

CANADA / JUDGMENT

Germany v. Duong

2020 BCCA 77

COURT

British Columbia Court of Appeal

DECIDED

5 March 2020

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2020 BCCA 77 Germany v. Duong

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Germany v. Duong,

2020 BCCA 77

Date: 20200305

Docket: CA45776

Between:

The Attorney General of Canada on behalf

of the Federal Republic of Germany

Respondent

(Requesting State)

And

Dong Tu Duong

Appellant

(Person Sought)

- and -

Between:

Dong Tu Duong

Applicant

And

Canada (Minister of Justice)

Respondent

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Bennett

On appeal from: An order of committal of the Supreme Court of British Columbia,
dated December 11, 2018 (Germany v. Duong, 2018 BCSC 2203,
Vancouver Docket 27216)

- and -

On judicial review from: An order of surrender (Extradition Act, S.C. 1999, c. 18)
issued by Canada (Minister of Justice), dated June 10, 2019.

Counsel for the Appellant:

G. Botting

Counsel for the Respondent:

D.B. Majzub

K.M. Tanner

Place and Date of Hearing:

Vancouver, British Columbia

December 13, 2019

Place and Date of Judgment:

Vancouver, British Columbia

March 5, 2020

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Groberman

Summary:

Mr. Duong appeals his committal for extradition to Germany to serve a sentence for drug-related offences on the basis that the extradition judge erred in (1) concluding the record of the case had been properly certified; (2) concluding that he had been properly summoned by Germany to appear in Court; (3) applying the incorrect test for committal and (4) refusing to admit evidence in relation to that issue. He also applies for judicial review of the Minister's surrender order. Held: Appeal and application for judicial review dismissed. The record of the case was properly certified. There was sufficient evidence to support the conclusion that Mr. Duong was properly summoned by Germany to appear in Court. The extradition judge did not err in applying the committal test under s. 29(1)(b) of the Extradition Act, and the evidence tendered was not admissible. The Minister's decision to surrender Mr. Duong is reasonable and is entitled to deference.

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] Dong Tu Duong, a Canadian citizen, was arrested in Germany on July 26, 2012, and charged with cultivation of marihuana offences. He remained in custody and attended 12 days of his trial, when, on August 19, 2013, he was released by the Regional Court Oldenburg. His passport was returned to him and he left Germany. As a result, he did not appear for his trial the next day. He returned to Canada, and his trial proceeded, in his absence, to conviction and sentence. Germany now seeks his extradition to serve the sentence.
- [2] On December 11, 2018, Mr. Duong was committed for extradition, and on June 10, 2019, the Minister of Justice ordered his unconditional surrender to Germany. He appeals the committal order and seeks judicial review of the surrender order.
- [3] For the reasons that follow, I would dismiss the appeal and the application for judicial review.

Background

- [4] The following is a brief summary of the evidence against Mr. Duong found in the Record of the Case ("ROC") and the Supplemental Record of the Case ("SROC").
- [5] Germany says that from early 2011 to September 2011, Mr. Duong organized and participated in the "Aschhausen Operation", which cultivated marihuana in a tree nursery in Aschhausen. He is said to have recruited four of his co-defendants to the operation, and received EUR 80,000 from the sale of the marihuana.
- [6] A second operation was started in Klobuky, Czech Republic in 2011, under the organization of Mr. Duong, despite the fact that he was now back in Canada. He returned to Europe in April 2012, and is said to have supervised the Klobuky operation. He travelled to Germany on July 26, 2012, and was arrested.

- [7] Mr. Duong attended 12 days of trial while he was in custody. Upon his release, on August 19, 2013, he left Germany without consulting his lawyer, and made his way back to Canada. German law permits a trial to continue when the accused person absents himself, "if he has already been examined on the indictment and the court does not consider his further presence necessary". The trial continued in his absence, with 31 additional trial appearances. On September 3, 2014, the Regional Court Oldenburg convicted Mr. Duong of the offences charged and sentenced him to nine years in custody. His lawyer was apparently present throughout the trial.
- [8] Mr. Duong's lawyer initiated an appeal on his behalf, but it was dismissed by the Federal Supreme Court on August 4, 2015.
- [9] Mr. Duong is now sought by Germany for the enforcement of the sentence imposed. The Authority to Proceed was issued on January 19, 2017.
- [10] The SROC, of which proper certification was not challenged, describes Mr. Duong's absence from the trial as follows:

Duong has therefore participated in the first 12 hearing dates (22 April 2013 to 13 Aug 2013) of an overall 43 hearing dates and had, after the reading of the indictment at the beginning of the court proceedings, the opportunity to make statements with respect to the accusation against him either personally or through his defence counsel.

