



SUPREME COURT OF CANADA

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

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BETWEEN:

**József Németh and
Józsefne Németh (a.k.a. Józsefne Nagy Szidonia)**

Appellants

and

Minister of Justice of Canada

Respondent

- and -

Barreau du Québec, Québec Immigration Lawyers

Association and Canadian Council for Refugees

Interveners

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

REASONS FOR JUDGMENT:
(paras. 1 to 124)

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

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NÉMETH v. CANADA (JUSTICE)

**József Németh and
Józsefne Németh (a.k.a. Józsefne Nagy Szidonia)**

Appellants

v.

Minister of Justice of Canada

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and

**Barreau du Québec, Québec Immigration Lawyers Association
and Canadian Council for Refugees**

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Indexed as: Németh v. Canada (Justice)

2010 SCC 56

File No.: 33016.

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 refugees to Republic of Hungary — Whether Minister of Justice had legal authority to surrender for extradition refugees whose refugee status had not ceased or been revoked — If so, whether Minister reasonably exercised his authority to surrender — Extradition Act, S.C. 1999, c. 18, s. 44 — Immigration and Refugee Protection Act,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).

On arriving in Canada in 2001, the Némeths, a couple of Roma ethnic origin, applied for refugee status for themselves and their children, alleging that acts of violence had been committed against them in their country of origin, Hungary. In 2002, the Némeths and their children were granted refugee status and they later became permanent residents. Years later, Hungary issued an international arrest

warrant in respect of a charge of fraud that had been laid against the Némeths and requested Canada to extradite them. The Minister of Justice eventually ordered their surrender for extradition and the decision was upheld on review by the Court of Appeal.

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

At the heart of the protections accorded to refugees under the 1951 *Convention Relating to the Status of Refugees* (“Refugee Convention”) are the provisions relating to expulsion and return. Article 33 of the Refugee Convention embodies in refugee law the principle of *non-refoulement* which prohibits the direct or indirect removal of refugees to a territory where they run a risk of being subjected to human rights violations. The main legislative vehicle for implementing Canada’s international refugee obligations is the *Immigration and Refugee Protection Act* (the “IRPA”) and the provision specifically directed to fulfilling this obligation in relation to *non-refoulement* is s. 115 which provides that a “protected person”, which includes a refugee, “shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion”. The meaning of the words “removed from Canada” in s. 115 when read in context has a specialized meaning in the IRPA that does not include removal by extradition. While it is accepted that protection against *refoulement* under the Refugee Convention applies to expulsion by extradition

and where possible statutes should be interpreted in a way which makes their provisions consistent with Canada's international treaty obligations and principles of international law, the presumption that legislation implements Canada's international obligations is rebuttable. If the provisions are unambiguous, they must be given effect and since s. 115 does not address removal by extradition, its clear meaning must be given effect. This interpretation of s. 115 does not result in Canadian domestic law failing to respect its *non-refoulement* obligations under the Refugee Convention, as those obligations in the context of extradition are fully satisfied by a correct interpretation and application of s. 44 of the *Extradition Act* ("EA"). Therefore, s. 115 of the IRPA does not conflict with the EA because the prohibition on removal from Canada does not apply to extradition.

The absence of a provision in the EA expressly addressing the extradition of a person with refugee status does not withhold that power from the Minister of Justice. The "silence" argument is premised on the fact that the EA addresses extradition only in the context of a refugee claimant, not a person with refugee status. The position that an earlier finding of refugee status under the IRPA is binding on the Minister of Justice under the EA until it is ended using the procedures of cessation or revocation under the IRPA finds no explicit support in the text of the IRPA or the EA and is inconsistent with the apparent intention of Parliament. The Minister of Justice was intended to take the lead when a refugee's rights are implicated in an extradition decision. The Refugee Convention does not bind the contracting states to any particular process for either granting or withdrawing refugee status. Moreover,

looking beyond the terms of the Refugee Convention, there are no international law norms to the effect that extradition may only be ordered if a previous finding that a person is a refugee has been formally set aside. Therefore, the Minister of Justice in dealing with an extradition request is not bound by a finding under the IRPA that the person sought is a refugee and can surrender that person for extradition even though his or her refugee status has not ceased or been vacated using the procedures provided under the IRPA.

The Minister of Justice's power to surrender someone for extradition under the EA is discretionary. However, this discretion to order or to refuse surrender is structured and, in some circumstances, constrained by the other provisions of the statute, the applicable treaty and the *Canadian Charter of Rights and Freedoms*. Although there are no express references to refugees in the EA, it does provide for protections of persons who fear abusive treatment, persecution or torture in the requesting state. The most relevant provision in this regard is s. 44 which sets out mandatory reasons for refusal of surrender. Under s. 44(1) of the EA, the Minister must refuse to make a surrender order if satisfied that (a) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or (b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons. These mandatory reasons for refusal of surrender prevail over provisions of an extradition treaty and as

the exercise of the Minister's power to surrender implicates the liberty and in some cases the security of the person sought, the Minister owes a duty of fairness both at common law and in accordance with the principles of fundamental justice under s. 7 of the *Charter*. There is thus an overlap between the provisions of s. 44 and the *Charter*. While s. 44(1)(a) is not limited to conduct that would constitute a breach of the *Charter*, it is nonetheless the case that where surrender would be contrary to the principles of fundamental justice, it will also be unjust and oppressive within the meaning of s. 44(1)(a). Furthermore, where extradition is sought for the purpose of persecuting an individual on the basis of a prohibited ground as contemplated by the first branch of s. 44(1)(b), ordering surrender will be contrary to the principles of fundamental justice.

Section 44(1)(b) of the EA is Canada's primary legislative vehicle to give effect to its *non-refoulement* obligations when a refugee is sought for extradition. This provision is inspired by the provisions in the *European Convention on Extradition* and the United Nations' *Model Treaty on Extradition* and the similarity of their texts makes clear that the provision was adopted to serve the purpose of protecting against prejudice in the requesting state, particularly when extradition would constitute a violation of the requested state's obligation in relation to *non-refoulement*. Both the English and the French texts of s. 44(1)(b) support the view that it contains two branches and that the "position" of the party is not limited to his or her position in relation to prosecution or punishment. Reading the section as being confined to prejudice in the prosecution or punishment of the refugee would not allow

the section to achieve the purpose of giving effect to Canada's obligations with respect to *non-refoulement*. Given the text and purpose of s. 44(1)(b) and the interpretation which has been given to the *European Convention on Extradition* on which it is based, the closing words of s. 44(1)(b) are read broadly as protecting a refugee against *refoulement* which risks prejudice to him or her on the listed grounds in the requesting state whether or not the prejudice is strictly linked to prosecution or punishment.

Section 44(1)(b) must be considered whenever the Minister's surrender decision concerns a person with refugee status in Canada and the requesting state is the one from which the refugee has been granted protection. Refusal of surrender is mandatory if the Minister is satisfied that the conditions which led to conferral of refugee status still exist and it is not shown that the person sought was or has become ineligible for refugee status. An individual's status as a refugee under the Refugee Convention has a temporal aspect; the status depends on the situation that exists at the time protection is sought. In the same way, the relevant time for assessing entitlement to *non-refoulement* protection is the time removal is sought. The same principle applies to s. 44(1)(b). The question of entitlement to protection against *refoulement* arises at the time surrender is being considered and must be assessed in light of the circumstances at the time. Where a person has been found, according to the processes established by Canadian law, to be a refugee and therefore to have at least a *prima facie* entitlement to protection against *refoulement*, that determination must be given appropriate weight by the Minister in exercising his duty to refuse

extradition on the basis of risk of persecution. There should not be a burden on a person who has refugee status to persuade the Minister that the conditions which led to the conferral of refugee protection have not changed. This approach is not only consistent with Canada's domestic law in relation to cessation of refugee protection on the basis of changed circumstances, but with Canada's international undertakings with respect to *non-refoulement* of refugees. This is a more practical and fair approach than placing a burden on refugees to prove current conditions in the country from which they have been absent perhaps for an extended period. The obligations under the Refugee Convention and the analogy to the cessation and revocation provisions under the IRPA suggest that, under s. 44(1)(b) of the EA, a refugee should not have to establish at the surrender phase that the conditions which led to conferring refugee status, and thus to *non-refoulement* protection, continue to exist. When the Minister acting under the EA is in effect determining that refugee protection (and thus *non-refoulement* protection under the Refugee Convention) of a person sought is excluded or is no longer required by virtue of a change of circumstances in the requesting country, he must be satisfied on the balance of probabilities that the person sought is no longer entitled to refugee status in Canada. The Minister of Justice must consult with the Minister of Citizenship and Immigration concerning current conditions in the requesting state in considering whether the person sought is no longer entitled to refugee protection on the basis of changed circumstances. Finally, a duty of fairness applies to the Minister's consideration of the issue under s. 44(1)(b) which includes providing the refugee with the case to meet, providing a reasonable

opportunity to challenge that case as well as a reasonable opportunity to present his or her own case.

In this case, the Minister's approach to the exercise of his powers failed to give sufficient weight or scope to Canada's *non-refoulement* obligations in light of which those powers must be interpreted and applied. The Minister's consideration of the Némeths' case was fundamentally flawed. He focussed exclusively on s. 44(1)(a) of the EA in requiring the Némeths to establish, on the balance of probabilities, that they would face persecution on their return to Hungary and that the persecution they face would shock the conscience or be fundamentally unacceptable to Canadian society. He imposed too high a threshold for determining whether the Némeths would face persecution on their return and placed the burden of proof on this issue on the Némeths notwithstanding the earlier finding that they were refugees. Further, the Minister failed to address s. 44(1)(b) which is the most relevant provision of the EA in relation to their surrender. The Minister applied incorrect legal principles and acted unreasonably in reaching his conclusions.

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APPEAL from a judgment of the Quebec Court of Appeal (Rochette, Rochon and Doyon J.J.A.), 2009 QCCA 99, [2009] R.J.Q. 253, 83 Imm. L.R. (3d) 16, 2009 CarswellQue 8504, [2009] Q.J. No. 271 (QL), dismissing an application for judicial review of a decision by the Minister of Justice of Canada ordering the appellants' surrender. Appeal allowed.

Marie-Hélène Giroux and Clément Monterosso, for the appellants.

Ginette Gobeil and Janet Henchey, for the respondent.

Pierre Poupart and Ronald Prigent, for the intervener Barreau du Québec.

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

John Norris and Brydie Bethell, for the intervener the Canadian Council for Refugees.

The judgment of the Court was delivered by

Cromwell J. —

I. Introduction

[1] This appeal requires us to reconcile Canada's competing obligations with respect to extradition and refugee protection. Under international treaties and domestic law, Canada has undertaken not to return refugees to face the persecution they fled. This is known as the principle of *non-refoulement* and it is a cornerstone of refugee protection. Canada also has obligations under treaties and domestic law to extradite persons who are sought by foreign states to face criminal prosecutions or serve sentences. These are important obligations that relate not only to Canada's engagements with other states, but also to the effectiveness of law enforcement. These two obligations in relation to *non-refoulement* and extradition may collide, however, when Canada is faced with a request to extradite refugees to a state which they fled to avoid persecution. This case is an example.

