Date: 20060302

Docket: T-769-05

Citation: 2006 FC 276

Ottawa, Ontario, March 2, 2006

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

KUNLUN ZHANG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the respondent, denying the request of the applicant for the consent of the respondent to prosecute. The consent of the Attorney General of Canada to prosecute in Canada an offence of torture allegedly committed entirely outside Canada by a non-Canadian is required by subsection 7(7) of the *Criminal Code*, R.S.C. 1985, c. C-46, as amended.

1. RELEVANT FACTS

[2] By letter dated March 12, 2004, the applicant requested that the respondent grant consent for a private prosecution of 22 individuals for the alleged inflicted torture of the applicant in China by individuals who are not Canadian citizens, including charges against the former President of China.

[3] On February 9, 2005, a petition to the Attorney General of Canada, entitled, "Say 'Yes' to Prosecuting Tortures of Falun Gong Practitioners!" was filed by the Member of Parliament from Port Moody – Westwood – Port Coquitlam. The petition appealed to the respondent to give consent to the request submitted by the applicant.

[4] The respondent denied the request by letter dated March 23, 2005 from William H. Corbett, Senior General Counsel for the respondent, on behalf of the Attorney General. Soon after, by letter dated March 29, 2005 from Mr. Corbett, the respondent withdrew the refusal on the basis that the Honourable Irwin Cotler, Attorney General and Minister of Justice of Canada at the time, had recused himself from considering the request.

[5] By a third letter, dated March 31, 2005 from Clare Barry, also Senior General Counsel for the respondent, on behalf of the acting Attorney General, the Honourable Anne McLellan denied the request of the applicant.

[6] The reasons for refusal to grant consent were as follows:

> The case described in your correspondence does not demonstrate that the required threshold can be met. Much of the evidence is not

> available to Canadian authorities for investigation, assessment, or trial. The persons alleged to have committed the offences are not located in Canada, nor is there a reasonable prospect that they can be brought to trial in Canada.
>
> The policy also requires that a prosecution only take place if it is in the public interest to do so. It would not be appropriate, or in the public interest, to allow charges to be laid, and thereby identify and accuse persons of very serious offences, without a full police investigation and a reasonable prospect of being able to bring the case to trial.
>
> Consequently, Minister McLellan, as acting Attorney General in this specific request following Minister Cotler's recusal, has decided that a consent to prosecute cannot be granted in the circumstances of this case.

[7] The applicant now challenges the decision made by the Honourable Anne McLellan, as acting Attorney General of Canada.

2. ISSUES

1. Has the applicant provided any evidence of flagrant impropriety on the part of the Honourable Anne McLellan in her exercise of prosecutorial discretion?

2. Does the decision of the Honourable Anne McLellan that consent to prosecute should not be granted infringe:

   (a) the applicant's section 7 Charter right to life, liberty and security of the person in a manner that does not accord with the principles of fundamental justice; or

   (b) the applicant's section 15 Charter right to equality?

3. ANALYSIS

A. Flagrant Impropriety

[8] The applicant seeks to challenge the manner in which prosecutorial discretion was exercised by the respondent, Attorney General of Canada. “It is manifest that, as a matter of principle and policy, courts should not interfere with prosecutorial discretion. This appears clearly to stem from the respect of separation of powers and the rule of law. Under the doctrine of separation of powers, criminal law is the domain of the executive […].” *R. v. Power*, [1994] 1 S.C.R. 601 at p. 621.

[9] Case law from across Canada has consistently and repeatedly stressed that an exercise of prosecutorial discretion is largely beyond the legitimate reach of the court.

[10] The Supreme Court of Canada has underlined the exclusivity of the Attorney General’s prosecutorial discretion in a number of cases. In *Nelles v. Ontario*, [1989] 2 S.C.R. 170, Justice McIntyre explained at page 216:

> Hence, the law is settled that the Attorney General's exercise of his "judicial" functions, such as the commencement of criminal proceedings, the entering of a *nolle prosequi*, the entering of a stay under s. 579(1) of the *Criminal Code*, or the preferring of direct indictments in the absence of a committal for trial after a preliminary hearing, are all incapable of judicial review and to that extent, the Attorney General enjoys an absolute and total immunity on the basis that he is performing a judicial function.

[11] In *Power*, above, the Supreme Court of Canada reiterated this proposition, explaining that “[j]udicial review of prosecutorial discretion, which would enable courts to evaluate whether or not a prosecutor's discretion was correctly exercised, would destroy the very system of justice it was intended to protect.” Consequently, “[i]n our system, a judge does not have the authority to tell

prosecutors which crimes to prosecute and when to prosecute them" (*Power*, above, at pages 627-28).