To all further hearing dates starting with 20 August 2013, Duong failed to appear without excuse but has however been represented through a solicitor at each individual hearing date as the above table exhibits.

In case that - as has happened here - an accused unlawfully fails to take part in the (further) court proceedings, § 231 Code of Criminal Procedure provides that the proceedings may be continued without this accused. The wording of § 231 Code of Criminal Procedure is:

§ 231 Defendant's Duty to be Present

- (1) A defendant who has appeared may not absent himself from the hearing. The presiding judge may take appropriate measures to prevent the defendant from absenting himself; he may also have the defendant kept in custody during an interruption of the hearing.
- (2) If the defendant nevertheless absents himself, or fails to appear when an interrupted main hearing is continued, the main hearing may be continued to the end in his absence if he has already been examined on the indictment and the court does not consider his further presence necessary.

The court proceedings have therefore been conducted lawfully despite the temporary absence of Duong. Against the judgement, Duong had the right to appeal ("Revision") before the Federal High Court of Justice as a remedy. He made use of this and filed an appeal. The Federal High Court of Justice has, by decision from 04 Aug 2015 which has already been forwarded to you, dismissed the appeal as unfounded and thereby confirmed the judgement against Duong.

The Committal Hearing

- [11] There were two issues raised at the committal hearing. The first was whether Mr. Duong was entitled to the higher protection offered by the combined effect of ss. 29(1)(a) and 29(5) of the Extradition Act, S.C. 1999, c. 18 [Act], to a person convicted without being present at their trial, or whether s. 29(1)(b), which applies to a convicted person, should be invoked. The request for extradition was based on s. 29(1)(b).
- [12] Mr. Duong testified on a voir dire regarding that issue. I will review his evidence in more detail below. The extradition judge refused to admit the evidence on the basis that it was irrelevant and unreliable, and concluded that s. 29(1)(b) applied.
- [13] The second issue was whether the ROC was properly certified in accordance with s. 33(3)(b) of the Act. The English translation reads that the German prosecutor confirmed that the documents were correct, as opposed to certify that the documents were correct.
- [14] The extradition judge concluded that the documents were properly certified, and that the use of the word confirm was a translation issue. She ordered Mr. Duong's committal into custody to await surrender to Germany. Her reasons are indexed at 2018 BCSC 2203.

The Surrender Order

- [15] Mr. Duong made submissions to the Minister regarding whether the evidence before the committal judge was properly certified, whether the proper test for committal was applied, the fairness of Mr. Duong's in absentia conviction, and his personal circumstances. Mr. Duong also requested that the Minister seek assurances from Germany that his conviction would be reviewed by a court of competent jurisdiction if he were surrendered.
- [16] The Minister declined to consider the issues of certification and committal, as these were matters to be argued in this Court on appeal. He also considered the fairness of the German proceedings, noting that the German authorities advised that Mr. Duong has the option to apply for a retrial by presenting new evidence, or he can make a complaint to the Federal Constitutional Court or file a complaint with the European Court of Human Rights. The Minister concluded that if surrendered to Germany, Mr. Duong will have opportunities to seek redress regarding his complaints about trial fairness.
- [17] The Minister summarized Mr. Duong's personal circumstances as follows:

- Mr. Duong grew up in Vietnam under difficult circumstances, particularly during the Vietnam war;
- Mr. Duong married in 1978 and in 1988, he and his wife, and two young daughters, left Vietnam for a refugee camp in Hong Kong hoping for a better life and an opportunity for his daughters to be educated;
- In 1991, the Duong family transferred to a transitional refugee camp in the Philippines before being accepted into Canada on October 10, 1991. The Duong family ultimately settled in Vancouver in February 1992 and have lived there ever since. Mr. Duong's son was born in Vancouver in 1992;
- While living in Canada Mr. Duong has worked as a janitor, landscaper, welder, window installer, carpenter and painter, and has also worked on fishing and crabbing boats;
- Mr. Duong and his wife separated in 1994, divorced later, and Mr. Duong has never remarried. Mr. Duong has continued to assist his former wife who suffers from a heart condition;
- Mr. Duong states that his health is declining and he suffers from chronic migraine headaches and a chronic cough that he has had since the Vietnam war. His eyesight is also declining due to a welding job explosion when he was in Vietnam; and
- His father passed away in February 2018 and his mother in Vietnam is currently in her late 90s. Mr. Duong notes that in Vietnamese tradition and culture, not being able to see your parents before they pass is considered "worse than sin: it is inhuman."

