NOVA SCOTIA COURT OF APPEAL

Citation: *Carroll v. Canada (Minister of Justice)*, 2021 NSCA 71

Date: 20211014
Docket: CA 505035
Registry: Halifax

Between:

Robert Charles Carroll

Applicant

v.

The Minister of Justice

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	June 14, 2021, in Halifax, Nova Scotia
Subject:	Extradition: application for judicial review of the Minister's surrender order.
Summary:	In 2017, this Court directed the Minister of Justice to redetermine whether surrender would be unjust or oppressive due to concerns over indeterminate detention under the Minnesota Sexual Offender Program (MSOP). The United States authorities reduced the charges and provided formal diplomatic assurances the applicant would not be referred to that program were he to be convicted. The applicant nonetheless resisted surrender on that ground and due to concern over exposure to COVID-19. The Minister ordered surrender on conditions. The applicant's sole argument on judicial review focussed on the risk to his health due to possible exposure to COVID-19.
Issues:	Did the Minister fail to consider all relevant criteria about the risk to the applicant's health or otherwise unreasonably conclude it would not be unjust or oppressive to order surrender?

Result: The application for judicial review is dismissed. The Minister thoroughly canvassed the applicant's submissions and evidence that it would be unjust or oppressive considering his health and the risks posed by COVID-19 should he be surrendered. The applicant's submissions amount to nothing more than a request for this Court to re-assess the relevant factors and arrive at a different result. The Minister's reasons demonstrate an internally coherent and rational analysis to a justifiable outcome. It is neither legally flawed nor unreasonable.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 13 pages.

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Judges:	Wood, C.J.N.S.; Beveridge and Derrick, JJ.A.
Appeal Heard:	June 14, 2021, in Halifax, Nova Scotia
Held:	Application dismissed, per reasons for judgment of Beveridge, J.A.; Wood, C.J.N.S. and Derrick, JJ.A. concurring
Counsel:	Scott McGirr, for the applicant Patricia MacPhee, for the respondent

Reasons for judgment:

INTRODUCTION

[1] Mr. Carroll applies to set aside the Minister of Justice's surrender order for his extradition to the United States. The applicant's sole complaint is that the Minister failed to properly consider all of the relevant criteria about the risk to the applicant's life and health should he be surrendered.

BACKGROUND

[2] Mr. Carroll is a Canadian citizen, who now resides in Nova Scotia. For approximately ten years he lived in Minnesota. He married a woman who had three foster children. After the marriage unravelled, he returned to Canada in 2008.

[3] In 2011, one of his former stepdaughters complained the applicant sexually assaulted her from age 13 to 18. The Minnesota police laid charges. The United States authorities requested extradition in 2015. Arrest in Canada followed.

[4] Although the applicant denies any wrongdoing, he consented to committal. He resisted surrender on the basis that if convicted his rights would be violated due to the prospect of indeterminate detention under the Minnesota Sexual Offender Program (MSOP), authorized by the *Minnesota Civil Commitment and Treatment Act*.

[5] Then Minister of Justice, Jody Wilson-Raybould ordered surrender. By a majority decision of this Court in 2017 that order was set aside and the surrender issue remitted back to the Minister for redetermination with directions to address the risk of indefinite civil detention under the MSOP (2017 NSCA 66).

[6] The United States and Canadian authorities responded. First, the Isanti County Attorney's office (ICA) reduced the complaint against the applicant to one count of criminal sexual conduct in the third degree. The United States amended their extradition request to correspond. The ICA explained the effect of the charge reduction would be to preclude referral for civil commitment even if the applicant were to be convicted.

[7] In addition, the United States Department of Justice provided informal assurances the applicant would not be subject to civil commitment under the MSOP. Finally on July 22, 2020, the United States Embassy provided formal diplomatic assurances to the same effect.

[8] In a series of submissions to the Minister, the applicant claimed the changes and assurances by the United States authorities were insufficient—there would still be a risk of indefinite detention under the MSOP. Later submissions focussed on the applicant's health and the risk he faced from exposure to the novel coronavirus if extradited to the United States.

[9] On March 2, 2021, the current Minister of Justice, the Honourable David T. Lametti, ordered the applicant's surrender subject to three conditions set out in assurances documented in the July 22, 2020 Diplomatic Note from the United States of America. The assurances were that the authorities within the United States of America: will not pursue civil commitment; will house the applicant in a Minnesota county jail facility if he were to be convicted; and, they will immediately place the applicant in deportation proceedings at the conclusion of his prosecution and any sentence he may receive.