[12] The factors considered by the Attorney General in exercising prosecutorial discretion are "not readily susceptible to the kind of analysis the courts are competent to undertake." (Justice Powell comments in *Wayte v. United States*, 470 U.S. 598 (1985), cited with approval in *Power*, above, at page 625).

[13] While a court must exercise extreme caution before embarking on any review of prosecutorial discretion, such discretion is not irreproachable. The Supreme Court of Canada has accepted that it would be possible to review an exercise of prosecutorial discretion in cases of flagrant impropriety or malicious prosecution: *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372 at para. 49. I note that, to this point, it appears that there has been no case in which any Court has actually set aside either a refusal to give consent to prosecute or a decision to enter a stay of proceedings where a prosecution had already been commenced.

[14] The threshold to demonstrate flagrant impropriety is very high. In that regard, the Supreme Court's comments in *Power*, above, are helpful in defining "flagrant impropriety". In its decision, the Supreme Court reiterated that a stay of proceedings for abuse of process will only be granted in the "clearest of cases", which amounts to conduct which "shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention" or where there is "conspicuous evidence of improper motives or of bad faith." Such findings will requiring overwhelming evidence to that effect and will be extremely rare (*Power*, above, at pages

615-16). I agree with the respondent that the act of a judge entering a stay of proceedings for an abuse of process and judicial review of a decision to refuse consent to commence a prosecution are two sides of the same coin. As pointed out by the respondent in both situations, a Court is called upon to interfere in an exercise of prosecutorial discretion. Thus, the evidentiary threshold in both cases will be the same.

[15] In other cases where the courts have been asked to review a stay of proceedings entered by the Attorney General, the accepted threshold is that "flagrant impropriety can only be established by proof of misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence.": *Kostuch v. Alberta (Attorney General)*, [1995] A.J. No. 866 (C.A.)(QL) at para. 34.

[16] I cannot accept the applicant's submission that the standard of review for questions of fact is flagrant impropriety and for questions of law, correctness. It is clear that the Court must not review the decision of the Attorney General unless it amounts to flagrant impropriety. The applicant's insistence that prosecutorial discretion should be subject to a pragmatic and functional analysis has no basis in law. In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, Justice Bastarache specified that the determination of the proper standard of review exercisable by a court involves examining "the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). The review of the Attorney General's prosecutorial discretion, however, is obviously not one which involves an examination of the legislative intent of an enabling statute or provision by which the Attorney General derives his power.

[17] The purpose of the pragmatic and functional approach is to determine the proper level of deference to be shown to the decision of the tribunal, as intended by the legislature. The review of a decision of the Attorney General, on the other hand, is not a matter of deference. As stated above, the Attorney General is accountable only to Parliament and is to exercise his prosecutorial discretion without court interference except in those extremely rare cases where such discretion amounts to flagrant impropriety. The court's recognition of its limited jurisdiction to intervene is not a result of deference, but rather of the Attorney General's independence in the exercise of his executive authority. The pragmatic and functional approach to determining the standard of review is thus not applicable to the exercise of prosecutorial discretion.

[18] The applicant has identified many administrative law grounds for review. For the reasons that follow, I am not satisfied that any of these allegations amount to flagrant impropriety on the part of the respondent.

[19] The applicant first submits that Minister McLellan did not form an independent opinion whether or not to grant consent to the applicant, but rather just repeated the opinion of Mr. Corbet.

[20] The applicant points to the similarities between the reasons given by Mr. Corbett and the reasons given by Ms. Carry, as well as the close time proximity between the two, and argues that any reasonable person would conclude that the Honourable Anne McLellan's decision was prejudged or predetermined by Mr. Corbett. I do not accept this argument. A more reasonable conclusion is that, after considering the matter independently, the Honourable Anne McLellan decided to refuse the request and adopted Mr. Corbett's reasons as her own. Additionally, one

would clearly anticipate the reasoning and conclusion of the Honourable Anne McLellan's decision to be the same given that it resulted from the application of the same criteria to the same factual situation. The evidence simply does not support a conclusion that the matter was prejudged so as to give rise to a reasonable apprehension of bias.

[21] The applicant next submits that the duty of fairness requires disclosure to the applicant and an opportunity to respond to the objections raised by the letter of Mr. Corbett before the Honourable Anne McLellan made her decision. Again, I disagree with this submission.