[18] The Minister concluded that these circumstances did not amount to the type of compelling and overriding factors that would justify non-compliance with Canada's international obligations.

[19] Finally, the Minister considered Mr. Duong's request for assurances. He concluded that such assurances were not necessary in light of the information received from the German authorities that Mr. Duong will be able to apply for a retrial, or file complaints with other courts. Requiring such assurances would, in his opinion, "unduly interfere with the ability of the German authorities and courts to proceed according to their law".

Committal appeal

[20] Mr. Duong raises four issues with respect to the committal order. He alleges the extradition judge erred by: i) refusing to admit his evidence tendered in relation to the issue of the proper section applied for committal; ii) applying the wrong committal section; iii) concluding that Mr. Duong had been "duly summoned" to appear in Court on August 20, 2013; and iv) concluding that the extradition documents were properly "certified" when they use the word "confirmed".

Standard of Review

[21] In *United States of America v. Gunn*, 2007 MBCA 21 (leave to appeal ref'd [2007] S.C.C.A. No. 108), the Manitoba Court of Appeal said the following regarding the standard of review and the jurisdiction of the Court on a committal appeal:

49 In summary, the appropriate standard of review with respect to an order of committal is derived from the wording of sec. 53 of the Act. A "reasonableness/cannot be supported by the evidence" test is applicable with respect to questions of fact. Nonetheless, deference is due to the extradition judge's findings and conclusions; an appellate court is not free to simply substitute its view of the facts for that of the committal judge. Under sec. 53(a)(ii), a correctness standard is applied to questions of law. But an appeal may nonetheless be dismissed even if there is a "wrong decision on a question of law" if "no substantial wrong or miscarriage of justice has occurred" pursuant to sec. 53(b)(ii).

[22] This Court applied those principles in *United States of America v. Costanzo*, 2009 BCCA 120.

i) The certification of the ROC

[23] I begin with this ground of appeal, because if Mr. Duong is successful, the committal for extradition falls. The argument is straightforward. The Act requires that the documents tendered to establish extradition must be certified as accurate by a judicial or prosecuting authority, as provided in s. 33(3):

Certification of record of the case

(3) A record of the case may not be admitted unless

(a) in the case of a person sought for the purpose of prosecution, a judicial or prosecuting authority of the extradition partner certifies that the evidence summarized or contained in the record of the case is available for trial and

(i) is sufficient under the law of the extradition partner to justify prosecution, or

(ii) was gathered according to the law of the extradition partner; or

(b) in the case of a person sought for the imposition or enforcement of a sentence, a judicial, prosecuting or correctional authority of the extradition partner certifies that the documents in the record of the case are accurate.

[24] Here, the prosecuting authority "confirmed" that the documents were correct in the ROC. In the SROC, the documents were "certified" to be correct. Mr. Duong submits that the ROC's lack of adherence to the language prescribed in the Act is fatal.

[25] In my view, the extradition judge did not err. Both the ROC and SROC were translated into English from German. We have before us the original German for the ROC only. The word "bestätige", in the original, was translated to "confirm". Suffice it to say, and consistent with s. 33(3) of the Act, the documents were identified as accurate by an authority with the

knowledge to do so. I agree with the extradition judge that the use of the word confirm instead of certify does not defeat the ROC. In these circumstances, they are in substance the same.

[26] I would therefore not give effect to this ground of appeal.

ii) The Committal Order

[27] I will address the issues of the validity of the committal order, including the admission of Mr. Duong's evidence at the hearing, whether he was properly summoned, and whether Mr. Duong was present at the trial together, as they are interrelated.

[28] The committal order may be made under one of two sections of the Act:

29(1) A judge shall order the committal of the person into custody to await surrender if

- (a) in the case of a person sought for prosecution, there is evidence admissible under this 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; and
- (b) in the case of a person sought for the imposition or enforcement of a sentence, the judge is satisfied that the conviction was in respect of conduct that corresponds to the offence set out in the authority to proceed and that the person is the person who was convicted.