[10] By consent, as for every step of the extradition proceedings, the applicant is on judicial interim release pending this application for judicial review.

ISSUES

[11] Originally, the applicant framed his judicial review application on the following grounds:

> The Minister of Justice erred by failing to properly consider all evidence before him;
>
> The Minister of Justice erred by basing his decision to surrender on an erroneous finding of fact made without regard to the materials before him; and
>
> Such other and further grounds as counsel may advise and this Honourable Court may allow.

[12] The applicant's factum reframed the issue as follows:

> [16] The sole issue to be decided is whether the Minister erred in concluding that Mr. Carroll's surrender would not be unjust or oppressive in the circumstances. Specifically, whether the Minister erred by failing to properly

> consider all relevant factors, including the risk to life Mr. Carroll faces on surrender.

[13] I find the respondent's paraphrase of the issue to be apposite:

> 32. Whether it was reasonable for the Minister to conclude that it would not be unjust or oppressive to surrender the Applicant in light of his risk of exposure to the Covid-19 virus and his health condition.

STANDARD OF REVIEW

[14] The parties have no disagreement—the standard of review is deferential. That means, absent legal error or an unreasonable outcome, courts must defer to the Minister's discretionary surrender order.

[15] This analytical paradigm is dictated by the provisions of the *Extradition Act*, S.C. 1999, c.19. The *Act* gives the Minister a general discretion to order surrender with or without assurances (ss. 40, 47). The person under threat of surrender is entitled to make submissions on any grounds relevant to the surrender decision (s. 43). The *Act* directs the Minister to refuse surrender if the conduct is a political or military offence or one that is barred by a limitation period of the extradition partner (s. 46).

[16] Section 44 of the *Act* also directs the Minister to refuse if surrender would be unjust or oppressive in light of all of the relevant circumstances. The applicant relied on this statutory directive as the foundation for his request the Minister refuse surrender. The relevant portion of s. 44 is as follows:

> 44 (1) The Minister shall refuse to make a surrender order if the Minister is satisfied that
>
> (a) the surrender would be unjust or oppressive having regard to all the relevant circumstances; …

[17] As explained by Charron J., for the majority in *Canada (Justice) v. Fischbacher*, 2009 SCC 46, s. 44 requires the Minister to consider all relevant circumstances, singly and in combination to determine whether surrender would be unjust or oppressive. Despite the mandatory direction, whether surrender would be unjust or oppressive is nonetheless for the Minister in their discretion to decide. Charron J. reasoned:

> [37] … Given the mandatory nature of s. 44(1)(a), the "Minister must consider all relevant circumstances, singly and in combination, to determine whether surrender would be unjust or oppressive": *United States of America v. Johnson* (2002), 62 O.R. (3d) 327 (C.A.), at para. 45. Whether the Minister is "satisfied" that surrender would be unjust or oppressive in a given set of circumstances, however, is entirely a matter of his discretion.

[18] The previous year, the Supreme Court, in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, affirmed a reasonableness standard of review whether the applicant complains surrender would be unjust, oppressive or violate an individual's *Charter* rights. LeBel J., for the Court held:

> [34] This Court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister's assessment of a fugitive's *Charter* rights. Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court's jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister's decision will be limited to exceptional cases of "real substance" reflects the breadth of the Minister's discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt*) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9).

See also: *M.M. v. United States of America*, 2015 SCC 62 at para. 106.

[19] However, as LeBel J. pointed out, reasonableness does not mandate blind submission to the Minister's assessment. Assessment for reasonableness requires the Court to ask whether the Minister applied the correct legal test, considered the relevant facts, and reached a defensible conclusion:

> [41] Reasonableness does not require blind submission to the Minister's assessment; however, the standard does entail more than one possible conclusion. The reviewing court's role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister's decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. I agree with Laskin J.A. that the Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out

> the proper analysis. If, however, the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. This approach does not minimize the protection afforded by the *Charter*. It merely reflects the fact that in the extradition context, the proper assessments under ss. 6(1) and 7 involve primarily fact-based balancing tests. Given the Minister's expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition.

ANALYSIS

Was the Minister's decision reasonable?