[2] The appellants came to Canada and were given refugee protection; they persuaded the authorities that they had a well-founded fear of persecution in their native Hungary on the basis of their Roma ethnic origin. Years later, Hungary requested Canada to extradite them and the Minister of Justice eventually ordered their surrender for extradition. His decision was upheld on review by the Quebec Court of Appeal: 2009 QCCA 99, 2009 CarswellQue 8504. The appellants contend on appeal to this Court that, because of Canada's *non-refoulement* obligations, they may not be extradited back to Hungary so long as they retain their refugee status in Canada. The respondent takes the view that the appellants may be extradited in spite of their refugee status because they are charged in Hungary with a serious non-political crime and have failed to establish any continuing risk of persecution upon their return.

[3] The resolution of the appeal requires an interpretation of the *Extradition Act*, S.C. 1999, c. 18 ("EA"), and the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), that reconciles the competing obligations in relation to extradition and *non-refoulement*. I agree with the respondent that, under certain conditions, the appellants may be extradited to their country of origin even though their refugee status under Canadian law has not formally ceased or been revoked. However, my view is that the Minister of Justice (the "Minister") did not apply the correct legal principles when he decided to surrender the appellants for extradition. He imposed on them the burden of showing that they would suffer persecution if extradited and by doing so, gave insufficient weight to the appellants' refugee status

and to Canada's *non-refoulement* obligations. I would therefore allow the appeal and remit the matter to the Minister of Justice for reconsideration according to law.

II. Facts and Proceedings

[4] On arriving in Canada in 2001, the appellants, who are a couple, applied for refugee status for themselves and their children, alleging that acts of violence had been committed against them in their country of origin, Hungary. Their application was based on three incidents between 1997 and 2001 in which the male appellant, together on one occasion with the female appellant, was attacked by Hungarian citizens because of their Gypsy ethnic origin. The appellants and their children were granted refugee status and became permanent residents.

[5] Some two years later, Hungary issued an international arrest warrant in respect of a charge of fraud that had been laid against the appellants. The Hungarian authorities allege that in early November 2000, the couple sold the right of lease for premises in Budapest for approximately C\$2,700, despite the fact that they did not possess the right to lease the flat.

[6] The Minister sought an order from the Superior Court of Quebec for the appellants' committal on the Canadian offence of fraud contrary to s. 380(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, which corresponds to the conduct alleged against them in Hungary. The committal order was granted and has not been appealed.

[7] The Minister then ordered their surrender. In reaching his decision, he considered the principle of *non-refoulement*, but concluded it did not stand in the way of ordering the appellants' surrender. The Minister noted first that there is an exception to *non-refoulement* with respect to persons who are accused of a serious non-political offence which he noted was defined in the immigration context to be an offence punishable by imprisonment of 10 years or more. Fraud, he noted, is such a crime. He did not, however, address the appellants' contention that, given the amount of the alleged deprivation, the offences alleged against them would not attract a punishment of 10 years in Canada. The Minister then turned to the issue of risk of persecution. He stated his view that persons challenging their surrender on the basis that they will be persecuted in the requesting state must establish two things on the balance of probabilities: that the persecution would sufficiently shock the conscience or be fundamentally unacceptable to Canadian society *and* that they will in fact be subjected to this persecution. The relevant time for assessing this, he said, is the present, not the time at which refugee status had been granted, in this case, some 6 years earlier. To assist his consideration of risk the appellants would face if returned to Hungary, the Minister sought and received the views of the Department of Citizenship and Immigration. The advice was to the effect that, following Hungary's accession to the European Union in 2004, there was no serious possibility that the appellants would be subjected in Hungary to persecution on the basis of their Roma origin.

[8] Doyon J.A., writing for the Court of Appeal, dismissed the joint application for judicial review. In his view, the respondent had jurisdiction to order the surrender of the appellants after having consulted with the Minister of Citizenship and Immigration (“MCI”) about this. Doyon J.A. also concluded that the respondent’s decision was reasonable :

[TRANSLATION] He could reasonably conclude that the situation in Hungary is such that extradition of the applicants is not oppressive or unjust, does not shock the conscience of Canadians, and is not unacceptable. The opinion of the Minister of Citizenship and Immigration authorized him to conclude that the situation in Hungary has changed since the applicants’ departure. Hungary’s accession to the European Union in May 2004 is proof that the country has satisfied certain criteria with regard to the stability of its democratic institutions, the rule of law, human rights, and the respect and protection of minorities; it has also had to harmonize its laws and institutions with those of the European Union. The detailed risk analysis sent by the Minister of Citizenship and Immigration permits the assertion that the respondent could reasonably conclude that there is no longer a risk of persecution in Hungary on the basis of racial origin and that these changes indicate that the situation there is completely different from the situation there about a decade ago. [para. 38]

III. Issues and Standard of Review

[9] The case raises two main issues:

1. Does the Minister have the legal authority to surrender for extradition a refugee whose refugee status has not ceased or been revoked?
2. If so, did the Minister exercise that authority reasonably in this case?

[10] The standard of judicial review is not contentious. The Minister's decision to surrender for extradition should be treated with deference; it will generally be reviewed for reasonableness. However, in order for a decision to be reasonable, it must relate to a matter within the Minister's statutory authority and he must apply the correct legal tests to the issues before him. As LeBel J. said on behalf of the Court in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41:

[T]he 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.... 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. [Emphasis added.]

IV. Analysis

A. *Introduction*

[11] The parties advance two competing approaches to the question of how to reconcile Canada's obligations with respect to *non-refoulement* and extradition. The appellants (to put their position in broad terms) submit that the powers to extradite under the EA must be read as being subject to the detailed scheme for the treatment of refugees under the IRPA. In brief, a person with refugee status cannot be extradited until the refugee status has ceased or been revoked through the processes set out in the IRPA. The respondent, on the other hand, submits that the interaction of extradition and *non-refoulement* is addressed mainly through the EA and, more

particularly, through the mandatory and discretionary bases on which the Minister may refuse surrender of a person sought for extradition.

[12] My analysis will be structured around these two competing approaches. In the next section I will explain why in my view, the appellants' central contention – that the power to surrender for extradition is subject to the refugee process under the IRPA – cannot be accepted. In the following section, I will address the respondent's position, which I largely accept, that protection against *refoulement* is addressed in the extradition context by the mandatory and discretionary bars of surrender in the EA. I will also explain why, in my view, the Minister applied the wrong legal tests in exercising those powers in this case.

B. The Minister's Authority to Extradite a Refugee

[13] The appellants' and supporting interveners' main submission is that, as a matter of statutory interpretation, the Minister dealing with an extradition request is bound by a finding under the IRPA that the person sought is a refugee and cannot surrender that person for extradition unless his or her refugee status has ceased or been vacated using the procedures provided for under the IRPA. This limitation, the appellants say, must be read into the EA for three main reasons. I will refer to these submissions as the "conflict" argument, the "silence" argument and the "fair process" argument. The first two will be addressed here and the third in the next section of my reasons.

(1) The Conflict Argument

[14] The first submission is that the Minister's powers under the EA should be interpreted as not applying to refugees in order to avoid a conflict between the provisions of the EA and the IRPA. This submission is supported by the principle of statutory interpretation which presumes harmony, coherence, and consistency between statutes dealing with the same subject matter: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at paras. 30 and 52; Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 223-25.

[15] The supposed conflict is between the *non-refoulement* provision (s. 115) of the IRPA and the Minister's powers of surrender under the EA. Section 115 of the IRPA provides that a "protected person", which includes a refugee, "shall not be removed from Canada to a country where they would be at risk of persecution". The general powers of the Minister to surrender a person for extradition under the EA have no express limitation or exception relating to refugees. Thus, it is argued that the statutes conflict because the IRPA prohibits removal of a refugee to a place he or she will face persecution while the EA permits the Minister to do so by means of surrendering the person for extradition. The appellants' position is that this conflict should be avoided by interpreting the Minister's power of surrender under the EA as being subject to a requirement that a refugee may only be surrendered to the country he or she fled if the refugee's status has ceased or been revoked by means of the processes set out in the IRPA.

[16] In my view, there is no conflict between the IRPA and the EA because the prohibition on removal from Canada under s. 115 of the IRPA does not apply to extradition. Before turning to my reasons for reaching that conclusion, it will be helpful to place the issue in the broader context of refugee protection in Canada.

[17] Canada has ratified the 1951 *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (“Refugee Convention”), as well as the 1967 *Protocol Relating to the Status of Refugees*, Can. T.S. 1969 No. 29. The Refugee Convention defines “refugee” and sets out a series of obligations to them on the part of contracting states. While the Refugee Convention applied only to events occurring before January 1, 1951 (Article 1A(2)) and, at the option of the contracting party, only to events occurring in Europe, the state parties to the 1967 Protocol agreed to eliminate this temporal and geographical limitation on the Refugee Convention’s operation, with certain exceptions not relevant here (Article 1). Thus, under the Refugee Convention and the Protocol, the definition of refugee includes “any person who ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (Refugee Convention, Article 1A(2)).

[18] At the heart of the protections accorded to refugees under the Refugee Convention are the provisions relating to expulsion and return. Most relevant to the

appeal is Article 33 which addresses the return of refugees to places where they may face persecution. This article embodies in refugee law the principle of *non-refoulement* which has been described as the cornerstone of the international refugee protection regime: United Nations High Commissioner for Refugees, *Guidance Note on Extradition and International Refugee Protection* (April 2008). Underlining the centrality of this provision is the fact that, by virtue of Article 42 of the Refugee Convention, ratifying states may not make reservations to the *non-refoulement* protections afforded by Article 33.

[19] Stated in broad and general terms, the principle of *non-refoulement* prohibits the direct or indirect removal of refugees to a territory where they run a risk of being subjected to human rights violations. The object of the principle is the prevention of human rights violations and it is prospective in scope: Kees Wouters, *International Legal Standards for the Protection from Refoulement* (2009), at p. 25. The principle of *non-refoulement* has been enlarged beyond its application to refugees by modern international human rights law, but it is its scope in relation to the Refugee Convention that is pertinent to this appeal: William A. Schabas, “Non-Refoulement”, in *Final Report, Expert Workshop on Human Rights and International Co-operation in Counter-Terrorism* (2007), 20, at p. 23.

[20] Article 33 of the Refugee Convention provides:

Article 33

Article 33

Prohibition of expulsion or return

(“Refoulement”)

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Défense d’expulsion et de Refoulement

1. Aucun des États Contractants n’expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté seraient menacées en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu’il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l’objet d’une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

[21] The main legislative vehicle for implementing Canada’s international refugee obligations is the IRPA. Among the statute’s stated objectives is fulfilling Canada’s international legal obligations with respect to refugees: s. 3(2)(b). The IRPA provides that it is to be construed and applied in a manner that ensures that decisions taken under it are consistent with the *Canadian Charter of Rights and Freedoms* and comply with international human rights instruments to which Canada is signatory: s. 3(3)(d) and (f). The statute expressly incorporates certain provisions of the Refugee Convention. With some exceptions, the MCI is responsible for the administration of the Act: s. 4(1).