[29] Section 29(5) reads:

- (5) Subject to a relevant extradition agreement, if a person has been tried and convicted without the person being present, the judge shall apply paragraph (1)(a).

[30] Germany sought the committal of Mr. Duong pursuant to s. 29(1)(b), as a person who had been convicted. The question is whether Mr. Duong was present at the trial. Mr. Duong sought to admit evidence that demonstrated that he was not present at his trial, according to the meaning of that word, and that he was not properly summoned by the German authorities.

Admission of Mr. Duong's evidence

[31] Section 32(1)(c) permits the person sought to tender evidence if it is relevant to the test in s. 29(1) and is reliable:

32 (1) Subject to subsection (2), evidence that would otherwise be admissible under Canadian law shall be admitted as evidence at an extradition hearing. The following shall also be admitted as evidence, even if it would not otherwise be admissible under Canadian law:

- (a) the contents of the documents contained in the record of the case certified under subsection 33(3);

- (b) the contents of the documents that are submitted in conformity with the terms of an extradition agreement; and
 - (c) evidence adduced by the person sought for extradition that is relevant to the tests set out in subsection 29(1) if the judge considers it reliable.
- [32] Mr. Duong tendered evidence to show that he was not properly summoned to Court, as required by the German authorities as he had been released by them and told to "go home", and was therefore not "present" for his hearing.
- [33] Mr. Duong testified on a voir dire that he had been arrested in July 2012 and remained in custody. Commencing April 2013, he attended 12 days of court proceedings. Sometimes witnesses were called, sometimes the days were filled with just argument. He was represented by a lawyer, and there was a Vietnamese interpreter present. A week or two prior to his release, his lawyer told him that there were a lot of mistakes made in the trial, and that she was going to take it to a higher court.
- [34] On August 19, 2013, a guard at the prison spoke to him in German. A cleaner, who was in the vicinity and spoke some English, purportedly translated what the guard said. Mr. Duong testified that he was told that he was being released, and that he had to be out of the prison by 5:00 p.m. He said that the guard, as translated by the cleaner, congratulated him on his release, patted him or hugged him, and told him he could go home to his family. She said to him, in English, "go home".
- [35] He was given his passport, some EUR 800-900 that he earned while working there, and was led to the prison gates by the guard. She also called a taxi for him. He spent the night at a hotel and caught a train the next day to France. Once in France, he bought a plane ticket back to Canada.
- [36] Mr. Duong acknowledged that he was not told that his case was over, nor did he contact his lawyer. He said he did not receive a request to return to the Court. The next time he heard anything more about the matter was upon his arrest in Vancouver.
- [37] The committal judge ruled on the admissibility of this evidence as part of her reasons committing Mr. Duong for extradition. In finding the evidence inadmissible, she said:
- [36] It is clear from the passage above that the evidence must be directly relevant to a test for committal in order to be admissible. That is where the evidence before me fails. The person sought seeks to have the proposed evidence admitted to explain why he did not attend court after being released. The only potential relevance of such evidence is to the determination of s. 29(5), whether the person sought was tried and convicted without being present. It has no relevance to the tests for committal in s. 29(1).

- [37] Even if it was sufficient for the evidence to be tangentially relevant to a test in s. 29(1), I am not satisfied that the evidence given by Mr. Duong passes the threshold reliability test. His story defies logic. There is nothing to corroborate it. He changed material evidence of what he claims he was told by the cleaner in cross-examination. Taken at its best it shows that he was wilfully blind and/or reckless as to the status of his charges and the necessity of his attendance at court.
- [38] As noted above, s. 32(1)(c) of the Act permits the person sought for extradition to present evidence if it is relevant to the tests for committal under s. 29(1) and is considered reliable by the judge. Therefore, for evidence to be admitted under this provision, it must be relevant and reliable.
- [39] The reliability requirement is not onerous. The evidence must possess "sufficient indicia of reliability to make it worth consideration by the judge at the hearing": *United States of America v. Ferras*, 2006 SCC 33 at para. 53.
- [40] The relevance requirement is more nuanced. The evidence must be relevant to the task of the extradition judge--whether the test for committal under s. 29(1) has been met--and is considered in light of the limited weighing of evidence undertaken in applying the test: *M.M. v. United States of America*, 2015 SCC 62 at para. 76. As noted by Cromwell J. in *M.M.*, for the majority:
- [78] [T]o admit evidence from the person sought, directed against the reliability of the evidence of the requesting state, the judge must be persuaded that the proposed evidence, considered in light of the entire record, could support the conclusion that the evidence essential to committal is so unreliable or defective that it should be disregarded.
- [41] Mr. Duong was entitled to challenge the appropriateness of the section under which he was being extradited: *In re Guisto*, [2003] UKHL 19 at para. 38. The judge heard his evidence on the voir dire but concluded that it was neither relevant nor reliable. In my view, the extradition judge applied an incorrect test to assessing both the reliability and the relevance of his evidence. She made findings that amounted to disbelief rather than "sufficient indicia of reliability". She seemed to require corroboration, and concluded that he was wilfully blind or reckless when he left--neither of which, as I indicate below, were relevant considerations for the extradition judge. In my view, she placed too high a burden on the reliability aspect of the evidence when she refused the admission of the evidence.
- [42] His evidence will likely be considered by German or European Courts, and the quick discarding of his evidence by the extradition judge, should not, in my view, impede any review he may have before those adjudicative bodies.