[22] The applicant had ample opportunity to make his case and submitted considerable material to the Attorney General in support of the request for consent. Yet, the applicant still insists that he should have been provided with an additional opportunity to influence the Attorney General's decision.

[23] As early as 1979, the Ontario Court of Appeal rejected the existence of any such duty. The Court explained that, "[i]f the Attorney-General must give a hearing to anyone who might be affected every time he proposed to exercise the discretion conferred upon him by virtue of his office, the administration of criminal justice would come to a standstill": *Re Saikaly and the Queen* (1979), 48 C.C.C. (2d) 192 (Ont. C.A.) at page 195.

[24] In *Krieger*, above, the Supreme Court of Canada reaffirmed the concept that the "quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute […]."

(at para. 32). In my view, to accept the applicant's contention that he should have been given an opportunity to respond would compromise the independence of the Attorney General in the sphere of prosecutorial discretion.

[25] The applicant next submits that the Attorney General inappropriately applied "The Decision to Prosecute" policy, which the applicant says is relevant to public prosecutions, but is inapplicable to deciding whether to give consent to a private prosecution, as the stakes are different for each.

[26] The applicant's submission on this point is misguided. The Attorney General's decision as to whether to bring a prosecution is undeniably an exercise of prosecutorial discretion: *Krieger,* above, at paragraphs. 46-47. Any attempt to distinguish this case because the issue is one of consent to prosecution "merely raises a distinction without a difference": *Winn v. Canada (Attorney General),* [1994] F.C.J. No. 1280 (T.D.)(QL) at paragraph 37.

[27] I also disagree with the applicant's suggestion that the respondent failed to take into account the possibility of extradition of the accused from China and instead has thrown up a general roadblock to consent to private prosecution where the perpetrator is abroad.

[28] There is no evidence to support the applicant's assertion that this factor was ignored. In fact, one of the reasons provided for the refusal to consent is that "[t]he persons alleged to have committed the offences are not located in Canada, nor is there a reasonable prospect that they can be brought to trial in Canada", supporting the conclusion that the Attorney General did indeed consider the likelihood of China cooperating with an extradition request. I agree with the respondent that

even if this factor was not considered, failure to consider any single relevant criterion falls short of meeting the threshold of flagrant impropriety necessary to justify a Court's interference with an exercise of prosecutorial discretion.

[29] The applicant's final administrative law submission is essentially that, in refusing to grant consent to prosecution, the respondent's decision amounts to an effective repeal of the law, or at the very least, makes the law unworkable.

[30] Unfortunately for those who apply for consent under subsection 7(7) of the *Criminal Code*, the Attorney General's decision to exercise extraterritorial jurisdiction to prosecute an offence committed abroad gives rise to a number of clear obstacles, including the lack of evidence and difficulty in obtaining the cooperation of the State in which the offence was allegedly committed. These are factors which the "Decision to Prosecute" policy takes into consideration. In the case at bar, the decision to refuse consent was based on such factors. In my view, this particular refusal in no way suggests that the Attorney General would refuse consent to prosecute in a case where these obstacles could be overcome.

[31] In conclusion, I am not satisfied that the Attorney General's refusal to consent constitutes flagrant impropriety.

B. Canadian Charter of Rights and Freedoms

1. Charter Violation – Section 7

[32] Section 7 of the *Canadian Charter of Rights and Freedoms,* Constitution Act, 1982 enacted as Schedule B of the Canada Act, 1982, (U.K.) 1982, c. 11 (the Charter) provides that:

Life, liberty and security of person	Vie, liberté et sécurité
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[33] A section 7 Charter analysis involves two steps. Before the issue of whether the applicant's section 7 rights have been infringed in a manner not in accordance with the principles of fundamental justice is considered, the applicant must first establish that the refusal to grant his request for consent to institute a private prosecution falls within the ambit of section 7 of the Charter. To trigger the operation of section 7, there must first be a finding that state action has resulted in a deprivation of his right to life, liberty or security of the person. Thus, if the applicant's interest in life, liberty or security of the person is not implicated by the state action, the section 7 analysis stops there: *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 47.

[34] The applicant submits that the right to security of the person under section 7 encompasses the right to freedom from torture, no matter where in the world it is inflicted and no matter whether that infliction is by a state or an individual. He suggests that the appropriate analysis to use, when the issue is whether a Canadian refusal to consent to a private prosecution for torture inflicted abroad can withstand Charter scrutiny, is that used by the Supreme Court of Canada in the cases of

United States v. Burns, 2001 SCC 7, [2001] 1 S.C.R. 283 and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3. The Supreme Court of Canada in *Suresh*, above, stated the following principle at paragraph 54 with regard to Canada's participation in the deprivation of the section 7 right:

> (…) the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected (...) At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand. (my emphasis)

[35] The applicant submits that there is a sufficient causal connection between his torture in China and the refusal by the Canadian government to consent to a private prosecution. I disagree.

