's intention to be bound be that treaty. As it was a condition precedent to the entry into force of the Extradition Treaty, the Applicant contends that the purported ratification is based on false representation and that the treaty is null *ab initio*. The Applicant adds, without much explanation, that this constitutes "an inexcusable violation of international law and a breach of the principle of the rule of law" (para 30 of the Applicant's memorandum of facts and law).

[26] All those questions are political in nature and they concern the executive, not this Court or any court. I see no distinction between the facts of this case and those arising in *Chateau-Gai Wines* and *Ganis*.

Jurisdiction

[27] I agree with the Respondents that the Applicant's application for judicial review is an indirect attack on the Minister's Order for Surrender, although framed as an attack on the actions of government officials, taken over 39 years ago. As such, section 57 of the Act ousts the jurisdiction of the Court to judicially review such a decision (*Schreiber v Canada (Attorney General)*, 2007 FC 618, aff'd 2008 FCA 147; *Waldman v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1326). I also agree with the Respondents that *Wilson*, above does not stand as authority for the claim that the Federal Court retains a residual jurisdiction in all extradition cases. In *Wilson*, just as in *Froom v Canada (Minister of Justice)*, 2004 FCA 352 [*Froom*], this Court was asked to judicially review an ATP issued by the Minister. Justice Noël found that the provincial court of appeal had exclusive jurisdiction to review an order of surrender by the Minister pursuant to the exception provided for under section 57 of the Act; however, no such exception was provided for in relation to the judicial review of a decision to issue an ATP (*Wilson* at paras 11, 17-18).

[28] Unlike *Wilson* and *Froom*, in this case the Order for Surrender is specifically at the heart of the Applicant's recourse. The question of the treaty's ratification or so-called "non-compliance" was raised by the Applicant before the Minister in relation to his decision to issue an Order for Surrender and the Order for Surrender does address the Applicant's argument that the Extradition Treaty would be invalid for lack of ratification. I agree with the Minister that there was no reason for the Applicant to choose not to pursue the issue, and consequently not to seek remedies, on judicial review of that decision before the BCCA

[29] Even when this Court has residual jurisdiction over an extradition matter - which is not the case in the present file - an applicant is supposed to exhaust his or her remedies in that forum since this Court has consistently declined to exercise any residual jurisdiction in favour of the provincial courts.

[30] Therefore, I am of the opinion that this Court does not have jurisdiction over the matter raised by the Applicant's application for judicial review, whether or not residual.

IV. Conclusion

[31] For the above reasons, the Respondents' motion to dismiss the application for judicial review will be granted. As a consequence, there is no need for this Court to rule on the Applicant's motion for a stay of the Order for Surrender until his application for judicial review is dealt with on the merits.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Respondents' motion to dismiss the Applicant's application for judicial review is granted;
2. The Applicant's motion for a stay of the Order for Surrender dated March 4, 2014 is dismissed;
3. Costs are granted to the Attorney General of Canada only, on both motions.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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