- [43] I do agree, however, that his conduct, and his explanation for it, is irrelevant, but not for the reason stated by the extradition judge. She excluded the evidence on the basis that it was not relevant to the tests set out in s. 29(1). As noted above, Mr. Duong was permitted to challenge whether he was being surrendered under the proper section in s. 29(1), thus it was relevant for that purpose.
- [44] However, the evidence fails the relevance test on a different basis. The evidence was tendered to show that he was not properly summoned and that he had a lawful excuse for not attending court, undermining the committal under s. 29(1)(b). I am not persuaded that the sequence of events leading to his release from custody "could support the conclusion that the evidence essential to committal is so unreliable or defective that it should be disregarded": M.M. at para. 78. While the evidence may be relevant to a hearing or review in Germany, it does not assist Mr. Duong in challenging whether the requirements for extradition in s. 29(1)(b) had been met.

Summons procedure

- [45] I turn next to the question of whether Mr. Duong was properly summoned to court. He submits that the extradition judge erred in finding that he had been duly summoned to attend court on August 20, 2013.
- [46] There is, in my view, no merit to Mr. Duong's argument. The ROC, which I have concluded was properly certified, stated that Mr. Duong was summoned to appear the day after he absconded. It is not a function of this Court to look behind the ROC and scrutinize Germany's summons procedure. The evidence in the ROC is presumed to be reliable: M.M. at para. 62. To permit a more involved analysis, in the absence of evidence capable of rebutting the presumption, would undermine the intention of the extradition process to be "expeditious and efficient": M.M. at para. 64. As noted above, the evidence tendered was not capable of rebutting the presumption of reliability.

The meaning of being present at trial

- [47] Sections 29(1)(a) and 29(1)(b) of the Act operate in slightly different ways. Section 29(1)(a) requires evidence 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. By contrast, s. 29(1)(b) requires only that the judge be satisfied that the conviction was in respect of conduct that corresponds to the offence set out in the authority to proceed.
- [48] Section 29(1)(b) does not apply without restriction. If the person sought was "not present" at their trial, then according to s. 29(5), s. 29(1)(a) will apply, regardless if there has been a conviction in the requesting state. In other words, a person whose trial proceeded in their absence is treated procedurally under the Act as a person who is still an accused before the Court in the requesting state.

- [49] In this case, Mr. Duong was detained in custody and attended 12 court appearances. He was released on August 19, 2013 and failed to appear at trial the next day, despite Germany's evidence that he was "duly summoned". The ROC and SROC state that the Court proceeded lawfully in his absence under its rules of procedure, and on all hearing dates, Mr. Duong was represented by counsel. He was convicted and sentenced following the conclusion of his trial.
- [50] Germany sought Mr. Duong's committal pursuant to s. 29(1)(b), as a person who had been convicted. On the basis of the circumstances relating to his release, Mr. Duong submits that the extradition judge erred in applying that section of the Act.
- [51] This leads to the central issue on appeal: whether a person who has been convicted and sentenced in absentia, after attending a portion of their trial and absconding voluntarily, falls within the scope of "not present" under s. 29(5). If the answer is yes, by operation of s. 29(5), s. 29(1)(a) applies and Mr. Duong was committed under the incorrect section.
- [52] There are essentially two types of in absentia proceedings. One invokes the concept of contumacy, where an accused is convicted in his absence, often with no notice, but a new trial is conducted on their return to the jurisdiction. The other is where proper notice is given, but the person either does not appear or absconds during the hearing. Mr. Duong argues first that he was convicted by reason of contumacy, and alternatively, that he was "not present" for his trial and conviction.
- [53] It is instructive to begin by considering the concept of a contumacious conviction, which had a place in the former Act. In the Treaty Between Canada and the Federal Republic of Germany Concerning Extradition, 11 July 1977, Can. T.S. 1979 No. 18, Article XII discusses convictions by reason of contumacy and their implications for extradition:

