

Case Comment: The Value of Assurances in Extradition Proceedings

September 27, 2017

By: James Hendry

India recently requested the extradition of Surjit Singh Badesha and Makit Kaur Sidhu who are Canadian citizens suspected of having conspired to murder Jaswinder Kaur Sidhu, the niece of Badesha and daughter of Sidhu, in an "honour killing".[1] The case reached the Supreme Court of Canada which released its decision on September 8, 2017. The central issue for the Court was whether the quality and role of assurances given by the Indian government justified the Minister of Justice's finding that neither accused faced a substantial risk of torture or other mistreatment while in custody when surrendered to India for trial. That kind of risk would have been contrary to s. 7 of the Charter and s. 44(1(a) of the *Extradition Act*[2], which precludes extradition where the surrender would be "otherwise unjust or oppressive" in the circumstances.[3]

Facts

Jaswinder had married a husband of lower socio-economic class than hers (according to Indian society) without the knowledge of her family a year before she was killed. The two were travelling together by scooter in the Punjab when they were attacked on June 8, 2000 by a group of armed men. She was found dead the next day after having been taken by car by the men to a nearby village. Her throat had been cut. The Indian government alleged that Badesha and Sidhu strongly opposed the marriage, took steps to end it and when they failed, they arranged for the attack in India. Badesha and

Sidhu were charged along with 11 others who were tried in India. Of the 11, 7 were convicted and 4 acquitted, with another 4 acquitted on appeal. By diplomatic note, India sought the extradition of Badesha and Sidhu under *Indian Penal Code*: *Extradition Treaty between the Government of Canada and the Government of India*[4] to stand trial in India.

The extradition judge found that there was substantial circumstantial evidence supporting the request, including evidence that Badesha and Sidhu believed the marriage brought dishonour to their family, death threats, telephone calls between Badesha's phone and some of the perpetrators in India around the time of the attack. He found that a properly instructed jury could find guilt on this evidence on conspiracy to commit murder and murder. The Minister of Justice issued an Authority to Proceed with the extradition on the corresponding Canadian charges of conspiracy, attempt and murder.

Concerns of Badesha and Sidhu about extradition to India[5]

Badesha and Sidhu expressed a number of concerns about their possible treatment in India that they said militated against their extradition.

In answer to Badesha and Sidhus' concerns about the death penalty, the Minister made their surrender contingent on receiving an assurance that India would not execute them. He was satisfied by Indian law that did not allow the death penalty where the surrendering country did not allow it that this was not a substantial risk.

The Minister was satisfied that the concerns of Badesha and Sidhu about receiving a fair trial were met by the absence of evidence that there would be a problem in their particular cases, but made the surrender order conditional on allowing Canadian officials to attend their hearings. India's reply was that their hearings would be public.

Concerning prison conditions, with respect to health and the possibility of torture, information about the condition of Indian prisons prompted the Minister to request an assurance that Badesha and Sidhu would get required medical treatment and that India would make every reasonable effort to ensure their safety in custody and ensure full consular access. The Minister was satisfied that Indian law required prison officials to take reasonable care of the health of prisoners. The availability of appropriate medical treatment was checked by the Canadian Department of Foreign Affairs. India responded to the request for assurance by saying that it would make every reasonable effort to meet the safety and medical needs of Badesha and Sidhu. While India did not respond with the request for an assurance of full consular access, it did agree to provide access to the extent required by the *Vienna Convention on Consular Relations*[6].

The Minister was content to rely on India's desire to respect relations with Canada and its standing in the international community to respect the assurances and to respond to the use of diplomatic tools to enforce them, such as diplomatic protests and threats to terminate the extradition treaty.

The Minister found there was abundant evidence to support the allegations against Badesha and Sidhu, that there were adequate means for them to lead evidence in defence in India, that the

extradition was a reasonable limit on their s. 6(1) Charter right to remain in Canada, that most evidence was in India, that India had a high stake in prosecuting honour killings, that the effect of the crime was most acutely felt in India and that there was no breach of s. 7 of the Charter nor was the surrender unjust and oppressive for that or any other reason.

