

**SUPREME COURT OF CANADA**

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| **Citation:** India *v.* Badesha, 2017 SCC 44, [2017] 2 S.C.R. 127 | **Appeal heard:** March 20, 2017  **Judgment rendered:** September 8, 2017  **Docket:** 36981 |

Between:

Attorney General of Canada on behalf of the Republic of India

Appellant

and

Surjit Singh Badesha and Malkit Kaur Sidhu

Respondents

- and -

David Asper Centre for Constitutional Rights, South Asian Legal Clinic of Ontario, Canadian Lawyers for International Human Rights, Canadian Centre for Victims of Torture and Canadian Council for Refugees

Interveners

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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| **Reasons for Judgment:**  (paras. 1 to 67) | Moldaver J. (McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ. concurring) |

India *v.* Badesha, 2017 SCC 44, [2017] 2 S.C.R. 127

Attorney General of Canada on behalf of the Republic of India Appellant

v.

Surjit Singh Badesha and

Malkit Kaur Sidhu Respondents

and

David Asper Centre for Constitutional Rights,

South Asian Legal Clinic of Ontario,

Canadian Lawyers for International Human Rights,

Canadian Centre for Victims of Torture and

Canadian Council for Refugees Interveners

**Indexed as: India *v.*** Badesha

2017 SCC 44

File No.: 36981.

2017: March 20; 2017: September 8.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for british columbia

*Constitutional law — Charter of Rights — Fundamental justice — Extradition — Surrender order — Judicial review — Minister of Justice ordering surrender of Canadian citizens for extradition — Whether it was reasonable for Minister to conclude that there was no substantial risk of torture or mistreatment that would offend principles of fundamental justice or that surrenders would not otherwise be unjust or oppressive — Contextual factors in assessing reliability of diplomatic assurances — Canadian Charter of Rights and Freedoms, s. 7 — Extradition Act, S.C. 1999, c. 18, s. 44(1)(a).*

B and S were charged in India for allegedly arranging an honour killing that occurred there. B is the victim’s uncle, and S is her mother. Both are Canadian citizens residing in Canada. India sought the extradition of B and S for the offence of conspiracy to commit murder. The Minister of Justice ordered their surrenders, after receiving assurances from India regarding their treatment if incarcerated, including health, safety and consular access, and determining, in accordance with s. 44(1)(a) of the *Extradition Act*, that their surrenders would not be unjust or oppressive. A majority of the Court of Appeal concluded that the Minister’s orders were unreasonable and set them aside.

Held: The appeal should be allowed and the surrender orders of the Minister restored.

The Minister’s surrender orders are subject to review on a standard of reasonableness. In this case, it was reasonable for the Minister to conclude that, on the basis of the assurances he received from India, there was no substantial risk of torture or mistreatment of B and S that would offend the principles of fundamental justice protected by s. 7 of the *Charter*, and that their surrenders were not otherwise unjust or oppressive.

Where a person sought for extradition faces a substantial risk of torture or mistreatment in the receiving state, their surrender will violate the principles of fundamental justice and the Minister must refuse surrender under s. 44(1)(a) of the *Extradition Act*. Where there is no substantial risk of torture or mistreatment and the surrender is *Charter* compliant, the Minister must nonetheless refuse the surrender if he is satisfied that, in the whole of the circumstances, it would be otherwise unjust or oppressive. In this regard, the Minister may take into account the circumstances alleged to make the surrender inconsistent with the *Charter*, the seriousness of the alleged offence and the importance of Canada meeting its international obligations.

In assessing whether there is a substantial risk of torture or mistreatment, diplomatic assurances regarding the treatment of the person may be taken into account by the Minister. Where the Minister has determined that such a risk exists and that assurances are therefore needed, the reviewing court must consider whether the Minister has reasonably concluded that, based on the assurances provided, there is no substantial risk. However, diplomatic assurances need not eliminate any possibility of torture or mistreatment; they must simply form a reasonable basis for the Minister’s finding that there is no substantial risk of torture or mistreatment. The reliability of diplomatic assurances depends on the circumstances of the particular case and involves the consideration of multiple factors.

In this case, the Minister was satisfied that, based on the assurances he received from India regarding their treatment, B and S would not face a substantial risk of torture or mistreatment. The Minister took into account relevant factors in assessing the reliability of the assurances, which formed a reasonable basis for the Minister’s conclusion that their surrenders would not violate the principles of fundamental justice. The inquiry for the reviewing court is not whether there is no possibility of torture or mistreatment, but whether it was reasonable for the Minister to conclude that there was no substantial risk of torture or mistreatment. Given the circumstances, the Minister’s decision to order the surrenders of B and S fell within a range of reasonable outcomes.