Article XII

Conviction by Reason of Contumacy

Where the person claimed has been convicted of an offence by reason of contumacy, extradition may be refused unless the requesting state gives such assurances as the requested state considers sufficient that the person claimed will be entitled to have the conviction on which the request for extradition is based reviewed by a court in points of fact and law.

- [54] Contumacy is not well-known in Canadian law. It was helpfully defined by Lord Hutton in *Guisto* at para. 52:

A conviction for contumacy is a conviction obtained in the absence of the accused which is subsequently annulled if he later surrenders or is arrested a person convicted for contumacy is regarded as an accused person because on his subsequent surrender or arrest his conviction is set aside and he is tried again.

[55] In *Extradition to and from Canada*, Anne Warner La Forest distinguishes convictions for contumacy from verdicts rendered after a person has voluntarily absconded part-way through his trial:

A convicted fugitive [does not] include a person sentenced by reason of contumacy, that is, in default of appearance, a concept that appears in the law of some countries and for which provision is made in most of the treaties [including Canada and Germany]. Fugitives so convicted are dealt with in the same manner as those who have merely been accused of a crime. This is not surprising. Convictions for contumacy are, in effect, declaratory judgments in the accused's absence; on his return he will be put on trial as if he had never been absent. This must be contrasted with a final judgment. Thus, a person who attends part of his trial and counsel continues to represent him as permitted by law while he voluntarily absents himself is not sentenced by reason of contumacy; he has no right to have the verdict set aside on his return.

Anne Warner La Forest, *Extradition to and from Canada*, 3d ed (Aurora, Ontario: Canada Law Book Inc., 1991) at 163-164.

[56] Under the former Act, in which the concept of contumacy remained, persons who absconded during their trial were treated differently than those who had no notice of, or opportunity to participate in, the proceedings: see, for example, *Re Whipple* (1972), 6 C.C.C. (2d) 517 at 521 (B.C.S.C.); *Socialist Federal Republic of Yugoslavia v. Rajovic* (1981), 62 C.C.C. (2d) 544 at 557 (Ont. Co. Ct.).

[57] A person convicted for contumacy is therefore treated as an accused person rather than a convicted person in extradition proceedings.

[58] It is clear from the evidence tendered by Germany that Mr. Duong was not convicted for contumacy. He was present for a significant portion of his trial, he had been properly summoned to return to court, and while the trial proceeded in his absence, his lawyer continued to be present throughout. Accordingly, trial fairness mechanisms were in place. Furthermore, the request from Germany does not contemplate a new trial; Mr. Duong is sought as a convicted person.

[59] The question remains whether Mr. Duong should be considered to be "not present" at his trial, in the sense required in s. 29(5), when he was convicted.

[60] Germany clearly has procedures for permitting a trial to proceed when a person has been properly summoned to court, but nonetheless fails to appear. Canada has similar provisions in s. 475 of the Criminal Code.

[61] Elaine F. Krivel Q.C., Thomas Beveridge and John W. Hayward note that s. 29(5) of the Act is "expressly limited to persons who have been 'tried and convicted without the person being present'", adding that:

Absconding during the trial will likely disallow application of this section since the person will have been present for at least part of the trial, and will be convicted without being present only because of having absconded.

Elaine F. Krivel, Thomas Beveridge & John W. Hayward, *A Practical Guide to Canadian Extradition* (Toronto, Ontario: Carswell, 2002) at 180.

[62] The more recently published book, *Prosecuting and Defending Extradition Cases: A Practitioner's Handbook*, discusses the impact of conviction in absentia for the committal test under s. 29, noting that courts are to proceed under s. 29(1)(b) if a person has absconded part-way through the proceedings:

Where a person has been convicted in absentia, the person is entitled to the test for committal under section 29(1)(a), requiring the requesting state to prove that there is a prima facie case to justify committal, as opposed to the test for committal where a person has been convicted of an offence. Section 29(5) of the Extradition Act states:

Subject to a relevant extradition agreement, if a person has been tried and convicted without the person being present, the judge shall apply paragraph (1)(a).