[36] The decisions of the Supreme Court of Canada in *Suresh* and *Burns* do not assist the applicant in this regard. In *Suresh*, above, the Supreme Court considered whether a decision that would allow for the deportation of Mr. Suresh to a *prima facie* risk of torture complied with the principles of fundamental justice. In *Burns*, above, the question was whether the surrender of Mr. Burns and Mr. Rafay, without assurances, to the State of Washington, where they could face the death penalty, complied with the principles of fundamental justice.

[37] In both cases, the causal connection between the Canadian government's decision in question and the future deprivation of the life, liberty or security of person of the individuals concerned was clearly sufficient. In both cases, Canada's participation was a necessary precondition

for the deprivation that would likely be effected by someone else's hands and where the deprivation would be an entirely foreseeable consequence of Canada's participation. This causal connection is absent in the case at bar. Here, there is no Canadian government action or participation leading to any potential deprivation of the applicant's life, liberty or security of person. The applicant is not being removed from Canada. He is currently in Canada and, as a Canadian citizen, he is entitled to stay in Canada.

[38] As stated above, if the applicant's interest in life, liberty or security of the person is not implicated by the state action, then the section 7 analysis stops there.

2. Charter Violation – Section 15

[39] Subsection 15(1) of the Charter provides that:

Equality before and under law and equal protection and benefit of law	Égalité devant la loi, égalité de bénéfice et protection égale de la loi
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[40] In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, the Supreme Court of Canada provided the current 3-step analysis to apply when a person alleges a violation of his or her equality rights:

> (1) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1).
>
> (2) Was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds?
>
> (3) Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the Charter in remedying such ills as prejudice, stereotyping, and historical disadvantage?

[41] Selection of the appropriate comparator group is not a threshold issue that, once decided, can be put aside. However, correctly identifying the appropriate comparator at the outset is essential for a proper analysis of the relevant inquiries: *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657, at para. 24; *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, [2004] 3 S.C.R. 357, at paras. 17-18.

[42] The applicant claims that he is subject to discrimination because he is a Canadian citizen with dual nationality. Given that the benefit claimed is consent to institute private prosecution pursuant to subsection 7(7) of the *Criminal Code*, the appropriate comparator group is in my view Canadian citizens, without another nationality, who would like to obtain consent to institute a private prosecution pursuant to subsection 7(7).

[43] The applicant claims that he is disadvantaged within Canadian society in that while the problems of denial of consent to private prosecution are the same for all Canadians, there is a differential adverse impact of denial of consent on dual nationals who are more vulnerable to torture abroad in the state of their other nationality. To remedy this disadvantage, the applicant submits that the respondent is required to consent to the private prosecution of the torturers. According to the applicant, by refusing consent to prosecution of the torturers here in Canada, the respondent is violating the equality rights of the applicant.

[44] I cannot accept that, by the Attorney General's refusal to consent, there has been differential treatment of the applicant, as a dual national. The Attorney General's prosecutorial discretion is exercised on the basis of "The Decision to Prosecute" policy in all cases, regardless of the nationality (or multiple nationality) of the victim. The policy, neither directly nor in its effect, treats dual nationals differently. Subsection 7(7) is such that single nationals and dual nationals alike will have the opportunity to institute private proceedings if they meet the criteria set forth by the Attorney-General.

[45] The disadvantage encountered by some dual nationals when traveling is not at all related to the Attorney General's denial of consent to institute private prosecution. Rather, the claimed disadvantage arises in the country of the dual nationals' other citizenship as a result of the laws of that country, which is not a disadvantage within Canadian society.

[46] In light of the finding that there is no differential treatment on the basis of dual nationality, I am satisfied that the applicant's right to equality has not been infringed.

[47] For all these reasons, this application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-769-05
STYLE OF CAUSE:	Kunlun Zhang and Attorney General of Canada
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	February 14, 2006
REASONS FOR JUDGMENT:	TREMBLAY-LAMER J.
DATED:	March 2, 2006

APPEARANCES:

David Matas	FOR THE APPLICANT
Joel Katz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Matas 602-225 Vaughan Street Winnipeg, Manitoba R3C 1T7	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Winnipeg, Manitoba	FOR THE RESPONDENT