[22] That brings me to the provision in the IRPA on which the appellants rely heavily, s. 115. It is a statutory expression of the principle of *non-refoulement*

providing that a protected person (which, by virtue of s. 95(2) includes a person on whom refugee protection is conferred) “shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion”. The full provision reads:

Principle of Non-refoulement

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security

Principe du non-refoulement

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue

of Canada.

pour la sécurité du Canada.

[23] Section 115 is directed to fulfilling Canada's obligations under the Refugee Convention in relation to *non-refoulement* and there is, accordingly, a close correspondence between it and the relevant provisions of the Refugee Convention. The grounds on which removal is prohibited in s. 115(1) (i.e., risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or a risk of torture or cruel and unusual treatment or punishment) closely parallel those in Article 33 (life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion). The exceptions to the application of s. 115(1) as set out in s. 115(2) (serious criminality, danger to the public, violating human rights or danger to Canada's security) closely follow the exclusions from the definition of refugee in Article 1F of the Refugee Convention (war crime, crime against humanity, serious non-political crime) and the grounds for expulsion of refugees provided for in Article 32 (national security or public order).

[24] I return, then, to the contention that s. 115, and particularly the phrase "shall not be removed from Canada", prohibits extradition of a refugee. The submission is that the plain meaning of the words includes removal by extradition, that this interpretation is necessary to implement Canada's obligations under the Refugee Convention; and that the judgment of the Court in *Suresh v. Canada*

(Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3, supports this view. The respondent, on the other hand, submits that “removal” is a term of art under the IRPA and applies only to removal orders made under that Act.

[25] For the following reasons, I agree with the respondent.

(a) *Ordinary Meaning*

[26] The appellants emphasize the ordinary meaning of the words “removed from Canada” in s. 115(1) and that extradition is a form of “removal”. I agree, of course, that the ordinary meaning of these words is broad enough to include removal by any means including extradition. However, according to the often repeated “modern principle” of statutory interpretation, the words used in the IRPA must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd.(Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. When this is done, it becomes clear in my view that the term “removed” has a specialized meaning in the IRPA and that it does not include removal by extradition.

[27] Section 115 must be considered in the context of the other provisions of the statute which also deal with the subject of removal. Division 5 of Part I of the IRPA addresses “Loss of Status and Removal”. The term “removal” is used in connection with the term “removal order” which is a specific order authorized by the

IRPA in particular circumstances set out in detail therein: see, for example, ss. 44(2), 45(d) and 48. “Removed” and “removal”, therefore, are words used in relation to particular procedures under the IRPA. This view is reinforced by the *Immigration and Refugee Protection Regulations*, SOR/2002-277. Section 53 of the IRPA provides that the regulations made under the IRPA may include provisions respecting “the circumstances in which a removal order shall be made or confirmed against a permanent resident or a foreign national”: s. 53(b). Part 13 of the Regulations, addresses removal. Section 223 specifies that there are three types of removal orders: departure orders, exclusion orders and deportation orders. Surrender orders under the EA are not included. The linking of removal to these three types of orders further reinforces the view that the words “removed” and “removal” refer to particular processes under the IRPA.

[28] This view is also supported by the terms of s. 115 itself. Section 115(1) provides that a protected person may not be “removed from Canada” to face persecution, risk of torture or cruel and unusual punishment. However, s. 115(2) creates exceptions to this prohibition in relation to persons who are inadmissible on certain grounds. Under s. 115(2)(a), protection against removal in s. 115(1) does not apply in the case of a person who is inadmissible on grounds of serious criminality and who in the opinion of the MCI constitutes a danger to the public. Inadmissibility on the grounds of serious criminality is addressed under s. 36 of the IRPA. Under s. 115(2)(b), the protection does not apply to persons inadmissible on grounds of security, violating human or international rights or organized criminality if, in the

opinion of the MCI, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada. Inadmissibility on the grounds of security, human rights violations and organized criminality are dealt with in the IRPA: ss. 34, 35 and 37. Thus, s. 115 deals with inadmissibility as defined under the IRPA and calls for the exercise of discretion by the MCI in relation to the danger of the person remaining in Canada. This, in my view, grounds the section in the processes of determining inadmissibility and ordering removal under the IRPA. It does not address extradition.

[29] It is also worth noting that while s. 115 of the IRPA does not refer to extradition, it is mentioned elsewhere in the IRPA. So, as we shall see shortly, s. 105 of the IRPA deals explicitly with certain aspects of the interaction of extradition proceedings and refugee claims and s. 112(2)(a) of the IRPA precludes persons from applying for protection under s. 112(1) when they have been ordered removed from Canada and have extradition proceedings pending against them. The IRPA, therefore, in certain instances expressly deals with the interplay between extradition and the refugee and the removal process. The fact that it does, supports an inference that when Parliament intended to address that interplay, it did so expressly. There is, as noted, no express provision in the IRPA dealing with the extradition of refugees.

[30] Finally on this point, the time limits for the Minister's surrender decision under the EA make it unlikely that Parliament intended to require him to await an application by the MCI under the IRPA for revocation or cessation of refugee status

before being able to surrender a refugee. Sections 40(1) and (5)(b) of the EA require the Minister to order surrender, if he so decides, within 90 days after the person's committal, with the possibility of a 60-day extension when the person has made submissions. These timelines are unrealistically short to allow the Minister to request the MCI to apply to the Refugee Protection Division for cessation or revocation of a person's refugee status and for that process to run its course as a precondition for the exercise of the Minister's surrender powers.

[31] To conclude on this point, my view is that when s. 115 is read in context, it is clear that the words "removed from Canada" in s. 115(1) refer to the removal processes under the IRPA, not to surrender for extradition under the EA. There is, therefore, no conflict between the two statutes.

(b) *Canada's International Obligations*

[32] The appellants submit that as s. 115 is addressed to the issue of *non-refoulement* it should be interpreted in a way that is consistent with Canada's *non-refoulement* obligations under the Refugee Convention. That obligation under Article 33 is not to "expel or return ("*refouler*") a refugee" and it is now widely accepted that this obligation applies to removal by way of extradition. It follows, the submission goes, that "removal" in the IRPA should receive the same broad interpretation. Only this interpretation, it is argued, is consistent with Canada's obligations in relation to *non-refoulement* under the Refugee Convention. While I agree with the principle on which this submission is based, I do not agree that it applies here.

[33] I accept that protection against *refoulement* under the Refugee Convention applies to expulsion by extradition. Admittedly, the Refugee Convention does not explicitly say so and a number of states in 1951 were of the view that it did not apply to extradition. However, this restrictive view is not consistent with the wording of the Refugee Convention or its obvious human rights purpose and this limited view is no longer generally accepted. The wording of the protection – “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever” – is so broad that it must include return by means of extradition and the commentators are unanimous in the view that it does: Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd 2007), at pp. 257-62; Wouters, at p. 136; Sibylle Kapferer, *The Interface between Extradition and Asylum* (2003); Elihu Lauterpacht and Daniel Bethlehem, “Avis sur la portée et le contenu du principe du non-refoulement” in Erika Feller, Volker Türk et Frances Nicholson, eds, *La Protection des réfugiés en droit international* (2008), 119, at pp. 144-45; United Nations High Commissioner for Refugees, *Problems of Extradition Affecting Refugees*, 16 October 1980, No. 17 (XXXI) - 1980; Cordula Droege, “Transfers of detainees: legal framework, *non-refoulement* and contemporary challenges” (2008), 90 *Int’l Rev. of the Red Cross* 669, at p. 677.

[34] I also accept, of course, that where possible statutes should be interpreted in a way which makes their provisions consistent with Canada’s international treaty obligations and principles of international law. As LeBel J. noted in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53, it is presumed that the legislature acts in

compliance with Canada's obligations as a signatory of international treaties and as a member of the international community as well as in conformity with the values and principles of customary and conventional international law: see also, for example, *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at pp. 409-10; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 137; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 70; and *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, at para. 50.

[35] The presumption that legislation implements Canada's international obligations is rebuttable. If the provisions are unambiguous, they must be given effect: see, e.g. *Schreiber*, at para. 50. As I have discussed at length earlier, s. 115 does not address removal by extradition and so its clear meaning must be given effect. Moreover, I do not accept that this interpretation of s. 115 results in Canadian domestic law failing to respect its *non-refoulement* obligations under the Refugee Convention. My view is that those obligations in the context of extradition are fully satisfied by a correct interpretation and application of s. 44 of the EA, as I will explain in the next section of my reasons.

[36] To sum up, my view is that s. 115 cannot and need not be interpreted as applying to removal by extradition.

(c) *Suresh*

[37] It is submitted that *Suresh*, at para. 7, supports the position that s. 115 prohibits extradition of a refugee. Respectfully, however, my view is that *Suresh* does not provide support for this view.

[38] *Suresh* was concerned with deportation of a refugee on security grounds; it had nothing to do with extradition. Deportation, unlike extradition, is one of the forms of removal provided for in the IRPA Regulations. In para. 7 of the reasons in *Suresh*, which is the first paragraph of the section headed “Facts and Judicial Proceedings”, there is a brief reference to s. 53(1) of the *Immigration Act*, R.S.C. 1985, c. I-2, the predecessor provision of the present s. 115 of the IRPA. The Court stated: “Recognition as a Convention refugee has a number of legal consequences; the one most directly relevant to this appeal is that, under s. 53(1) of the *Immigration Act*, generally the government may not return (“*refouler*”) a Convention refugee ‘to a country where the person’s life or freedom would be threatened’”(para. 7). While the Court used the word “return” instead of the statutory word “remove”, I do not consider this brief description of *non-refoulement*, which I note starts with the word “generally”, as helpful authority about how the relevant section of the IRPA relates to extradition.

[39] I conclude that s. 115 of the IRPA does not address removal by extradition. There is, therefore, no conflict between this provision and the provisions of the EA authorizing the Minister to surrender a refugee for extradition. I reject the conflict argument.

(2) The “Silence” Argument

[40] The EA expressly addresses extradition of a refugee *claimant* (see s. 40(2)) but it is silent in relation to extradition of a person with refugee *status*. On this foundation, the appellants erect their silence argument: the absence of a provision in the EA expressly addressing the extradition of a person with refugee status should be understood as withholding that power from the Minister. This view is reinforced, according to the submissions, by two other considerations. First, claims for refugee status are determined by specialized processes and decision-makers under the IRPA; the powers of the Minister under the EA should therefore not be interpreted to allow him in effect to usurp the jurisdiction of these specialized processes and decision-makers. Second, the suspension of refugee proceedings when extradition proceedings are initiated, as provided for in s. 105 of the IRPA, does not apply to all extraditable offences. The suspension applies only to extradition proceedings in relation to offences punishable by 10 years or more of imprisonment. Thus, the legislative intent is to leave in place the normal refugee process for persons sought with respect to less serious offences. This, it is argued, supports the view that suspension is the exception and the general rule is that the refugee process remains in place for individuals not falling within that exception. The appellants, as persons who have previously been accorded refugee protection, do not fall within the exception and therefore are not subject to removal except in accordance with the provisions of the IRPA.