The evidence of prison conditions

Badesha and Sidhu presented evidence based on reports of torture and mistreatment in India's prisons from the Asian Centre for Human Rights, The Times of India, Human Rights Watch and the 2013 report on human rights practices in India by the United States Department of State that drew on similar findings in other human rights reports.[7]

This information had earlier led the BCCA to find that India's human rights record was disturbing and that the assurances that this would not be the case with Badesha and Sidhu did not meaningfully address the risks they were intended to mitigate. Further, the BCCA was concerned that there was no indication that the Minister considered the steps India was planning to take to mitigate the risk of violence that these reports revealed, despite the existence of protections in Indian law mentioned in India's reply to the request for assurances.[8] The Minister had, in the view of the majority of the BCCA, failed to consider India's capacity to comply with its assurances and had thus acted unreasonably.

The SCC's reasoning

The Court noted that extradition was at the extreme end of the judicial remit in judicial review and deferred heavily to the Minister's superior expertise in international relations and foreign affairs.[9]

The question the Minister had to answer – whether he could conclude there was no substantial risk of torture or mistreatment – was a fact-driven inquiry.[10] The Minister had to consider the human rights record of the receiving state among other factors. In the extradition context, the Minister could consider evidence of the general state of human rights in the state, including reports from reputable government and non-governmental organizations. The risk to be assessed by the Minister had to be the personal risk faced by the individual, but general evidence of pervasive and systemic human rights abuses in a receiving state can support a finding that a person to be surrendered might face a substantial risk of torture or mistreatment.[11]

Another consideration required to satisfy the principles of fundamental justice is whether the Minister should ask for assurances to safeguard against potential substantial risk of torture or mistreatment. The reviewing court must assess whether these assurances eliminated the substantial risk. The Court made it clear that diplomatic assurances need not reduce any possibility of torture or mistreatment, but only needs to supply a reasonable basis for a finding there is no substantial risk.[12]

This consideration places the focus on the reliability of the diplomatic assurances in the circumstances. This is a contextual inquiry. For example, it is easier to accept an assurance against the death penalty because it can be monitored, than to accept an assurance against torture as satisfying the duty to ensure there is no substantial risk, when the receiving state has previously

tortured or allowed torture on its territory and because torture is usually carried out surreptitiously. In assessing the value of the assurance, the Minister may consider the human rights record of the assuring state, its record in complying with assurances, its capacity to fulfil the assurances, eg. in circumstances when the state has had trouble controlling its security forces in the past. But it will be rare that a state can never properly take another's assurances.[13]Also, a request for assurances does not mean that the Minister perceived a substantial risk: it might mean that the Minister was being cautious. The European Court of Human Rights provided a non-exhaustive list of contextual factors for assessing the reliability of assurances in *Othman*:

1. Whether the assurances are specific or are general and vague;

2. Who has given the assurances and whether that person can bind the receiving state;

3. If the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;

4. Whether the assurances concern treatment which is legal or illegal in the receiving state;

5. The length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;

6. Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the individual's lawyers;

7. Whether there is an effective system of protection against torture in the receiving state, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs) and whether it is willing to investigate allegations of torture and to punish those responsible; and

8. Whether the individual has previously been ill-treated in the receiving state.[14]

The Minister must give the question of the value of the assurances considerable thought. Here, the US Department of State reported severe conditions in Indian prisons. The Minister had reacted by seeking assurances that both surrendered persons would get proper medical care and that India would make every reasonable effort to ensure their safety. The Minister was satisfied with the Indian response. Though the Minister got less than the fullest consular access he asked for, he was assured by the promise of India's compliance with the convention on access. It was not up to the reviewing court to re-assess the factors. It was sufficient that the Minister's decision fell within a range of reasonable outcomes. The Court held it did.