**Cases Cited**

**Adopted:** *Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09, ECHR 2012‑I; **considered:** *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; **referred to:** *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *M.M. v. United States of America*, 2015 SCC 62, [2015] 3 S.C.R. 973; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 413; *Said v. the Netherlands*, July 5, 2005, *Reports* 2005‑VI; *Thailand (Kingdom) v. Saxena*, 2006 BCCA 98, 265 D.L.R. (4th) 55; *Bonamie, Re*,2001 ABCA 267, 293 A.R. 201.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 6(1), 7.

*Code of Criminal Procedure* (India).

*Extradition Act*, S.C. 1999, c. 18, ss. 3(2), 44(1)(a).

*Penal Code* (India)*.*

**Treaties and Other International Instruments**

*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, art. 3(1).

*Extradition Treaty between the Government of Canada and the Government of India*, Can. T.S. 1987 No. 14.

*International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47.

*Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25.

APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Newbury and Goepel JJ.A.), 2016 BCCA 88, 4 Admin. L.R. (6th) 280, 383 B.C.A.C. 220, 661 W.A.C. 220, [2016] B.C.J. No. 365 (QL), 2016 CarswellBC 468 (WL Can.), allowing an application for judicial review of surrender orders made by the Minister of Justice, setting the orders aside and remitting the matter to the Minister for further consideration. Appeal allowed.

Janet Henchey and Diba B. Majzub, for the appellant.

Michael Klein, Q.C., and *Michael Sobkin*,for the respondent Surjit Singh Badesha.

E. David Crossin, Q.C., Elizabeth France and Miriam Isman, for the respondent Malkit Kaur Sidhu.

John Norris and Cheryl Milne, for the intervener the David Asper Centre for Constitutional Rights.

Ranjan K. Agarwal and Preet Bell, for the intervener the South Asian Legal Clinic of Ontario.

Adriel Weaver and Louis Century, for the interveners the Canadian Lawyers for International Human Rights, the Canadian Centre for Victims of Torture and the Canadian Council for Refugees.