[41] As noted earlier, I accept the two principles underlying these submissions: *non-refoulement* protection under the Refugee Convention applies to expulsion by extradition and that our domestic laws are presumed to comply with our international obligations. I do not agree, however, that applying these principles in this case leads where the appellants would take us. In my view, the IRPA does not and was not intended to implement Canada's international obligations against *refoulement* in the context of expulsion by extradition. That role, as I will explain in the next section of my reasons, is assigned to s. 44 of the EA.

[42] The "silence" argument is premised on the fact that the EA addresses extradition only in the context of a refugee claimant, not a person with refugee status. However, applying the same reasoning to the IRPA, one notes that the IRPA itself expressly deals with extradition in only two contexts, ss. 112 and 105, neither of which relates to extradition of a refugee. In both contexts, the legislative intent is to give primacy to the extradition proceedings.

[43] Extradition is referred to in s. 112 of the IRPA. That provision deals with applications for protection by those subject to removal orders. Section 112(2)(a) provides that persons may not apply for such protection if they are the subject of an authority to proceed under the EA.

[44] Another context in which extradition is mentioned in the IRPA is in s. 105 dealing with the extradition of persons with pending refugee claims. The section provides that the Refugee Protection and the Refugee Appeal Division cannot

commence and must suspend consideration of any matter concerning a person against whom an authority to proceed has been issued under s. 15 of the EA with respect to certain offences, namely those punishable under federal law by at least 10 years' imprisonment. The suspension lasts until a final decision under the EA with respect to the discharge or surrender of the person has been made. If the person is discharged at the extradition proceedings, the refugee proceedings may be commenced or continued: s. 105(2). If the person is ordered surrendered for an offence punishable by a term of imprisonment of at least 10 years, the order of surrender is deemed to be a rejection of the claim for refugee protection based on section F(b) of Article 1 (serious non-political crime) of the Refugee Convention: s. 105(3). The deemed rejection may not be appealed and a person who has not made a claim for refugee status before the order of surrender was made may not do so thereafter: ss. 105(4) and (5).

[45] These provisions address only those *seeking* refugee status; not those who already have been granted refugee protection. Further, the provisions do not apply in the case of all offences for which extradition may be ordered. As we shall see, extradition may be ordered if the conduct with respect to which extradition is sought, had it occurred in Canada, would have constituted an offence that is punishable by a term of imprisonment of two years or more (or as specified in the extradition agreement): s. 3(1) of the EA (I put aside the special provision in relation to specific agreements in s. 3(1)(b)(i)). However, the suspension of proceedings before the Refugee Protection Division, as set out in s. 105 of the IRPA, applies only if

extradition is sought with respect to conduct which under Canadian law is punishable by imprisonment of 10 years or more: s. 105(1). Presumably this is to permit the suspension provisions to apply only to those excluded from refugee status under the serious crime exception set out in section F of Article 1 of the Refugee Convention. Thus, for these purposes Canada has defined “serious crimes” as those punishable by 10 years or more of imprisonment and has decided that if there is sufficient evidence to warrant committal in extradition proceedings, the “serious reasons for considering” test under the Refugee Convention in relation to serious non-political crimes has been met.

[46] These suspension provisions were added to the IRPA as consequential amendments when the EA was enacted in 1999. Their purpose was explained by Departmental officials testifying before Parliamentary committees. Resort to this material is appropriate where, as here, it is relevant and reliable and provided it is used with caution and not given undue weight: Sullivan, at pp. 609-14; *Reference re Firearms Act (Can)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 17; *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870, at para. 23; *Canada 3000 Inc. (Re)*, 2006 SCC 24, [2006] 1 S.C.R. 865, at paras. 57-59.

[47] The amendments sought to harmonize the extradition and refugee recognition processes and to entrust to the Minister of Justice the ultimate decision about the extradition of a person claiming refugee status: see, for example, testimony of Jacques Lemire, Senior Counsel, International Assistance Group, Department of

Justice, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 60, 1st Sess., 36th Parl., March 10, 1999, at pp. 60:6 *et seq.*; Testimony of Gerry Van Kessel (Director General, Refugees, Department of Citizenship and Immigration, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Human Rights* (November 17, 1998). As Mr. Van Kessel put it during his testimony:

... the basic question we believe we face is how to deal with persons who are facing extradition and make refugee claims. At the present time they are separate processes.

...

Bill C-40 [which became the 1999 *Extradition Act*] changes will legislate the rules for the interaction between the extradition process and the refugee determination process for the first time.

...

Bill C-40 also says protection [i.e. of refugees] remains an issue and a concern that the Minister of Justice needs to deal with, and that is also dealt with in Bill C-40. The choice made there is that the Minister of Justice, before making a final decision on extradition or surrender order, shall refuse to make a surrender if the refugee definition applies In a sense, what has really changed here is who the decision-maker is. [Emphasis added; at 11:45 and 12:05.]

[48] This evidence is consistent with the text and scheme of the EA and the IRPA: the Minister of Justice was intended to take the lead when a refugee's rights are implicated in an extradition decision. In addition, the reference in the evidence to the Minister's *duty to refuse* surrender "if the refugee definition applies" clearly refers to s. 44 of the EA, not to s. 115 of the IRPA. I will come back to this point.

[49] The appellants and interveners submit, in effect, that the earlier finding of refugee status under the IRPA is binding on the Minister under the EA until it is ended using the procedures of cessation or revocation under the IRPA. This position, as I have discussed earlier, finds no explicit support in the text of the IRPA or the EA and is inconsistent with the apparent intention of Parliament. Moreover, this “binding effect” argument is not well supported by international law principles.

[50] Under the Refugee Convention, refugee status depends on the circumstances at the time the inquiry is made; it is not dependent on formal findings. As one author puts it, “it is one’s de facto circumstances, not the official validation of those circumstances, that gives rise to Convention refugee status”: James C. Hathaway, *The Rights of Refugees under International Law* (2005), at pp. 158 and 278. It follows that the rights flowing from the individual’s situation as a refugee are temporal in the sense that they exist while the risk exists but end when the risk has ended. Thus, like other obligations under the Refugee Convention, the duty of *non-refoulement* is “entirely a function of the existence of a risk of being persecuted [and] it does not compel a state to allow a refugee to remain in its territory if and when that risk has ended”: Hathaway, at p. 302; *R. (Yogathas) v. Secretary of State for the Home Department*, [2002] UKHL 36, [2003] 1 A.C. 920, *per* Lord Scott of Foscote, at para. 106. The relevant time for assessment of risk is at the time of proposed removal: Hathaway, at p. 920; Wouters, at p. 99. This temporal understanding of refugee status under the Refugee Convention does not support the “binding effect” approach to earlier formal findings of refugee status.

[51] In addition, to the extent that this “binding effect” argument is based on the need for a particular procedural approach, that position is not supported by Canada’s obligations under the Refugee Convention. The Refugee Convention does not contain specific procedural provisions. While it does provide that refugees shall have free access to the courts (Article 16) and due process in relation to expulsion decisions (Article 32), it does not bind the contracting states to any particular process for either granting or withdrawing refugee status. Thus, Canada’s international undertaking with respect to *non-refoulement* does not commit it to any particular procedural scheme for its application in extradition matters.

[52] Moreover, looking beyond the terms of the Refugee Convention, I have not found any international law norm to the effect that extradition may only be ordered if a previous finding that a person is a refugee has been formally set aside. So far as I have been able to determine, state practices on this point vary considerably. Kapferer notes that in some countries, recognition of refugee status by the asylum (refugee) authorities is binding on those dealing with extradition requests. She also notes, however, that this is not the case in other states (paras. 273-77): see also M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (5th ed. 2007), at p. 193; E. P. Aughterson, *Extradition: Australian Law and Procedure* (1995), at pp. 35-36. Similarly, the United Nations High Commissioner for Refugees in *Guidance Note on Extradition and International Refugee Protection*, at para. 53 acknowledges that in some countries, the extradition authorities are not bound by a previous formal conferral of refugee status by the immigration or asylum

authorities. It seems that this is not problematic from an international law point of view, provided that the extradition authorities give due weight to the obligation of *non-refoulement* by fairly examining the question of whether the risk of persecution persists. I conclude that Canada's obligations under the Refugee Convention do not require an earlier formal determination of refugee status to be binding on the extradition authorities. (I should add that in this case Canada is both the state that formally accorded refugee protection to the appellants and the requested state in the extradition process. It is not necessary, therefore, to address the situation in which extradition is requested from Canada of a person whose refugee status was formally accorded by another state.)

[53] For these reasons, I reject the appellants' silence argument.

(3) The "Fair Process" Argument

[54] The interveners, Québec Immigration Lawyers Association and Canadian Council for Refugees, in different ways, make the point that the powers of the Minister of Justice to surrender a person sought under the EA do not adequately give effect to Canada's obligations under the Refugee Convention. They submit, in effect, that the protections under the IRPA are different and better than those found in the EA. However, these submissions are based on the wrong comparison. The protections in the IRPA in relation to *non-refoulement* do not apply to extradition; the question, therefore, is not whether the EA provides the same protection as the IRPA would if it did apply, but how the Minister's surrender powers under the EA should

be interpreted and applied having regard to its provisions read in light of Canada's international undertakings and the *Charter*. I will take up that issue in the next section of my analysis.

(4) Summary of Conclusions

[55] In my view, the IRPA does not constrain the authority of the Minister to extradite a person with refugee status. I conclude that the Minister has that authority under the EA. That brings us to the question of whether the Minister exercised his authority reasonably in this case.

C. Did the Minister Reasonably Exercise his Authority to Surrender the Appellants?

(1) Introduction

[56] Section 44(1)(a) and (b) of the EA set out the grounds on which the Minister *must* refuse to surrender a person sought. In brief, they are first, if the Minister is satisfied that surrender would be unjust or oppressive in all of the relevant circumstances; second, if the Minister is satisfied that the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race,

religion, nationality, ethnic origin, etc.; and third, if the Minister is satisfied that person's position may be prejudiced for any of those reasons.

[57] In this case, the Minister focussed exclusively on the first ground. He required the appellants to establish, on the balance of probabilities, that they would face persecution on their return to Hungary and that the persecution they face would shock the conscience or be fundamentally unacceptable to Canadian society.