[20] Whether the applicant's complaint is framed as the Minister failed to properly consider all relevant factors or that he unreasonably concluded surrender would not be unjust or oppressive in the circumstances, I would dismiss the application for judicial review.

[21] With respect, the applicant's submissions amount to nothing more than a request for this Court to re-assess the relevant factors and arrive at a different conclusion. That is not our role. I will explain.

[22] As illustrated by Charron J. in *Fischbacher*, the factors or circumstances relevant to a surrender request will vary:

> [38] Reaching a conclusion on surrender requires the Minister to undertake a balancing of all the relevant circumstances, weighing factors that militate in favour of surrender against those that counsel against. The circumstances that will be "relevant" to a surrender decision will vary depending on the facts and context of each case. Some of these factors may include: any representations made by the person sought on the question of surrender in accordance with s. 43(1) of the Act, the conduct of the proceedings in the requesting country before and after the request for extradition, the potential punishment facing the individual if surrendered, humanitarian issues relating to the personal circumstances of the individual, the timeliness and manner of prosecuting the extradition proceedings in Canada, the need to respect the constitutional rights of the person sought and Canada's international obligations under the *Treaty* and as a responsible member of the international community: see *Bonamie, Re*, 2001 ABCA 267, 293 A.R. 201, at para. 54, and *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, at para. 34.

[23] The applicant's submissions to the Minister stressed the fact he faced an elevated risk to his life from COVID-19 because of his underlying medical condition. Counsel's August 14, 2020 letter to the Minister made this point:

> Mr. Carroll, born July 14, 1963, is 57 years old. In the 1980s, he was diagnosed with sarcoidosis — a condition which causes inflammatory cells (granulomas) most commonly affecting the lungs and lymph nodes. Mr. Carroll's illness primarily affected his heart and lungs. There is no cure for sarcoidosis and the condition is subject to recurrence without warning. Mr. Carroll's family physician, Dr. George Burden of the Elmsdale Medical Centre has indicated that this diagnosis is still a concern and would put him at great risk in the United States as a result of COVID-19. Please be advised that we are awaiting a letter from Dr. Burden regarding Mr. Carroll's medical history and particular vulnerability to COVID-19.
>
> As an older adult with an underlying medical condition, Mr. Carroll is a member of a particularly vulnerable population as recognized by the Public Health Agency of Canada. Further, inmates of correctional facilities are themselves a vulnerable population. The nature of prisons and jails precludes even the simplest precautionary steps that can be taken to avoid infection. Inmates are not able to physically distance and do not have the luxury of self-isolating in a safe home environment.

[24] Counsel followed up on September 1, 2020, with a copy of Dr. Burden's opinion letter along with the submission that given the situation in the United States, at least as counsel viewed it, the American authorities are either unable or unwilling to protect the applicant's life or health. The relevant extracts from Dr. Burden's opinion letter are as follows:

> At Mr. Carroll's request I can advise that he was diagnosed with sarcoidosis with cardiac involvement in his twenties. He currently suffers from elevated lipids and in 2017 had episode of probable Transient Ischemic Attack (TIA) also known colloquially as a "mini-stroke." Mr. Carroll had an episode of joint inflammation which was assessed by a rheumatologist and can be a manifestation of sarcoidosis. Sarcoidosis frequently attacks the lungs and in fact can manifest almost anywhere in the human body.
>
> COVID-19 is a viral infection with which most of us have some familiarity. It would appear from current statistics that our neighbour to the south, the United States, has been less than assiduous in their measures to control this outbreak with incidence rates roughly 30 times those of Canada despite having proportionately only ten times our population.
>
> Nova Scotia where Mr. Robert Carroll resides had been several weeks without a single case of COVID-19 identified despite a rigorous screening program. Covid

> 19 acts by attacking the ACE (angiotensin converting enzyme) receptors in the body. The heart and lungs are very rich in these receptors and those with pre-existing conditions such as sarcoidosis would be especially vulnerable to complicated and potentially fatal infections.
>
> From a medical perspective in my opinion it would be placing Mr. Carroll's health and life at risk to force him to travel to and remain anywhere with suboptimal precautions and control of this virus.

