# COURT OF APPEAL FOR ONTARIO

CITATION: United States v. Yu, 2012 ONCA 876
DATE: 20121213
DOCKET: C54877

Doherty, Simmons and Hoy JJ.A.

IN THE MATTER OF an application for judicial review pursuant to s. 57 of the Extradition Act, S.C. 1999, c. 18

BETWEEN

The Minister of Justice and the Attorney General of Canada
and the United States of America

Respondents

and

Kang Ming Yu

Applicant

John Norris, for the applicant

Heather J. Graham, for the respondent

Heard and released orally: December 7, 2012

On application for judicial review of the surrender order of the Minister of Justice, dated December 14, 2011.

## ENDORSEMENT

[1] This is an application for judicial review of the decision of the Minister ordering the applicant to surrender to the United States for prosecution on drug charges pursuant to the terms of the relevant treaty between Canada and the United States. The Canadian prosecutorial authority exercised its discretion not

to prosecute the applicant on those charges. It did, however, prosecute the applicant on different substantive charges in Canada arising out of the same investigation. The applicant pled guilty to those charges and will be surrendered for extradition once released on those charges.

[2] The applicant argues that the Minister: (1) erred in concluding that in the circumstances extradition did not unjustifiably violate the applicant's s. 6(1) *Charter* rights; (2) denied the applicant procedural fairness in refusing to obtain and disclose the prosecutor's *Cotroni*[1] assessment; and (3) erred in concluding that extradition would not constitute an abuse of process and thereby violate the applicant's s. 7 *Charter* rights and be unjust or oppressive under s. 44(1)(a) of the *Extradition Act* (the "Act").

[3] The Minister's surrender decision under the Act is to be afforded substantial deference and should not be interfered with unless it is unreasonable. This court must ask whether the Minister considered the relevant factors and whether his decision falls within range of reasonable outcomes.

[4] We are not persuaded that the Minister's conclusion that extradition does not unjustifiably violate the applicant's s. 6(1) *Charter* rights is unreasonable. The Minister's reasons demonstrate that he considered the relevant factors in conducting his *Cotroni* analysis and reached a defensible conclusion.

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[1] *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469.

[5] In oral argument, counsel for the applicant advanced three submissions in support of the contention that the Minister's *Cotroni* analysis under s. 6(1) was flawed.

[6] First, he argues that the Minister fell into the same error identified in para. 78 of *United States v. Leonard*, 2012 ONCA 622, namely:

> … by positing the choice in these cases as being between surrender and allowing accused drug traffickers to walk free, the Minister has misstated and distorted the true consequences of refusing surrender

[7] While the Minister's reasons are similar in some respects to those in *Leonard*, he did not make the error identified in para. 78 of *Leonard*. The absence of Canadian charges with respect to the conduct was only one of the factors in his analysis. He wrote:

> In sum the United States' significant interest in prosecuting this case, the location of key evidence in the United States, and the absence of criminal proceedings against Mr. Yu in Canada strongly militate in favour of surrender. I am, therefore, satisfied that surrendering Mr. Yu to stand trial in the United States would not unjustifiably violate his s. 6(1) *Charter* rights.

[8] Counsel's second submission targets the Minister's observation that "Canada does not have jurisdiction to prosecute Mr. Yu on the U.S. offence of conspiracy to import ketamine into the United States". We agree with counsel that this observation, while technically correct, ignores the fact that it was open to Canada to prosecute the substance of the conduct through a charge of exporting.

We are satisfied, however, that this observation played no role in the Minister's decision to surrender. On these facts, the United States had the clearly stronger interest in prosecuting the conduct, however named.

[9] In his third submission, counsel argues that the Minister failed to consider that extradition to the United States would deny the applicant the ability to invoke the *Charter* to challenge Canadian gathered evidence (for example, wiretaps). Assuming this argument might have force in the appropriate circumstances, there is nothing in this record to suggest that the Canadian gathered evidence is constitutionally suspect or that the inability to raise *Charter* arguments would actually disadvantage the applicant.

[10] Nor are we persuaded that the Minister denied the applicant procedural fairness in refusing to disclose the prosecutor's *Cotroni* analysis. This court, in several cases, declined to order the disclosure of the prosecutor's *Cotroni* analysis. We see no reason to come to a different conclusion in this case, particularly as it appears that the Minister did not even look at the prosecutor's *Cotroni* analysis.

[11] With respect to the applicant's final, abuse of process argument, even accepting that the Minister described the abuse of process doctrine too narrowly, we are not persuaded that an abuse of process is made out. The test applied is whether surrender would "shock the conscience" or whether the applicant faces

“a situation that is simply unacceptable”. While the Canadian and United States prosecutions arose out of the same investigation, they are in respect of different offences, committed in different countries. The public would, in our view, consider both countries as having a legitimate interest in the prosecution of the applicant.

[12] This application is accordingly dismissed.

“Doherty J.A.”
“Janet Simmons J.A.”
“Alexandra Hoy J.A.”