The Court enumerated the considerations. In this context, Indian prisons had sufficient medical capacity as confirmed by the Canadian Department of Foreign Affairs, India was a party to the *International Covenant on Civil and Political Rights*[15], had made efforts to ratify the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the Indian judiciary

had attempted to address violence in the prisons, India would want to maintain a positive diplomatic relationship with Canada, tools such as diplomatic notes and threats of termination of the extradition treaty with India could enforce the assurances, and India would not want to damage its place in the international community by failing to comply with assurances. There was no history of India failing to comply with assurances, nor evidence of corruption in the investigation of Badesha and Sidhu or mistreatment of their co-accused. There was no evidence that they belonged to a group that would be persecuted in this kind of a case. There was no evidence of personal danger. Thus, the Minister relied on factors that would meaningfully respond to the concerns they were intended to address.

The Court did not dispute the observation that consular monitoring was not a panacea because consular officials could not see into all of the places where torture might take place. But the question was not the elimination of the risk, but whether the Minister could properly conclude that in all the circumstances the surrender would not result in a substantial risk of torture or mistreatment. Some cases might require third party or more sophisticated monitoring to meet the requirement of reasonableness. However, here India's relationship with Canada and other treaty partners, the lack of a history of failure to comply with assurances, and absence of evidence that Badesha and Sidhu belonged to a persecuted group all supported the conclusion that the Minister could be assured by consular monitoring.

The Court concluded by saying that the offence here was so horrific that it engaged the interests of India to prosecute it on its own territory.

Conclusion

The decision of the Court in this case shows a continuing strong deference to decision-makers, in this case a Minister of Justice whose superior expertise in Canada's international relations and foreign affairs and proximity to the political nature of the decision placed him in the best position for weighing factors for and against extradition. Presumably this is based on a strong acceptance of Cabinet solidarity because the Minster of Foreign Affairs acted as a fact-confirmer in this case rather than the Minister in charge of international relations. The nature of the alleged offences on might suggest that India was the right place for it to be tried as a systemic concern, but the alleged crimes might also be the kind of offences to be dealt with in a secular state with less tolerance for such barbarity.

Post-script

Sidhu and Badesha were placed on a plane to India after the Court made its decision.[16] However, by the time they reached Toronto on September 21, 2017 on their way to India, the British Columbia Court of Appeal had ordered a further judicial review that will be heard on an expedited basis.[17]

Please cite this article as: James Hendry, "The Value of Assurances in Extradition Proceedings" (2017) 1 PKI Global Just J 11.

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James Hendry is the Editor-in-Chief of the PKI Global Justice Journal. He served as counsel to the Canadian Human Rights Commission before joining the Department of Justice in 1989. He was General Counsel at the DOJ until retirement in 2011, working in civil Charter social policy review, specializing in equality rights, human rights legislation, and human rights act design. He has also published extensively on Canadian and comparative constitutional issues and has lectured in Canada, Spain, South Africa, the United States and Hong Kong.

References

1. *India v. Badesha*, 2017 SCC 44. See the post-script for developments immediately following the decision.
2. Para. 40.
3. Para. 53. The Minister might refuse surrender for reasons other than a Charter breach, where it would be otherwise be unjust or oppressive.
4. Para. 11 see Can. T.S. 1987 No. 14.
5. Para. 31 the BCCA noted that the response of India to the request for assurances was the same for both parties.
6. Para. 18 see Can. T.S. 1974 No. 25.
7. Para. 31 referring to *India v. Badesha*, 2016 BCCA 88, paras. 22 to 30.
8. Para. 32.
9. Para. 39.
10. Para. 44 referring to *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3.
11. Para. 45.
12. Para. 46.
13. Para. 50 citing *Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09, ECHR 2012-I, paras. 188-189.
14. Para. 51 quoting *Othman*, para. 189.
15. Art. 7 prohibits torture and cruel, inhuman or degrading treatment.
16. See http://www.ctvnews.ca/canada/extradition-halted-at-last-minute-for-pair-accused-in-honour-killing-in-india-1.3601471 (CTV and Canadian Press).
17. *India v. Sidhu*, 2017 BCCA 333 (September 21, 2017). It is not clear from the reasons what the issues are.