Courts have consistently interpreted this provision to mean that the person was not present for any part of their trial, which is not uncommon in many European jurisdictions. However, where a person is present for the arraignment and then flees from the jurisdiction in the middle of the trial, the authority to proceed is under section 29(1)(b) for the imposition or enforcement of sentence. No court has ever held that this is not appropriate. Indeed, such an approach is consistent with Canadian law.

Nancy L. Dennison & Seth Weinstein, *Prosecuting and Defending Extradition Cases: A Practitioner's Handbook* (Toronto, Ontario: Emond, 2017) at 224.

[63] That opinion however, relies on several cases discussed below, which were also relied upon by Germany, that do not necessarily support the observation that absconding during trial means the person was present in accordance with s. 29(5).

[64] In *United States of America v. Sepehri*, (2003) 68 O.R. (3d) 691 (C.A.), the Court considered an appeal in the context of a person tried in absentia in California. The issue was not whether the person sought was "present", as it related to the test for committal under s. 29(1), but whether the burden of proof under s. 29(1)(b) was a balance of probabilities. The Court ruled in the affirmative. Although the case stands as an example of an extradition under s. 29(1)(b) for an in absentia conviction, it does not assist the analysis here. Nor was the issue of absconding during the trial raised before the extradition judge: *United States of America v. Sepehri* (2003), 175 C.C.C. (3d) 511 (Ont. S.C.).

- [65] In *Italy v. Caruana*, 2007 ONCA 488, the Court upheld the committal for extradition of Mr. Caruana, who had been convicted in Italy in absentia for drug trafficking offences and Mafia association. The extradition proceeded pursuant to s. 29(1)(a), and therefore the issue of which provision applied to him was not engaged.
- [66] Finally, in *France v. Liang*, 2007 ONCA 741, the Court considered the extradition of Mr. Liang, who had been convicted in absentia and sentenced to ten years' imprisonment for drug related offences. At the committal hearing, France proceeded under s. 29(1)(a) of the Act, and was willing to grant Mr. Liang a new trial and account for time spent in pre-extradition custody if he was convicted again. The Court dismissed the appeal and the application for judicial review. Again, that decision does not engage the issues in this case.
- [67] Courts sometimes turn to the United Nations Model Treaty on Extradition to assist in interpreting extradition legislation. See, for example, *Németh v. Canada (Justice)*, 2010 SCC 56 at para. 80.
- [68] The Model Treaty sets out the following mandatory grounds for refusal of extradition:
- Article 3: Mandatory Grounds for refusal
- Extradition shall not be granted in any of the following circumstances:
- (9) If the judgment of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence.
- [69] The commentary accompanying this Article notes that all three of the conditions set forth above must be met to constitute mandatory grounds for refusal of extradition. It also describes how some legal systems do not consider convictions to be in absentia when the fugitive absconds, knowing about the proceedings.
- [70] Overall, the weight of the authorities suggests that the rationale for requiring a person to be "present" for their trial is rooted in notice of the proceedings. If a person convicted by the requesting state had notice of the proceedings yet chose not to attend, they should not be able to avail themselves of the protection afforded under s. 29(1)(a). I agree with the respondent's submission that allowing a person to take the benefit of s. 29(1)(a) in such circumstances would reward conduct that frustrates the course of justice.
- [71] In this case, Mr. Duong clearly had notice of the proceedings brought against him. He was arrested on July 26, 2012 and spent over a year in custody. He attended a significant part of his trial, and had a lawyer represent him throughout the proceedings, including on the hearing dates he missed while in Canada. The ROC states that he was "properly summoned" to attend. I am therefore satisfied that Mr. Duong was "present" at his trial and cannot avail himself of s. 29(5).

[72] Accordingly, s. 29(1)(b) applies to Mr. Duong.

Disposition of appeal

[73] In summary, in my view, the ROC was properly certified; Mr. Duong was properly summoned to appear in Court; the voir dire evidence was irrelevant and not admissible; and he was "present" in the German Court for the purpose of ss. 29(1)(b) and 29(5) of the Act.

[74] I would therefore dismiss the appeal in relation to the committal for extradition.

Judicial Review of the Surrender Decision

Standard of Review

[75] The standard of review of the Minister's decision is reasonableness. The decision is accorded deference, and will only be overturned if it is unreasonable: *Lake v. Canada* (Minister of Justice), 2008 SCC 23.