[58] In my view, the Minister applied incorrect legal principles and acted unreasonably in reaching his conclusions. His decision in this case related to the surrender for extradition of refugees to the country they fled. The Minister's approach to the exercise of his powers, in my respectful view, failed to give sufficient weight or scope to Canada's *non-refoulement* obligations in light of which those powers must be interpreted and applied. While the mandatory grounds for refusal set out in s. 44 must be considered as a whole, the most relevant provision in this case is the second branch of s. 44(1)(b) set out in the closing words of that subsection. This provision was included in the EA in part to give effect to Canada's *non-refoulement* obligations under the Refugee Convention in the extradition context. While the Minister considered the appellants' status as refugees and examined current conditions in Hungary, his approach in practical terms gave their refugee status no weight and took too narrow a view of Canada's *non-refoulement* obligations. The Minister in my respectful view applied incorrect legal principles by imposing too high a threshold for determining whether the appellants would face persecution on their return and, by

placing the burden of proof on this issue on the appellants notwithstanding the earlier finding that they were refugees. My reasons for these conclusions follow.

(2) Grounds for Refusal of Extradition:

[59] In my view, this case turns on the interpretation and application of s. 44 of the EA. For the purposes of this appeal, there are three key interpretative issues about s. 44 which must be resolved: (1) What is the most pertinent ground under s. 44 where, as here, the Minister is deciding whether to surrender a person with refugee status? This turns on whether the protection afforded by s. 44(1)(b) is available only in relation to the risk of prejudice *resulting from the prosecution or punishment* of the person sought or whether it applies to prejudice resulting from discrimination generally; (2) Does a person with refugee status in Canada meet the threshold for invoking this protection? and (3) Who bears the onus of proof that the risk exists? To address these issues, I will first place s. 44 in the context of the extradition process and explain how it interacts with the refugee determination process. I will then turn to a detailed discussion of the purpose of s. 44 and conclude with my analysis of these three interpretative issues.

(a) *Section 44 in Context*

[60] Extradition is mainly an executive branch function stemming from international agreements between states: *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532, at para. 27. The EA's main purpose is to provide the

means which give effect to Canada's obligations in this regard. Under the EA, the Minister of Justice is responsible for the implementation of extradition agreements, dealing with extradition requests and generally for the administration of the EA: s. 7.

[61] Charron J. recently outlined the scheme of the act in *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170. I will not repeat it in detail here other than to briefly outline the three phases of the extradition process under the EA.

[62] In the first phase, the Minister considers an extradition request and decides whether to proceed with it. If he decides in favour of proceeding, he issues an authority to proceed. Where, as here, extradition to face trial is sought, the EA simply requires the Minister to be satisfied that the conduct described in the extradition request is criminal in the foreign jurisdiction and that the associated penalty meets the threshold established by s. 3(1)(a) (of at least two years or as specified in the relevant treaty). There is no reference to the immigration status of the person in relation to the Minister's discretion to issue the authority to proceed.

[63] The authority to proceed authorizes the Attorney General, acting on behalf of the extradition partner, to initiate extradition proceedings to seek the order of a superior court judge for the committal of the person sought. The process thus moves into its judicial phase. The function of an extradition hearing is to determine whether the domestic component of double criminality is met (i.e., if the conduct had occurred in Canada, it would have been an offence with the requisite punishment) as required by s. 3(1)(b) of the EA. The judge is required to order committal of a person

sought for prosecution if there is evidence admissible under the Act of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the authority to proceed and the judge is satisfied that the person is the person sought by the extradition partner: s. 29(1)(a). Nothing in the EA specifies that the role of the extradition judge is affected by the fact that the person sought is a refugee.

[64] Following committal, the matter reverts to the Minister for the third phase of the process. It is at this point which he exercises his power under s. 40 of the EA to surrender, or to refuse surrender, the person sought to the extradition partner. This is the phase which is in issue in this case. At the surrender stage, the extradition process is essentially political in nature; the Minister must take into account the requirements of good faith and honour of Canada in responding to the request under an extradition treaty and must weigh the political and international relations ramifications of the decision whether or not to surrender.

[65] In general, the power to surrender is discretionary; as s. 40(1) provides, the Minister “may ... order that the person be surrendered to the extradition partner”. However, this discretion to order or to refuse surrender is structured and, in some circumstances, constrained by the other provisions of the statute, the applicable treaty and the *Charter*. The statute sets out discretionary grounds on which the Minister may refuse surrender in s. 47. It also sets out mandatory and qualified mandatory

grounds of refusal in ss. 44 and 46. Section 44, as noted, is most relevant to this appeal and I will return to it in a moment.

[66] The refugee determination process is not expressly mentioned in the EA, other than in s. 40(2). It provides that, before ordering the surrender of “a person who has made a claim for refugee protection”, the Minister of Justice must consult with the Minister responsible for the IRPA: s. 40(2). Note that the provision refers to those who have *claimed* refugee protection; it does not refer to those who, like the appellants, have been *granted* refugee protection. It follows that, in the case of a person with refugee status, s. 40(2) does not require the Minister to consult with the MCI. However, it has been held that the provision does not preclude the Minister from doing so: see *Hungary (Republic) v. Horvath*, 2007 ONCA 734, 65 Imm. L.R. (3d) 169, at paras. 16-18, application for leave to appeal to the SCC dismissed ([2008] 1 S.C.R. ix). Moreover, the Minister took the position in oral submissions before us that such consultation is required by virtue of s. 7 of the *Charter* when he considers the surrender of a refugee. I agree that such consultation must occur when the surrender decision concerns a person with refugee status.

[67] Although there are no other express references to refugees in the EA, it does provide for protections of persons who fear abusive treatment, persecution or torture in the requesting state. The most relevant provision in this regard is s. 44 which sets out mandatory reasons for refusal of surrender. I turn now to a detailed examination of this key provision.

(b) *Section 44 — General Considerations*

[68] Under s. 44(1) of the EA, the Minister must refuse to make a surrender order if “satisfied” that (a) the surrender would be unjust or oppressive having regard to all the relevant circumstances; or (b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person’s position may be prejudiced for any of those reasons. Section 44(1) reads:

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; or

(b) the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person’s position may be prejudiced for any of those reasons.

44. (1) Le ministre refuse l’extradition s’il est convaincu que :

a) soit l’extradition serait injuste ou tyrannique compte tenu de toutes les circonstances;

b) soit la demande d’extradition est présentée dans le but de poursuivre ou de punir l’intéressé pour des motifs fondés sur la race, la nationalité, l’origine ethnique, la langue, la couleur, la religion, les convictions politiques, le sexe, l’orientation sexuelle, l’âge, le handicap physique ou mental ou le statut de l’intéressé, ou il pourrait être porté atteinte à sa situation pour l’un de ces motifs.

[69] These mandatory reasons for refusal of surrender prevail over provisions of an extradition treaty. This is apparent for two reasons. The use of the mandatory language “shall refuse to make a surrender order” leaves the Minister no discretion to depart from statutory language to give effect to a treaty obligation. Moreover, where Parliament intended treaty obligations to prevail over the statutory grounds for refusal of surrender, this is specifically provided for as it is in s. 45(1) and (2): see Robert J. Currie, *International & Transnational Criminal Law* (2010), at pp. 467-68.

[70] As the exercise of the Minister’s power to surrender implicates the liberty and in some cases the security of the person sought, the Minister owes a duty of fairness both at common law and in accordance with the principles of fundamental justice under s. 7 of the *Charter*. While we are not called on in this case to address the precise ambit of this duty of fairness, the Court has affirmed that it generally includes adequate disclosure of the case against the person sought, a reasonable opportunity to respond to it and a reasonable opportunity to state his or her own case: see, for example, *United States of America v. Whitley* (1994), 119 D.L.R. (4th) 693 (Ont. C.A.), at p. 707, aff’d [1996] 1 S.C.R. 467.

[71] The orientation of s. 44 is the protection of human rights. It is therefore not surprising that, as LeBel J. pointed out in *Lake*, at para. 24, there is overlap between the provisions of s. 44 and the *Charter*. While s. 44(1)(a) is not limited to conduct that would constitute a breach of the *Charter*, it is nonetheless the case that where surrender would be contrary to the principles of fundamental justice, it will

also be unjust and oppressive within the meaning of s. 44(1)(a). Where extradition is sought for the purpose of persecuting an individual on the basis of a prohibited ground as contemplated by the first branch of s. 44(1)(b), ordering surrender will be contrary to the principles of fundamental justice. It is also not surprising that there is some overlap among the grounds of refusal in s. 44(1)(a) and (b). The grounds set out in s. 44(1)(b) focus on the conduct of the requesting state. They may be viewed as specific examples of situations in which the surrender would be unjust and oppressive and therefore, in those situations, as structuring and narrowing the Minister's consideration and weighing of competing objectives and concerns that go into the broad assessment of whether surrender would be unjust and oppressive.

[72] The Court has discussed s. 44(1)(a) most recently in *Fischbacher*, at paras. 37-39. Under that paragraph, the Minister is required to undertake “a balancing of all the relevant circumstances, weighing factors that militate in favour of surrender against those that counsel against” (para. 38). It is generally accepted that the Minister must have a wide measure of appreciation of what circumstances are “unjust or oppressive” and that the person sought bears the burden of demonstrating that such circumstances exist: see, e.g., *Fischbacher*, at para. 37; *Lake*, at paras. 38-39; *Pacificador v. Canada (Minister of Justice)* (2002), 166 C.C.C. (3d) 321 (C.A. Ont.), at para. 55.

[73] The conduct of the requesting state may be considered under s. 44(1)(a) as well as under s. 7 of the *Charter*. The concern of both provisions is not only the

act of extradition, but the potential consequences of extradition for the person sought: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 60. The analysis under s. 7 in this context asks whether extraditing the person sought to face those consequences offends the principles of fundamental justice: *Burns*, at para. 59. Section 44(1)(a) has thus been invoked where the person sought contested his surrender on the basis that he would be persecuted by virtue of his race or sexual orientation (*United States of America v. Pannell*, 2007 ONCA 786, 227 C.C.C. (3d) 336; *United States of Mexico v. Hurley* (1997), 35 O.R. (3d) 481 (C.A.)) or that the delay in seeking extradition and the potential punishment and other humanitarian circumstances combined to make surrender unjust and oppressive (*United States v. Bonamie*, 2001 ABCA 267, 96 Alta. L.R. (3d) 252). In this context, it has been held that where the person sought alleges that he or she will face persecution so that surrender would be contrary to the principles of fundamental justice and therefore unjust and oppressive, he or she bears the burden of proof on the balance of probabilities that such persecution will be suffered and that it would shock the conscience of Canadians: see, e.g. *Hurley*, at paras. 51-59. I mention this not to express my view on this approach but simply to contrast the broad balancing called for under s. 44(1)(a) with the much more tightly focussed, specific considerations set out in s. 44(1)(b).

[74] Under s. 44(1)(b), the Minister is concerned with the specific situations in which the requesting state seeks to prosecute or punish the person sought for a discriminatory purpose or where that person's position may be prejudiced for a

discriminatory reason. In contrast to the broad ground of “unjust or oppressive” in s. 44(1)(a), s. 44(1)(b) sets out specific grounds on which surrender must be refused.