The judgment of the Court was delivered by

Moldaver J. —

1. Overview
2. On June 9, 2000, the body of Jaswinder Kaur Sidhu was discovered in a village in the Indian state of Punjab. It is the theory of the Indian government that she was the victim of an honour killing arranged by the respondents, Surjit Singh Badesha, her uncle, and Malkit Kaur Sidhu, her mother, both of whom are Canadian citizens residing in Canada.
3. India requested that Mr. Badesha and Ms. Sidhu be extradited on a charge of conspiracy to commit murder contrary to the Indian *Penal Code*. After an extradition hearing, Mr. Badesha and Ms. Sidhu were committed for surrender. The Minister of Justice then ordered their surrenders to India after determining, in accordance with s. 44(1)(a) of the *Extradition Act*, S.C. 1999, c. 18(“Act”), that it would not be unjust or oppressive to do so.
4. Mr. Badesha and Ms. Sidhu applied for judicial review of the Minister’s decision to the British Columbia Court of Appeal.A majority of the court concluded that it was unreasonable for the Minister to find that surrendering Mr. Badesha and Ms. Sidhu would not be unjust or oppressive in the circumstances. Accordingly, the majority ordered that the Minister’s decision be set aside and that the matter be remitted to the Minister for further consideration. The Attorney General of Canada appeals from that order.
5. Central to the appeal is whether Mr. Badesha and Ms. Sidhu face a substantial risk of torture or other forms of mistreatment if they are incarcerated in India. To surrender them in such circumstances would violate their rights under s. 7 of the *Canadian Charter of Rights and Freedoms* and render their surrenders unjust or oppressive under s. 44(1)(a) of the Act.[[1]](#footnote-1)
6. In assessing whether to surrender Mr. Badesha and Ms. Sidhu, the Minister was cognizant of the health and safety risks they might face if incarcerated in India and treated them seriously. In the end, however, upon seeking and receiving assurances from the Indian government designed to address his concerns about Mr. Badesha and Ms. Sidhu’s health and safety while in custody, the Minister concluded that they did not face a substantial risk of torture or mistreatment.
7. For reasons that follow, I am respectfully of the view that the Minister’s conclusion in this regard was reasonable. I take a similar view of his related conclusion that the surrenders were not otherwise unjust or oppressive. In this respect, the Minister considered the case as a whole, and determined that there was no justifiable basis for Canada not to extradite according to its extradition treaty with India. The alleged crime for which India was seeking Mr. Badesha’s and Ms. Sidhu’s extradition was extremely serious, and in the Minister’s view, it was important that Canada comply with its treaty obligations to India so that India could see “justice done on [its] territory”: see Minister’s reasons at A.R., vol. I, at pp. 85 and 105. In short, the Minister considered the relevant facts and reached a defensible conclusion on the basis of those facts: *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41.
8. Accordingly, I would allow the appeal and restore the surrender orders.
9. Background Facts
10. On June 8, 2000, Jaswinder Kaur Sidhu and her husband, Sukhwinder Singh Sidhu, were travelling by scooter in the Punjab region in India when they were attacked by a group of armed men. Sukhwinder was seriously injured in the assault. The assailants forced Jaswinder into a car and drove away. The next day, Jaswinder’s body was discovered on the bank of a canal in a village close to where the attack had taken place. Her throat had been cut.
11. Almost a year earlier, the couple had married in India without the knowledge of Jaswinder’s family. Jaswinder’s family was from a high socio-economic class. Her husband was from a low socio-economic class: he was a rickshaw driver from a poor family. It is alleged by the Indian government that Mr. Badesha and Ms. Sidhu strongly opposed the marriage of Jaswinder and Sukhwinder, took steps to try to end it, and when those efforts failed, arranged for a number of persons in India to attack and kill the couple.
12. Thirteen people, including Mr. Badesha and Ms. Sidhu, were charged in India in connection with the killing of Jaswinder and the attack on Sukhwinder. Eleven of those charged were tried together in India. Seven were convicted and four were acquitted of offences arising out of the attack, including murder, attempted murder, and conspiracy to commit murder. Four of the seven who were convicted were later acquitted on appeal. Mr. Badesha and Ms. Sidhu are the only accused persons who remain to be tried in this matter.
13. By a diplomatic note, India sought their extradition for the offence of conspiracy to commit murder under the Indian *Penal Code*: the *Extradition Treaty between the Government of Canada and the Government of India*, Can. T.S. 1987 No. 14. The Minister of Justice issued an Authority to Proceed, authorizing extradition proceedings against Mr. Badesha and Ms. Sidhu on the corresponding Canadian offences of conspiracy to commit murder, attempt to commit murder and murder.[[2]](#footnote-2)
14. The extradition judge found that there was a substantial body of circumstantial evidence implicating Mr. Badesha and Ms. Sidhu in the alleged crime, including evidence that: they viewed the marriage between Jaswinder and Sukhwinder as bringing dishonour to their family; they issued death threats to Jaswinder and Sukhwinder; and phone calls were placed from Mr. Badesha’s home phone in British Columbia to some of the Indian perpetrators around the time the couple was attacked. The extradition judge concluded that on this evidence, a reasonable jury, properly instructed, could find that Mr. Badesha and Ms. Sidhu hired the Indian perpetrators to kill Jaswinder. Accordingly, he committed Mr. Badesha and Ms. Sidhu on charges of conspiracy to commit murder and murder.
15. Decisions Below
    1. The Minister’s Surrender Decisions
       1. Mr. Badesha’s Surrender Order
16. In his submissions to the Minister, Mr. Badesha argued that his surrender was unjust or oppressive under s. 44(1)(a) of the Act because (1) there was no guarantee India would honour a death penalty assurance, (2) he would not have a fair trial in India, (3) prison conditions in India rendered his surrender contrary to principles of fundamental justice, given his advanced age and health problems, and (4) there were significant weaknesses in the evidence.
17. Commencing with the death penalty concern, the Minister stated that absent evidence of bad faith on the part of India, he was entitled to presume that the Indian authorities would honour any assurances they provided, including an assurance regarding the death penalty — and he made the surrender order contingent on receiving such an assurance.
