

CASE LAW UPDATE

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Nemeth v. Canada (Justice)

2010 SCC 56, Released 25 November 2010

Immigration and Refugee Law – Extradition – Principle of *non-refoulement*

This appeal involved the interplay between the right of refugees not to be returned to a country where they will face prosecution (the principle of *non-refoulement*) and Canada's obligations with respect to extradition.

The appellants, who are of Roma ethnic origin, arrived in Canada from Hungary in 2001, and were given refugee status due to a well-founded fear of persecution. Two years later, Hungary issued an international arrest warrant in respect of a fraud charge against the appellants, for an allegedly fraudulent lease for \$2,700 CAD. The Minister of Justice ordered the appellants' extradition to Hungary.

The principle of *non-refoulement* prohibits the direct or indirect removal of refugees to a territory where they run the risk of being subjected to human rights violations. Section 115 of the *Immigration and Refugee Protection Act* ("IRPA") incorporates this principle into statutory law. However, the Court found that the term "removed" in s. 115 of the IRPA has a specialized meaning and does not include removal by extradition. Rather, *non-refoulement* in the extradition context is dealt with by s. 44 of the *Extradition Act* ("EA").

Pursuant to s. 44 of the EA, the Minister must refuse to surrender an individual for extradition if the surrender would be unjust or oppressive having regard to all the relevant circumstances, or if the request for extradition is made for the purpose of prosecuting or punishing the person by reason of certain grounds such as race and religion, or if "the person's position may be prejudiced for any of those reasons". The Court held that the prejudice referred to in s. 44 is not limited to prejudice in the prosecution or punishment of the person, and that s. 44 protects a refugee against *refoulement* that risks prejudice on the listed grounds, whether or not the prejudice is strictly linked to prosecution or punishment.

A person who has obtained refugee status meets the test for prejudice, and the Minister must refuse to surrender that person for extradition unless it is shown that the person has become ineligible for refugee status. In determining this issue, the refugee does not have the burden of

showing that the circumstances giving rise to his refugee status continue to exist. The Minister must consult with the Minister of Citizenship and Immigration concerning current conditions in the requesting state, and owes a duty of fairness.

The Court held that the Minister's decision in this case was based on incorrect legal principles and was unreasonable. Among other things, the Minister had imposed a burden on the appellants to show a continuing risk of persecution, and failed to respond to the appellants' submission to him that they did not fall within the "serious crime exception" to refugee protection. As a result, the Court remitted the matter to the Minister for reconsideration in accordance with its reasons.

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