[75] Virtually all of the case law approaches the risk of discriminatory treatment in the requesting state through the lens of s. 44(1)(a). This is likely because on first reading, s. 44(1)(b) seems to be concerned only with prosecution or punishment for a discriminatory purpose: see *Pannell*, at para. 29. For reasons I will develop in a moment, I think that is too narrow a reading of s. 44(1)(b).

[76] I turn now to a detailed analysis of s. 44(1)(b). I will first set out the purpose of the provision and then turn to the three interpretative issues to which the section gives rise: (1) whether the prejudice must be related to the prosecution or punishment of the person sought; (2) whether a person with refugee status in Canada meets the threshold for invoking this protection; and (3) who bears the onus of proof that the risk exists.

(c) *The Purpose of Section 44(1)(b) of the Extradition Act*

[77] It is critical to understand that s. 44(1)(b) is Canada’s primary legislative vehicle to give effect to Canada’s *non-refoulement* obligations when a refugee is sought for extradition. This appears not only from the text of the section, but also from its origins and the debates and hearings at the time of its adoption.

[78] The *non-refoulement* provisions in Article 33 of the Refugee Convention have had considerable impact on extradition law. Extradition statutes and treaties commonly contain provisions inspired by the Refugee Convention's protection against *refoulement*. The formulation adopted by the European Convention on Extradition, Eur. T.S. No. 24 ("Extradition Convention"), has been influential. Article 3(2) of that Convention stipulates mandatory reasons for refusal of extradition based on *non-refoulement* as set out in Article 33(1) of the Refugee Convention: Wouters, at p. 137; Goodwin-Gill and McAdam, at p. 258. It provides that extradition shall not be granted "if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons".

[79] The text of Article 3(2) of the Extradition Convention suggests that it has two branches: the first is concerned with prosecution or punishment for a discriminatory purpose as set out in the opening words and the second with more general discrimination that may prejudice the person's position. The words used in the second branch would be an odd choice if the intention was to limit the meaning of "position" to "position in relation to the prosecution or punishment". The provision is phrased disjunctively and the word "position" is not explicitly tied back to the prosecution or punishment. The French text of the provision supports even more strongly the view that the person's "position" is not limited to his or her position in

relation to the prosecution or punishment. The second branch in the French text is “*ou que la situation de cet individu risque d’être aggravée pour l’une ou l’autre de ces raisons*”. The clause is clearly disjunctive and “*la situation de cet individu*” is not clearly linked to the prosecution or punishment.

[80] Article 3(2) of the Extradition Convention was substantially adopted by Article 3(b) of the United Nations’ *Model Treaty on Extradition* (1990): Bert Swart, “Refusal of Extradition and the United Nations Model Treaty on Extradition” (1992), 23 *Neth Yrbk. Int’l.L.* 175, at p. 194. The United Nations Office on Drugs and Crime’s *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters* (2002), at para. 47 notes that this formulation, which is inspired by the principle of *non-refoulement* contained in the Refugee Convention, has been used, sometimes in a modified form, in extradition treaties around the world. As the Manual puts it, this clause “enables a party to refuse extradition if it determines that the extradition request is discriminatory in its purpose or if the subject of the request may be prejudiced because of one of the enumerated discriminatory grounds” (emphasis added).

[81] Section 44(1)(b) is inspired by the provisions in the Extradition Convention and the *Model Treaty on Extradition*. This is clear from the similarity of their texts. The wording of the closing section of all three provisions is virtually identical. The Extradition Convention, as noted, provides in Article 3(2) that extradition shall not be granted “if the requested Party has substantial grounds for

believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons" (emphasis added). Article 3(b) of the *Model Treaty on Extradition*, which was based on the Extradition Convention, provides, that extradition shall not be granted "[i]f the requested State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be prejudiced for any of those reasons". Section 44(1)(b) of the EA provides that the Minister "shall refuse to make a surrender order if the Minister is satisfied that the request for extradition is made for the purpose of prosecuting or punishing the person by reason of their race, religion, nationality, ethnic origin, language, colour, political opinion, sex, sexual orientation, age, mental or physical disability or status or that the person's position may be prejudiced for any of those reasons". The adoption of this language in s. 44(1)(b) makes clear that it was directed to the same purpose as the comparable provision in the Extradition Convention and the *Model Treaty on Extradition*: fulfilling *non-refoulement* obligations in the extradition context. It is reasonable to infer that this provision was adopted to serve the purpose identified for its counter-part in the Extradition Convention and *Model Treaty on Extradition*, protection against prejudice in the requesting state, particularly when extradition would constitute a violation of the requested state's obligations in relation to *non-refoulement*.

[82] Both the English and French texts of s. 44(1)(b) support the view that it contains two branches and that the “position” of the party is not limited to his or her position in relation to prosecution or punishment. The English text, “or that the person’s position may be prejudiced” is, like the Extradition Convention, disjunctive and does not expressly link the person’s “position” to the prosecution or punishment. The French text, “*ou il pourrait être porté atteinte à sa situation*” suggests more strongly that “sa situation” is not limited to the prosecution or punishment. The use of the general expression “*il pourrait*” clearly does not refer to the prosecution or punishment and seems an unlikely choice of words had such a limitation been intended.

[83] The co-relation between s. 44(1)(b) and *non-refoulement* is explicit in the debates and discussions leading to its enactment. There were references to the origin of the provision in the *Model Treaty on Extradition* (which was modelled on the Extradition Convention) and to the fact that the draft Bill adopted the listed grounds of discrimination from the Refugee Convention’s refugee definition: see, for example, the Hon. Peter Adams, Parliamentary Secretary to the Leader of the Government, *House of Commons Debates*, Vol. 135, No. 162, 1st Sess., 36th Parl., November 30, 1998, at pp. 10591-92; the Hon. Réal Menard, *House of Commons Debates*, at p. 10595; Mr. Don Piragoff, General Counsel, Criminal Law Policy Section, Department of Justice, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Human Rights*, November 5, 1998, at p. 1710.

[84] I earlier referred to testimony of Gerry Van Kessel. His evidence makes it particularly clear that the EA was intended to oblige the Minister to refuse extradition where the person sought fell within the refugee definition. As Mr. Van Kessel put it during his testimony:

Bill C-40 [which became the 1999 *Extradition Act*] changes will legislate the rules for the interaction between the extradition process and the refugee determination process for the first time.

...

Bill C-40 also says protection [i.e. of refugees] remains an issue and a concern that the Minister of Justice needs to deal with, and that is also dealt with in Bill C-40. The choice made there is that the Minister of Justice, before making a final decision on extradition or surrender order, shall refuse to make a surrender if the refugee definition applies [Emphasis added.]

(Testimony before the Standing Committee on Justice and Human Rights, November 17, 1998, at 11:45 and 12:05.)

[85] This comment relates to what is now s. 44(1)(b) of the EA as it is the only provision among the grounds for refusal of surrender that lists the prohibited grounds of discrimination which will give rise to refugee protection. (I note that the draft Bill originally listed only grounds that very closely mirrored those set out in the refugee definition in the Refugee Convention. That the list of prohibited grounds was expanded during Parliamentary consideration of the Bill to include the prohibited grounds of discrimination in the *Charter* and the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6: see House of Commons, *Sixteenth Report* Standing Committee on Justice and Human Rights, November 23, 1998, at clause 44.)

[86] This clear link between s. 44(1)(b) and Canada's international obligations under the Refugee Convention has important implications for its interpretation and application in the refugee context. The Refugee Convention has an "overarching and clear human rights object and purpose" and domestic law aimed at implementing the Refugee Convention, such as s. 44(1)(b), must be interpreted in light of that human rights object and purpose: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 57. Section 44(1)(b), when applied to the situation of a refugee whose extradition is sought, must be understood in the full context of refugee protection.

(d) *The Three Interpretative Questions*

[87] I turn now to the three interpretative issues on which the appeal turns.

(i) Prejudice and the Prosecution

[88] As noted, s. 44(1)(b) provides that the Minister shall refuse surrender if satisfied that "the request for extradition is made for the purpose of prosecuting or punishing the person by reasons of their race [etc.] ... or [if] the person's position may be prejudiced for any of those reasons". The question arises whether s. 44(1)(b) is concerned only with prejudice in the context of the prosecution. The first part of the paragraph appears to be so directed as it relates to prosecutions or punishments with a discriminatory purpose. However, the concluding words of the subsection – "or that the person's position may be prejudiced for any of those reasons" – are not explicitly limited to prejudice to the person with respect to the prosecution. In my view, for

three reasons, the prejudice referred to in these concluding words is not limited to prejudice in the prosecution or punishment.

[89] First, as I have discussed earlier, there is strong textual support in both the English and French texts of the Extradition Convention and the EA for the view that the second branch of s. 44(1)(b) is not limited to the position of the person with respect to the prosecution or punishment in the requesting state.

[90] Second, as a review of the provision's origins and the Parliamentary record shows, a clear legislative purpose of the provision includes giving effect to Canada's obligations with respect to *non-refoulement*. Reading the section as being confined to prejudice in the prosecution or punishment of the refugee would not allow the section to achieve this purpose.

[91] Third, the provisions of the Extradition Convention on which s. 44(1)(b) is based have been interpreted as not being confined to prejudice in the context of prosecution or the imposition of punishment but have also been applied to prejudice resulting from extradition in violation of a refugee's *non-refoulement* protection. In short, the direct link between these provisions and the *non-refoulement* protections in Article 33 of the Refugee Convention has been noted and given effect.

[92] A succinct discussion of the relationship between Article 3(2) of the Extradition Convention and Article 33(1) of the Refugee Convention may be found in the decision of the Netherlands, Council of State, Judicial Division, in *Folkerts v.*

State-Secretary of Justice (1978), 74 I.L.R. 472. Most relevant for our purposes is the following passage which, quoting from the decision of the *State-Secretary*, makes two important points. First, the criteria are the same for *non-refoulement* protection under Article 33 of the Refugee Convention and for protection against discrimination under Article 3(2) of the Extradition Convention. Second, the protection against discrimination under Article 3(2) is not limited to discrimination in the criminal proceedings themselves, but more generally. The report puts it this way at p. 474:

As appears from their wording and obvious intent, there is a close relation between [Article 3(2) of the European Convention on Extradition] and Article 33 of the Geneva Convention on the Status of Refugees, in the sense that the criteria for the decision on whether an individual is threatened on account of his race, religion, nationality or political opinion must be considered to be the same in the two provisions.

The Refugees Convention does indeed apply to persons subject to forms of persecution other than criminal proceedings (prosecution), whereas a request for extradition can be made only in respect of a criminal investigation or the enforcement of a criminal judgment, though examination of a request for extradition in the light of Article 3(2) of the European Convention on Extradition does allow a judgment on the possibility of persecution other than in the sense of criminal proceedings. [Emphasis added.]