18. As for Mr. Badesha’s right to a fair trial, the Minister was satisfied that, while there were ongoing concerns with respect to corruption and intimidation in India, there was no information before him to suggest that Mr. Badesha would be subjected to these abuses. Absent evidence to the contrary, he was entitled to assume that Mr. Badesha would receive a fair trial in India and that his surrender would not violate the principles of fundamental justice on this basis. However, as a precautionary measure, the Minister made his surrender order conditional upon India providing an assurance that it would allow Canadian officials to attend the court proceedings on request.
19. With respect to prison conditions in India, the Minister noted that the Ministry of External Affairs of India (“MEA”) had advised Canada that the treatment and safety of inmates in prisons in Punjab, the region in which Mr. Badesha would be incarcerated, was governed by the *Punjab Jail Manual*. Under the terms of the *Manual*,medical officers are required to make frequent visits to the prisons, are on-call 24 hours a day, and are obliged to take such measures as are necessary for the maintenance of the prison and the health of inmates. The MEA further indicated to the Minister that prisons have modern equipment to provide medical treatment and that specialist doctors visit the jails to see and treat inmates.
20. With a view to confirming this information, the Minister took the additional step of having his officials consult with the Canadian Department of Foreign Affairs on medical care in prisons located in Punjab. Based on information received from the Canadian High Commission in India, the Department of Foreign Affairs confirmed that prisons in that area had medical facilities for the basic medical care of inmates and advised that inmates requiring more specialized care were referred to hospitals and institutes.
21. Even with this feedback, other information identifying substandard conditions in Indian prisons left the Minister concerned about Mr. Badesha’s health and safety while in prison. In view of this, he made Mr. Badesha’s surrender conditional on receipt of an assurance that India would provide Mr. Badesha with required medical care and medications, and make every reasonable effort to ensure his safety while in custody in India. He also made Mr. Badesha’s surrender conditional on receipt of an assurance that India would provide immediate and unrestricted consular access to Mr. Badesha while in custody. While the assurance he received from India in this regard did not provide for “immediate and unrestricted consular access”, it did provide that consular access “shall be provided as per India’s obligations” under the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25.
22. In the end, the Minister was confident that these assurances would be respected by the Indian authorities, because India had an interest in maintaining its extradition treaty and its “positive political relationship” with Canada. He also noted that there were tools to enforce the assurances. According to the Department of Foreign Affairs, if an extradition treaty partner were to act contrary to diplomatic assurances given to Canada, Canada could protest and take steps, including at a political level, to ensure compliance with the assurances. Other measures were also available, including the possible termination of Canada’s extradition treaty with India. As well, India had a diplomatic incentive to comply with the assurances. Any failure by India in this regard could have negative implications on India’s relationships with other treaty partners.
23. The Minister found that there was abundant evidence to support India’s allegations against Mr. Badesha and that there were adequate procedural and legal avenues through which Mr. Badesha could adduce defence evidence in India.
24. The Minister also determined that Mr. Badesha’s extradition was a reasonable limit on his s. 6(1) right to remain in Canada under the *Charter*. He noted that “much, if not all” of the evidence needed to prosecute Mr. Badesha was available in India. Furthermore, it was in India’s interests to prosecute Mr. Badesha for the alleged crime — an honour killing — and the impact of the crime was felt most acutely in India.
25. In sum, the Minister concluded that Mr. Badesha’s surrender would not violate the principles of fundamental justice contrary to s. 7 of the *Charter* or unjustifiably infringe s. 6(1) of the *Charter*. Further, considering the case as a whole, which included the serious nature of the alleged crime and India’s strong interest in pursuing it on Indian soil, Mr. Badesha’s surrender would not otherwise be unjust or oppressive.
    * 1. Ms. Sidhu’s Surrender Order
26. Ms. Sidhu argued that her surrender was unjust or oppressive under s. 44(1)(a) of the Act because (1) there was no guarantee India would honour a death penalty assurance, (2) there were reports of custodial violence and torture in India, (3) Ms. Sidhu’s personal situation, including her health problems, would render her surrender contrary to s. 7 of the *Charter*,(4) there were significant weaknesses in the evidence, and (5) there was a delay on the part of India in seeking Ms. Sidhu’s extradition.
27. The Minister stated that in the absence of evidence of bad faith on the part of India, he was entitled to presume that the Indian authorities would honour any assurances they provided, including an assurance regarding the death penalty — and he made the surrender order conditional on receiving such an assurance.
28. As for Ms. Sidhu’s safety concerns, the Minister was satisfied that the Indian government was committed to addressing the problem of violence and torture in its prisons. Nonetheless, he acknowledged that the reports of torture and mistreatment in Indian prisons submitted by Ms. Sidhu raised serious concerns with respect to the safety of inmates in Indian custody, particularly female inmates. In the end, however, he determined that Ms. Sidhu’s surrender would not be unjust or oppressive provided that it was made conditional on assurances that India would make reasonable efforts to ensure her safety while in Indian custody and that India would provide immediate and unrestricted consular access to her upon request. As regards consular access, the Minister received the same assurance from India that he received in respect of Mr. Badesha.
29. The Minister also made Ms. Sidhu’s surrender conditional on receipt of an assurance from India that Ms. Sidhu would receive needed medical care and medications while she remained in custody. He was satisfied that India had the ability to comply with that assurance on the basis of information provided by the MEA and the Canadian Department of Foreign Affairs. The Minister further noted that the same tools which were available to enforce the assurances provided for Mr. Badesha were available for Ms. Sidhu.
30. As for the strength of the case against Ms. Sidhu, the Minister determined that there was sufficient evidence to support India’s allegations against Ms. Sidhu and that there were adequate procedural and legal avenues through which Ms. Sidhu could adduce evidence in India.
31. With respect to the delay in seeking Ms. Sidhu’s surrender, the Minister found that the Indian authorities pursued Ms. Sidhu’s extradition in good faith and with reasonable diligence.