[76] Mr. Duong argues that the Minister's decision to surrender should be set aside because the record was not properly certified; the trial in absentia was unfair because he did not "abscond" but left, and was not duly summoned to attend court; the Minister did not properly consider Mr. Duong's personal circumstances; and the Minister failed to seek assurances that his conviction would be reviewed by a court of competent jurisdiction.

Discussion

[77] In my view, the first two issues--whether the ROC was properly certified, and whether Mr. Duong was properly summoned--are answered in the reasons in relation to the committal appeal.

[78] I have concluded that the ROC was properly certified and need not say more.

[79] Regarding the in absentia conviction and summons procedure, I add the following. The Minister carefully considered the fairness of the German proceedings, including its rules for continuing in the absence of an accused, and noted that Canada maintains similar provisions in the Criminal Code. He indicated, under advisement from German authorities, that Mr. Duong has the option to apply for a retrial by presenting new evidence, and if he is successful, a new hearing will be held. Mr. Duong may also launch a constitutional complaint to the Federal Constitutional Court, as well as a complaint to the European Court of Human Rights. Given these circumstances, the Minister reasonably concluded that his surrender would not "shock the conscience".

[80] There is no basis to set aside the Minister's decision on either of these grounds.

Personal circumstances

- [81] Mr. Duong's personal circumstances are noted above. The Minister set out those circumstances, and considered them, as required, in the context of Canada's compliance with international obligations to its extradition partners. While recognizing that Mr. Duong's incarceration will present hardship for him and his family, it would not "shock the conscience", nor would it "violate our sense of fundamental justice as to tilt the balance against extradition", citing *United States v. Burns*, 2001 SCC 7 at para. 69.
- [82] The Minister concluded that Mr. Duong's personal circumstances are not the type of compelling and overriding factors that require him to decline surrender. His decision is entitled to deference, and is not unreasonable.

Assurances

- [83] The Minister was asked to seek assurances from Germany that Mr. Duong's conviction would be reviewed by a court of competent jurisdiction. In refusing that request, the Minister said the following:

As noted earlier, in my view, the fact that Mr. Duong was convicted after he absconded during the trial, does not render his surrender contrary to the principles of fundamental justice or otherwise unjust or oppressive. I note that Canada allows for trials to continue in the absence of an accused in similar circumstances. In addition, Canada has determined that the German system is sufficiently fair to maintain an extradition treaty with Germany and commit to the international obligations stated therein. A foreign judicial system is not fundamentally unjust because its procedural or evidentiary safeguards are not identical to our own (*Schmidt*).

Given that this issue involves the criminal procedure established under German law, a matter that properly falls within the purview of the relevant German authorities, it is important that I give appropriate weight to the principle of comity upon which reciprocity is based. In addition, I am mindful that despite the fact that Mr. Duong was not present for a portion of his trial, he was represented by counsel, who, upon Mr. Duong's conviction, launched an appeal on his behalf. I also note that the German authorities have confirmed that Mr. Duong will have the option to apply for a retrial by presenting new evidence and may file complaints to the Federal Constitutional Court or the European Court of Human Rights.

In my view, the requested assurance is not required. I am entitled to rely on the information provided by the German authorities, without the need for formal assurances (*Scarpitti v United States of America*, 2007 BCCA 498). Such a request would also unduly interfere with the ability of the German authorities and courts to proceed according to their law. Extradition is based on "the principle of comity which demands deference and respect for the laws of other nations" (*Canada (Justice) v Fischbacher*, 2009 SCC 46).

[84] Again, it cannot be said that the Minister's decision is unreasonable. As I have noted above, the German law, like Canadian law, permits trials to continue in the absence of an accused when that person has absconded. Mr. Duong will have an opportunity to have his conviction reviewed, and, as the Minister concluded, there is no need for formal assurances to that effect, nor would it shock the conscience to surrender Mr. Duong without them.

[85] I would not give effect to that ground of judicial review.

Disposition of judicial review application

[86] Having concluded that the judicial review should be dismissed, I would add that hopefully, Canada will arrange for consular services in Germany to assist Mr. Duong when he is surrendered in order for him to pursue the avenues of redress that are open to him.

Conclusions

[87] In summary, I would dismiss the appeal from the committal order, and I would dismiss the judicial review application.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Groberman"

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Prepared on 26 October 2026 · Esheria