[93] The Swiss Federal Court has taken the same view. In a decision noted in (1993), 5 *Int'l J. Refugee L.* 271, the court is reported as saying that “art. 3 of the 1957 European Convention on Extradition stipulates not only non-extradition for political offences, but also for reasons concerning the personal situation of the individual to be extradited in the country of origin. ... Article 3(2) of the European Convention on Extradition is the concrete expression of the refugee law principle of

non-refoulement in the context of extradition law. Both provisions protect persons who are in danger of persecution or punishment for race, religion, nationality or their political opinion” (p. 272).

[94] It is true that there is English and Australian authority for the view that the protection afforded by the comparable provisions in those jurisdictions is limited to protection against prejudice in the trial or punishment of the person sought: see, e.g., Clive Nicholls, Clare Montgomery and Julian B. Knowles, *The Law of Extradition and Mutual Assistance* (2nd 2007), at § 5.44 - 5.53; *Hilali v. Central Court of Criminal Proceedings No 5 of the National Court, Madrid*, [2006] EWHC 1239 (Admin), [2006] 4 All E.R. 435 (Q.B., Div. Ct.); Aughterson, at § 111-115; *Republic of Croatia v. Snedden*, [2010] HCA 14, 265 A.L.R. 621. However, this approach reflects significant differences in drafting between those provisions, on one hand, and the Extradition Convention and s. 44(1)(b) on the other.

[95] The English provisions focus more specifically on discrimination in the context of the trial and punishment than do the Extradition Convention or s. 44(1)(b). After addressing in s. 13(a) of the *Extradition Act 2003* (U.K.), c. 41, extradition sought for a discriminatory purpose, s. 13(b) is directed to situations in which the person sought, if extradited, “might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, [etc.]”. The Australian provision, s. 7(c) of the *Extradition Act 1988*, No. 4 of 1988, similarly makes an explicit link between discrimination and prejudice at trial or in relation to

punishment: “... the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion [etc.]”.

[96] Given the text and purpose of s. 44(1)(b) and the interpretation which has been given to the Extradition Convention on which it is based, I would read the closing words of s. 44(1)(b) broadly as protecting a refugee against *refoulement* which risks prejudice to him or her on the listed grounds in the requesting state whether or not the prejudice is strictly linked to prosecution or punishment.

(ii) Refugee Status and Invoking the Protection

[97] This appeal does not call for an exhaustive interpretation of s. 44(1)(b). The question here is the relationship between the conditions giving rise to refugee status and the risk described in s. 44(1)(b). In my view, a person who is a refugee and therefore entitled to *non-refoulement* protection under the Refugee Convention is entitled to invoke the protection under s. 44(1)(b). This approach is consistent with the text of the provision and achieves its legislative purpose.

[98] The Refugee Convention affords refugee protection (subject of course to exclusions) to persons having a “well-founded fear” of being persecuted on the enumerated grounds: Article 1A(2). In Canadian domestic law under s. 95 of the IRPA, a refugee claimant must show that he or she falls within the statutory definition of refugee, which, in the case of Convention refugees, closely tracks the language of the Refugee Convention: IRPA s. 96 of the IRPA. Jurisprudence from the Federal

Court of Appeal holds that the burden is on the claimant to show that he or she subjectively fears persecution and that this fear is objectively well-founded. The latter condition requires proof that there is a “reasonable chance”, a “reasonable” possibility, or a “serious possibility”: see, e.g., *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.), at p. 683; Lorne Waldman, *Immigration Law and Practice* (loose-leaf) vol. 1, at § 8.91-8.98. My objective is not to reach any firm conclusions about precisely how the test should be framed; the point is simply that under the Refugee Convention and under s. 96 of the IRPA, the refugee claimant has to establish a risk of persecution and does not have to prove on the balance of probabilities that the feared persecution will in fact occur.

[99] The next question is how this approach to refugee protection fits with the Refugee Convention’s protection against *refoulement*. On an initial reading of the text, the Refugee Convention’s *non-refoulement* provision, Article 33, does not seem to be exactly aligned with the Convention’s definition of refugee. While the Article 1 definition of refugee speaks of a “well-founded fear of being persecuted” on the prohibited grounds, Article 33 protects against expulsion of a refugee to a place “where his life or freedom would be threatened” on those grounds. The use of the words “would be” in Article 33 may suggest that a probability of persecution has to be shown, while the use of the word “threatened” suggests that, like the definition of refugee, this protection against *refoulement* is concerned with risk. The different words used in Articles 1 and 33 give rise to the question of whether all persons who meet the definition of refugee in Article 1 (and are not otherwise excluded from

refugee protection) are entitled to protection against *refoulement* under Article 33, or whether some different or higher standard is required to be entitled to that protection. There is a strong case to be made that the thresholds are in fact the same under both provisions. But in any event, the language of s. 44(1)(b) – “may be prejudiced” – demonstrates a clear legislative intent to refer to a risk of prejudice rather than to a more certain standard.

[100] Commentators are generally in agreement that the thresholds under Articles 1 and 33 of the Refugee Convention are the same – in other words, that all refugees under the Refugee Convention benefit from Article 33 *non-refoulement* protection notwithstanding the difference in wording between Article 1 and Article 33: see, e.g., Goodwin-Gill and McAdam, at p. 234; Wouters, at pp. 56-57; Hathaway, at pp. 304-5; Jari Pirjola, “Shadows in Paradise - Exploring *Non-Refoulement* as an Open Concept” (2007), 19 *Int’L J. Refugee L.* 639, at p. 645. The commentators’ position is supported by judicial decisions in the United Kingdom, Australia and New Zealand: see, e.g., *R. v. Secretary of State for the Home Department ex p. Sivakumaran*, [1988] 1 A.C. 958, at p. 1001; *M38/2002 v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2003] FCAFC 131, 199 A.L.R. 290, at para. 38; *Zaoui v. Attorney General (No. 2)*, [2005] 1 N.Z.L.R. 690 (C.A.), at para. 36.

[101] There are however, opinions to the contrary in the United States. For example, in *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S.

421 (1987), in the course of interpreting the U.S. domestic law tests for withholding of deportation and granting asylum as a refugee, a majority of the Supreme Court opined that Article 33.1 of the Refugee Convention does not extend *non-refoulement* protection to everyone who meets the definition of refugee: at p. 1218. This view, however, was not accepted by three members of the court. Given the fundamental human rights character of the Refugee Convention and the centrality to refugee law of the principle of *non-refoulement*, I, with respect, find the views of the commentators and the judicial opinions from other jurisdictions to which I have referred more persuasive on this point.

[102] The closing words of s. 44(1)(b) – “may be prejudiced” – seem concerned with risk of prejudice rather than with the need to demonstrate that it is more likely than not to occur. It is only sensible, in my view, to think that a person who meets the definition of refugee under s. 96 of the IRPA also meets the test for risk of prejudice set out in s. 44(1)(b). Moreover, this interpretation best gives effect to an important purpose of s. 44(1)(b), that is, to implement Canada’s *non-refoulement* obligations in the extradition setting. As Mr. Van Kessel put it during his testimony to the Parliamentary Committee considering the draft Bill, the purpose of this provision is to require the Minister to refuse surrender “if the refugee definition applies”. It also seems to me that a person’s position is prejudiced when he or she is extradited contrary to Canada’s *non-refoulement* obligations under international law. I conclude that a person entitled to refugee protection in Canada and therefore protection against *refoulement* is entitled to protection under s. 44(1)(b).

(iii) Burden of Proof

[103] There is one significant difference between the task facing the Minister on a surrender decision under the EA and the task facing the Refugee Protection Division (or the Refugee Appeal Division) under the IRPA at the time refugee status was granted. That is the factor of timing. As noted earlier, an individual's status as a refugee under the Refugee Convention has a temporal aspect; the status depends on the situation that exists at the time protection is sought. In the same way, the relevant time for assessing entitlement to *non-refoulement* protection is the time removal is sought. The same principle applies to s. 44(1)(b). The question of entitlement to protection against *refoulement* arises at the time surrender is being considered and must be assessed in light of the circumstances at that time. I therefore agree with the Minister when he decided that he should have regard to current conditions in considering whether to surrender the appellants, not to the conditions in Hungary some six years earlier when the appellants had sought and been granted refugee status.

[104] It is often contended, as it was during argument of this appeal, that the principle of *non-refoulement* has acquired the status of *jus cogens*. I do not find it necessary to decide this point, which is controversial among international law scholars: see, e.g., the review of the literature in Aoife Duffy, "Expulsion to Face Torture? *Non-refoulement* in International Law" (2008), 20 *Int'l J. Refugee L.* 373. Canada has bound itself to the principle of *non-refoulement* by express provision in the Refugee Convention. There is no inconsistency between Canadian domestic law

and Canada's international undertaking in this regard on the interpretation I would adopt of s. 44.

[105] The question then arises as to who bears the burden when a person with refugee status invokes s. 44(1)(b) to avoid surrender. The approach taken by the Minister in this case – to place the burden of proving on the balance of probabilities that persecution would in fact occur – in my view is not compatible with Canada's international undertakings with respect to *non-refoulement* or with the requirements of fundamental fairness to the refugee. As noted, *non-refoulement* is a cornerstone of refugee protection under the Refugee Convention and one from which states may not make reservations: see Article 42. Moreover, the EA underlines the central importance of this obligation in s. 44(1)(b) by making risk of persecution a mandatory ground of refusal of surrender which prevails over extradition treaty obligations. Canada has established elaborate *quasi-judicial* proceedings to make refugee determinations. In light of all this, my view is that where a person has been found, according to the processes established by Canadian law, to be a refugee and therefore to have at least a *prima facie* entitlement to protection against *refoulement*, that determination must be given appropriate weight by the Minister in exercising his duty to refuse extradition on the basis of risk of persecution.

[106] In my view, there should be no burden on a person who has refugee status to persuade the Minister that the conditions which led to the conferral of refugee protection have not changed. This approach is not only consistent with

Canada's domestic law in relation to cessation of refugee protection on the basis of changed circumstances, but with Canada's international undertakings with respect to *non-refoulement* of refugees. It also seems to me to be a more practical and fair approach than placing a burden on refugees to prove current conditions in the country from which they have been absent perhaps, as in this case, for an extended period.

[107] Change of circumstances in a refugee's country of origin may lead to cessation of refugee protection. This is contemplated by Article 1C(1) - (6) of the Refugee Convention. In short, protection ceases to apply to persons who, by virtue of a change in circumstances, no longer need it. Thus, under Article 1C(5) and (6), refugee protection ceases to apply when the circumstances which led to refugee status being recognized have ceased to exist. When these changes in circumstance occur between the time refugee status is claimed and adjudication of the claim, they may justify refusal of refugee status. If the changed circumstances occur after refugee status has been conferred, they may be invoked to justify revocation of that status on the basis that the person is no longer entitled to refugee protection.