[25] The applicant argues before us the Minister framed the relevant considerations too narrowly because he focused on the protections in place to prevent infections and treat the virus if contracted. He summarizes his complaint:

> [24] By limiting his consideration to the measures in place to prevent infection and the adequacy of available treatment, the Minister failed to properly weigh all relevant criteria when ordering Mr. Carroll's surrender. Specifically, the evidence before the Minister establishes that Mr. Carroll would face a substantial risk to his life if he is exposed to COVID-19 as the result of an underlying medical condition. This evidence is clear and uncontradicted. There is no adequate treatment for COVID-19, so the commitment on the part of Isanti County to provide inmates in their facility with quality medical care consistent with community standards rings hollow. The Minister failed to recognize that the risk Mr. Carroll faces cannot be mitigated by access to treatment facilities in the institution.

[26] I am unable to agree the Minister failed to properly consider the relevant factors or considerations or unreasonably concluded surrender would not be unjust or oppressive in the circumstances. Before turning to the Minister's reasons to demonstrate, it is useful to revisit our Court's role where the standard of review is reasonableness.

[27] The majority judgment of the Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, set out the roadmap for a reviewing court. It begins with the guidance to examine the written reasons (if any) with a view to understand the reasoning process followed by the decision maker. Ultimately, a reasonable decision is one based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law:

> [84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the

> reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.
>
> [85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, **a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision**.
>
> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. **Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis**.
>
> [Bold emphasis added]

[28] With this roadmap in mind, I turn to the Minister's March 2, 2021 reasons. I need not canvass all 26 pages of those reasons, as the applicant's sole complaint is in relation to surrender in the face of the risk to the applicant's health and life due to possible exposure to COVID-19.

[29] It is simply untenable the Minister failed to properly consider all of the relevant factors. Over some eight pages, the Minister thoroughly canvassed the applicant's submissions that it would be unjust or oppressive or otherwise infringe his s. 7 *Charter* rights should he be surrendered in light of his health and the risks posed by COVID-19.

[30] The Minister accurately referred to the relevant circumstances identified by the applicant. Those included: the applicant's underlying medical condition that made him especially vulnerable to complicated and potentially fatal infections; the risk to his health if required to travel; the risk to the applicant's life while in pre-trial custody in the United States; the potential backlog of cases pending trial in Minnesota; inmates are an inherently vulnerable population during a pandemic; and, the "wholly inadequate" United States response to the global pandemic.

[31] In order to avoid these risks, the applicant proposed that the Minister, if he were to order surrender, require Mr. Carroll to remain on bail in Canada pre-trial and require an assurance he serve any sentence he may receive in a Canadian facility.

[32] The Minister recognized the circumstances and concerns raised by the applicant were relevant, but it would not be unjust or oppressive to order surrender having regard to all of the circumstances. He reasoned:

> As stated previously, I must decline to order surrender if doing so would be unjust or oppressive under section 44(1)(a) of the Act, and/or would violate the principles of fundamental justice under section 7 of the Charter. An assessment of both the direct and indirect consequences the person sought for extradition will face on surrender are part of this analysis (*Burns*). Therefore, the concerns you raise with respect to the impact of the pandemic on Mr. Carroll's life and well-being are relevant to my consideration of the issue of surrender.
>
> On the basis of the record before me, including your submissions and supporting materials, I am satisfied that Mr. Carroll's risk of exposure to the COVID-19 virus in the face of his pre-existing medical condition is not a basis to deny the United States the right to prosecute him on the serious criminal conduct alleged against him. In my view, it would not shock the Canadian conscience, nor be unjust or oppressive to order his surrender in the particular circumstances of this case.

[33] The Minister then set out the information provided by the American authorities about the measures in place by the Isanti County Jail to protect inmates from contracting COVID-19 and the treatment facilities available for those that might be infected. The Minister also noted that there had not yet been a single COVID-19 case at the County Jail where the applicant would be housed:

> On October 14, 2020, the Isanti County Sheriff's Office, which is responsible for the Isanti County Jail, provided the USDOJ with the following information on COVID-19 procedures, as well as medical resources available to treat Mr.