[108] Apart from changed circumstances, the Refugee Convention also has exclusion clauses (Article 1F) which may be invoked after refugee status has been granted to demonstrate that the person was not, in fact, entitled to refugee protection. As noted earlier, the exclusions relate for example to war crimes, serious non-political crimes and acts contrary to the purposes and principles of the United Nations. As these exclusions relate to the entitlement of a person to refugee status, they will also

be relevant to determining entitlement to *non-refoulement* protection. For the purposes of *non-refoulement* protection under the Refugee Convention, it is co-extensive with the entitlement to refugee protection.

[109] It is widely accepted that the state bears the burden of proof that refugee status previously recognized should be terminated on the basis that the circumstances justifying refugee status no longer exist: Hathaway, at p. 920, note 20; Goodwin-Gill and McAdam, at p. 143; Joan Fitzpatrick and Rafael Bonoan, “La Cessation de le protection de réfugié” in Feller, Türk and Nicholson, 551, at pp. 596 and 603; United Nations High Commissioner for Refugees, Summary Conclusions – Exclusion from Refugee Status, May 3-4, 2001, para. 27 reproduced in Feller, Türk and Nicholson, 611. Thus, under the Refugee Convention, persons who have established that they meet the refugee definition should not bear the burden of proving that they continue to do so.

[110] This view is also consistent with Canadian domestic law. The cessation provisions of the Refugee Convention are reflected in the IRPA. Under the IRPA, the MCI may apply to the Refugee Protection Division for a determination that refugee protection has ceased by virtue of any of the circumstances set out in s. 108(1): s. 108(2). Section 108(1) lists a number of circumstances which virtually mirror those set out in Article 1C(1) - (6) of the Refugee Convention and includes, in s. 108(1)(e) that “the reasons for which the person sought refugee protection have ceased to exist”. A second basis of termination is provided for under s. 109. The Refugee

Protection Division, on application of the Minister, may vacate a decision to allow a claim for refugee protection if it finds that the decision was obtained as a result of misrepresentation or withholding material facts. Consistent with my earlier comments on the burden of proof, the IRPA makes it clear that it is up to the MCI to apply for the order that refugee protection has ceased and to advance the reasons in support of the application: s. 108(2) of the IRPA and *Refugee Protection Division Rules*, SOR/2002-228, rule 57(2)(f).

[111] Thus, the obligations under the Refugee Convention and the analogy to the cessation and revocation provisions under the IRPA suggest that, under s. 44(1)(b) of the EA, a refugee should not have to establish at the surrender phase that the conditions which lead to conferring refugee status, and thus to *non-refoulement* protection, continue to exist. This approach also seems to me to be both practical and fair. It gives some weight, but not binding force, to the earlier conclusion that refugee protection was justified. It also prevents placing a burden on a person sought that he or she is not well placed to discharge. Consider the present case. It does not to me seem either fair or practical to require the appellants to establish current conditions in Hungary, a country from which they have been absent for six years. Both the Minister, through consultation with the MCI, and the requesting state are much better placed to come forward with evidence of changed conditions than is the refugee whose extradition is sought.

[112] In my view, when the Minister acting under the EA is in effect determining that refugee protection (and thus *non-refoulement* protection under the Refugee Convention) of a person sought is excluded or is no longer required by virtue of a change of circumstances in the requesting country, he must be satisfied on the balance of probabilities that the person sought is no longer entitled to refugee status in Canada.

[113] Nothing I have said affects the burden on a person who has not been granted refugee status who relies on mandatory grounds of refusal of surrender under s. 44.

(d) *Summary of Conclusions*

[114] I will summarize my conclusions about how s. 44(1)(b) should be applied when the person sought has refugee status in Canada and the requesting state is the country from which refugee protection was accorded.

1. Section 44(1)(b) must be considered whenever the Minister's surrender decision concerns a person with refugee status in Canada and the requesting state is the one from which the refugee has been granted protection.

2. Refusal of surrender is mandatory if the Minister is satisfied that the conditions which lead to conferral of refugee status still exist and it is not shown that the person sought was or has become ineligible for refugee status. In short, a person's position may be prejudiced within the meaning of s. 44(1)(b) if surrendered in violation of Canada's *non-refoulement* obligations under the Refugee Convention.

3. The relevant time for considering the person's ongoing entitlement to refugee protection and therefore protection against *refoulement* and any change of conditions in the requesting state for the purposes of s. 44(1)(b) is the time at which surrender is sought.

4. The refugee status of the person sought establishes, absent proof on the balance of probabilities to the contrary, that his or her position will be prejudiced on a prohibited ground under s. 44(1)(b) if surrendered. The refugee does not have the burden of showing that the circumstances giving rise to conferral of refugee status continue to exist in the requesting state or that he or she otherwise remains entitled to refugee protection.

5. The Minister must consult with the MCI concerning current conditions in the requesting state in considering whether the person sought is no longer entitled to refugee protection on the basis of changed circumstances.

6. A duty of fairness applies to the Minister's consideration of the issue under s. 44(1)(b) which includes providing the refugee with the case to meet,

providing a reasonable opportunity to challenge that case as well as a reasonable opportunity to present his or her own case.

(3) The Minister's Decision

[115] I return to the Minister's decisions with respect to the appellants. As is apparent from the preceding discussion, my view is that the Minister's consideration of the appellants' case was fundamentally flawed. He failed to address s. 44(1)(b) which is the most relevant provision of the EA in relation to their surrender, he imposed a burden on them to show continuing risk of persecution and he applied a wrong and more onerous test than that prescribed by s. 44(1)(b). In short, the decision was based on incorrect legal principles and was unreasonable. I should add that the appellants did not place before the Minister the role that s. 44(1)(b) ought to play in his determination and the provision was referred to only in passing in the submissions in this Court.

[116] The respondent briefly submits that the appellants are disentitled to *non-refoulement* protection by virtue of the serious crime exception. However, in my view, this question was never more than a peripheral issue in this case and the Minister did not base his decision on it.

[117] I should first set out the legal parameters of the serious crime exception to *non-refoulement* protection. Article 1E and F of the Refugee Convention set out exclusions from refugee protection in relation to those who either do not need or are

seen as not deserving it: Martin Jones and Sasha Baglay, *Refugee Law* (2007), at p. 146. Section 98 of the IRPA simply incorporates these exclusions by reference. Article 1E excludes persons who are recognised by the country in which they have taken residence as having rights and obligations attaching to nationality in that country. Article 1F excludes persons with respect to whom there are serious reasons for considering that they have (a) committed a crime against peace, a war crime, or a crime against humanity; (b) a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee or (c) has been guilty of acts contrary to the purposes and principles of the United Nations.

[118] In this case, the Minister referred to the exclusion in (b), which I will refer to as the “serious crime” exception, in reaching his decision to extradite the appellants. In his January 30, 2008 letter addressing Mr. Nemeth’s submissions as to why he ought not to be surrendered, the Minister noted the exception to *non-refoulement* dealing with serious non-political offences and that in the immigration context, such offences had been defined to be offences punishable by imprisonment of 10 years or more. He continued: “While it is not clear that refugee law is applicable in the extradition context, I note that the offence of fraud is punishable under Canadian law by a maximum term of imprisonment of more than ten years” (A.R., vol. 1, at p. 12).

[119] These comments make it clear, in my view, that the Minister did not decide whether the serious crime exception applied to the appellants. His decision

leaves three critical issues unresolved: how the serious crime exception relates to extradition proceedings, what constitutes a “serious non-political crime” for these purposes and whether the appellants were accused of committing such a crime.

[120] First, the Minister noted how serious crime was defined in the “immigration context”. I take this to be a reference to s. 105 of the IRPA. As I mentioned earlier, that provision states that if a person is ordered surrendered for an offence punishable by 10 years or more, the order of surrender is deemed to be a rejection of a claim for refugee protection by virtue of the serious crimes exception in Article 1F(b) of the Refugee Convention. Thus, it seems that Parliament, in the IRPA, has decided two issues about how the Refugee Convention should be implemented in Canada. The first is that a crime punishable by at least 10 years imprisonment constitutes a “serious non-political crime” within the meaning of Article 1F. (I note that this approach is also consistent with the inadmissibility rules for serious criminality provided for in s. 36 of the IRPA). The second is that the test for committal on extradition is sufficient to meet the “serious reasons for considering” test set out in Article 1F(b). In his decision, however, the Minister simply noted that “it is not clear” that approach to the definition of serious crime under the IRPA applies in the extradition context; I do not take this as a decision that it does.

[121] Moreover, while the Minister stated that the offence of fraud is punishable by imprisonment of 10 or more years, he did not decide that the appellants were charged with an offence punishable by such a sentence. Under Canadian law,

the possible punishments for fraud depend on the value of the subject matter of the offence. Where it exceeds \$5000, the maximum penalty is 14 years imprisonment; where it does not exceed \$5000, the maximum term of imprisonment is 2 years: *Criminal Code*, s. 380(1)(a) and (b). Thus, even assuming the IRPA's approach to the definition of a serious non-political crime applies under the Refugee Convention, whether the crime alleged against the appellants in Hungary is such a crime depends on the value of the subject matter of the offence.

[122] The Minister noted in his January 30 letter that the appellants were alleged to have sold the right of lease for premises in Budapest for approximately C\$2700 when they in fact had no right to do so (A.R., vol. 1, at p. 10). Neither the case summary nor the supplementary case summary provided to the Minister suggested that the alleged offence involved deprivation of over \$5000 and there is no response in the record or in the Minister's January 30 letter challenging the appellants' submissions to the Minister that the subject matter of the fraud was less than \$5000. It is true, as pointed out in a footnote in the respondent's factum and as referred to briefly in oral argument that there is evidence in the record that the money paid to the appellants was a deposit in relation to a transaction for a total of just under \$10,000. However, there is no evidence in the record that the actual deprivation exceeded the roughly \$2700 (or in some places in the record \$2500) that was allegedly given to the appellants.

[123] There may be a nice legal question about the value of the subject matter in this case. However, my view is that the Minister did not base his decision on the serious crime exception. As I noted, the Minister did not resolve either of the questions that he would have had to resolve in order to base his decision on this point. Nor do I think that, in the circumstances of this case, we should give effect to the Minister's submission that this exclusion applies. As the Court noted in *Lake*, at para. 25, "the Minister must respond to any submissions against surrender made by the individual and explain why he disagrees". Here, he did not do so with respect to this issue. The appellants had submitted to him, in effect, that they did not fall within the serious crime exception because the value of the subject matter did not exceed \$5000. The Minister's decision does not indicate that he disagreed with that submission or explain why he thought it was incorrect. While it will be open to the Minister to consider on the reconsideration of this matter whether the appellants are excluded from refugee protection, and therefore also from *non-refoulement* protection, by virtue of the serious crime exception, it is now too late to resolve this appeal adversely to the appellants on that basis.

V. Conclusion

[124] I would allow the appeal, set aside the judgment of the Court of Appeal and the Minister's surrender decisions and remit the matter to the Minister for reconsideration according to law. The appellants did not request costs and I would order none.

Appeal allowed.

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