Carroll's condition, sarcoidosis, during his detention at that facility. These include the following measures:

- Inmates are screened for symptoms before entering the locked facility. This screening includes taking the inmate's temperature with a no touch thermometer and asking questions regarding possible symptoms or exposure. All inmates are then provided with two masks.
- If an inmate does not show any symptoms associated with COVID-19, he or she will be placed in quarantine for seven days. During the quarantine period, the inmate does not share a cell with anybody else and the inmate's temperature is taken daily.
- If, at any point, an inmate shows symptoms of COVID-19, a COVID test will be made available to the inmate and he/she will be placed on a 14-day quarantine.
- If displaying symptoms, inmates receive the appropriate medical treatment as determined by the Registered Nurse at the jail or the Nurse Practitioner. If medically indicated, the inmate will be transported to the Cambridge Medical Center for treatment, a hospital with over 65 physicians and over 25 consulting physicians providing specialty care. The Medical Center is located less than a mile from the jail.
- To limit possible exposure of inmates to COVID-19, the Isanti County Jail has temporarily suspended any work release programs that would allow inmates to leave and re-enter the facility on a daily basis. Additionally, in-person social visits have been suspended. Instead, visits are only conducted virtually or via phone. For a fee, inmates may also use an electronic texting device provided by the jail.
- Most court appearances are also conducted through remote technology, further limiting an inmate's exposure to the virus.
- Jail staff are screened for symptoms daily before the beginning of their shift and are provided personal protective equipment.
- With respect to the treatment of Mr. Carroll's medical condition, officials of the jail are committed to providing inmates in their facility with quality medical care that is consistent with community standards.
- Jail officials confirm that, while at the Isanti County Jail, Mr. Carroll will receive adequate medical treatment for any medical conditions, including sarcoidosis. The Isanti County Jail employs a Registered Nurse, who is present in the facility 32 hours every week and provides inmates with general medical care, as needed. In addition, once a week, a Nurse Practitioner at Advanced Correctional Healthcare, comes into the facility to attend to the medical and prescription needs of individual inmates. The Nurse Practitioner

> is also available via phone during times when she is not physically present at the facility.
>
> - For medical needs that cannot be met by the Registered Nurse or Nurse Practitioner, or that require immediate attention or specialty care, inmates are transported to the Cambridge Medical Center, which, as noted above, is located very close to the jail.

[34] The Minister acknowledged the applicant's concern about the potential for lengthy pre-trial custody, but found it to be speculative. Contrary to the applicant's complaint the Minister only focussed on treatment for his underlying condition, and not on COVID-19—the Minister was well aware of the difference and the availability of steps the applicant could take to ameliorate the risk. The Minister commented as follows:

> Whether in Canada or the United States, during the global pandemic, all persons face some risk of contracting COVID-19. Mr. Carroll is in the same position as other inmates detained pending trial or serving a sentence, whether in the United States or Canada.
>
> While his pre-existing health condition is said to make him more vulnerable to the virus, I note that Mr. Carroll will have an opportunity to advise the Isanti County Jail authorities of his condition and they can take additional measures necessary to ensure that his specific concerns are addressed. Indeed, ensuring that inmates are protected from exposure to the virus safeguards not only the inmates themselves but jail staff as well.
>
> In addition, Mr. Carroll will have an opportunity to present his concerns about the risk of contracting COVID-19 and any other concerns, to the American court in the context of his bail proceedings and before the sentencing judge if he is convicted.

[35] The Minister observed that the assurances requested by the applicant about pre- and post-trial custody were not possible under Canada's extradition regime. In any event, the Minister squarely addressed the issue of the risk to the applicant's life if surrendered:

> It should also be noted that the status of the pandemic is changing by the minute. As of this date, vaccines have been approved in both Canada and the United States and are already being administered to the most vulnerable members of our respective populations and health care workers. By the time Mr. Carroll's surrender were to take effect, the spread of COVID-19 in the United States, and elsewhere in the world, may be further contained.
>
> Ultimately, however, I am satisfied that the Isanti County Jail has sufficient safeguards in place to protect Mr. Carroll during the duration of his custody at

> that facility, both pre-trial and while serving any custodial sentence. Therefore, I find that his surrender would be neither unjust or oppressive, nor would it offend the principles of fundamental justice under section 7 of the Charter.

[36] Oddly enough, at the hearing of this application on June 14, 2021, applicant's counsel had no information about whether the applicant had received any of the widely available vaccines.

CONCLUSION

[37] The Minister's reasons demonstrate a clear understanding of the relevant circumstances. They also exhibit an internally coherent and rational chain of analysis to an outcome that is justified by the facts and law. I am far from persuaded the Minister's decision is legally flawed or unreasonable.

[38] I would therefore dismiss the application for judicial review. Costs were not sought. I would make no order as to costs.

Beveridge, J.A.

Concurred in:

Wood, C.J.N.S.

Derrick, J.A.