32. The Minister also determined that Ms. Sidhu’s extradition was a reasonable limit on her s. 6(1) right to remain in Canada under the *Charter* essentially for the same reasons he adopted in Mr. Badesha’s case.
33. In the end, the Minister concluded that Ms. Sidhu’s surrender would not violate the principles of fundamental justice contrary to s. 7 of the *Charter* or unjustifiably infringe s. 6(1) of the *Charter*. Further, considering the case as a whole, which included the serious nature of the alleged crime and India’s strong interest in pursuing it on Indian soil, Ms. Sidhu’s surrender would not otherwise be unjust or oppressive.
    1. The Court of Appeal for British Columbia, 2016 BCCA 88, 4 Admin. L.R. (6th) 280
       1. The Majority Judgment (Donald J.A., Newbury J.A. Concurring)
34. A majority of the Court of Appeal concluded that it was unreasonable for the Minister to find that surrendering Mr. Badesha and Ms. Sidhu would not be unjust or oppressive in the circumstances. While recognizing that the Minister’s decision was subject to a standard of reasonableness, the majority maintained that for the Minister to reasonably accept diplomatic assurances from a requesting state, the assurances had to “address meaningfully the risks that they are intended to mitigate”: para. 37.
35. The majority noted that there was a “valid basis for concern” that Mr. Badesha and Ms. Sidhu would be subjected to violence, torture or neglect in India if surrendered (para. 50). In the opinion of the majority, the Minister failed to consider whether the assurances regarding Mr. Badesha’s and Ms. Sidhu’s health and safety meaningfully responded to this concern. The assurances amounted to promises that the laws protecting prisoners in India would protect Mr. Badesha and Ms. Sidhu from mistreatment. However, the reports submitted by Mr. Badesha and Ms. Sidhu documented human rights abuses that had occurred under these same laws. The Minister did not consider what steps India was planning to take to mitigate the risk of violence and neglect that Mr. Badesha and Ms. Sidhu would accordingly face despite the existence of these laws. He therefore failed to take into account India’s capacity to fulfill the assurances regarding Mr. Badesha’s and Ms. Sidhu’s health and safety. The only realistic protection the assurances gave against the risk of torture or mistreatment was consular monitoring, which the majority dismissed as an inadequate safeguard. In the final analysis, the majority concluded that “the assurances in this case regarding health and safety could not be reasonably accepted” and that the Minister’s decision was therefore unreasonable in the circumstances: para. 69.
    * 1. The Minority Judgment (Goepel J.A.)
36. Goepel J.A., writing in dissent, held that the Minister’s decision to order the surrenders of Mr. Badesha and Ms. Sidhu was not unreasonable given the assurances provided by India.
37. Goepel J.A. disagreed with the majority that the Minister erred in failing to appreciate that India’s assurances did not meaningfully address the health and safety risks faced by Mr. Badesha and Ms. Sidhu. The Minister reviewed information provided by India’s MEA and the Canadian Department of Foreign Affairs, which detailed the availability of medical treatment in India’s prisons. In his reasons for Ms. Sidhu’s surrender, the Minister concluded that based on this information, India had the ability to comply with its assurances. The Minister was satisfied that India was committed to addressing the problem of violence and torture in Indian prisons. He also considered the diplomatic incentive for India to comply with the assurances and that India and Canada’s relationship as extradition partners had value to both parties. Given these considerations, it could not be said that the Minister failed to address India’s capacity to fulfill its assurances regarding Mr. Badesha and Ms. Sidhu’s health and safety.
38. Analysis
    1. General Principles of Extradition Law
39. It is a basic principle of extradition law that when a person is alleged to have committed a crime in another country, he or she should expect to be answerable to that country’s justice system: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 72. As Cromwell J. stated in *M.M. v. United States of America*, 2015 SCC 62, [2015] 3 S.C.R. 973, extradition is “the process by which one state assists another in putting that principle into practice”: para. 14. The Act implements Canada’s international obligations under extradition treaties to surrender persons for prosecution, or to serve sentences imposed, in another country: *M.M.*,at para. 14. The extradition process is founded on principles of “reciprocity, comity and respect for differences in other jurisdictions”: *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170, at para. 51, quoting *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 844.
40. The Act does not merely fulfill Canada’s international obligations. It also serves pressing and substantial domestic objectives. It protects the public against crime through its investigation, it brings fugitives to justice for the proper determination of their criminal liability, and it ensures — through international cooperation — “that national boundaries do not serve as a means of escape from the rule of law”: *M.M.*,at para. 15, citing *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 10.
41. That being said, the extradition process also protects the rights of the person sought. At each stage of the process, including the Minister’s decision to order the person’s surrender to its treaty partner, there is a careful balancing of the broader purposes of the Act with the individual’s rights and interests: *M.M.*,at para. 16.
42. Where a person’s surrender offends the principles of fundamental justice enshrined in s. 7 of the *Charter*, the Minister must refuse the person’s extradition. In extradition cases, s. 7 of the *Charter* should be presumed to provide at least as great a level of protection as found in Canada’s international commitments regarding non-*refoulement* to torture or other gross human rights violations: see *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 23. Extraditing a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is prohibited under art. 3(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36 (“*CAT*”). It follows that in the extradition context, surrendering a person to face a substantial risk of torture or mistreatment in the requesting state will violate the principles of fundamental justice.
    1. Standard of Review
43. The Minister’s decision to order the surrender of a person falls “at the extreme legislative end of the *continuum* of administrative decision-making” and is seen as “largely political in nature”: *Lake*, at para. 22, quoting *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at p. 659; *Sriskandarajah*,at para. 11. Given the Minister’s superior expertise in Canada’s international relations and foreign affairs, he or she is in the best position to determine whether the factors weigh in favour of or against extradition: *Lake*,at para. 41. The Minister’s decision to order surrender is therefore subject to review on a standard of reasonableness. As this Court noted in *Lake*:

The reviewing court’s role is not to re-assess the relevant factors and substitute its own view. Rather, the court must determine whether the Minister’s decision falls within a range of reasonable outcomes. To apply this standard in the extradition context, a court must ask whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts. [para. 41]

* 1. Section 44(1)(a) of the Act

1. The Minister’s discretion to order a person’s surrender is subject to restrictions set out in the Act. Section 44(1)(a) reads as follows:

The Minister shall refuse to make a surrender order if the Minister is satisfied that

(a) the surrender would be unjust or oppressive having regard to all the relevant circumstances;

1. Given the mandatory nature of s. 44(1)(a), the Minister must balance all the relevant circumstances to determine whether the surrender is unjust or oppressive: *Fischbacher*, at para. 37. The circumstances that will be relevant will vary depending on the facts and context of each case: para. 38. Although it is the Minister who considers and weighs all the relevant circumstances to determine whether the surrender would be “unjust or oppressive”, the person sought for extradition bears the burden of demonstrating that such circumstances exist: *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 72. If the Minister is satisfied that a person’s surrender would be unjust or oppressive, he must refuse the surrender and has “no discretion” to give effect to a treaty obligation to extradite the person: para. 69.
2. Where a person sought for extradition faces a substantial risk of torture or mistreatment in the receiving state, his or her surrender will violate the principles of fundamental justice and the Minister must refuse surrender under s. 44(1)(a). But where there is no substantial risk of torture or mistreatment and where the surrender is *Charter* compliant, the Minister must nonetheless refuse the surrender if he or she is satisfied that, in the whole of the circumstances, it would be otherwise unjust or oppressive.
   * 1. Section 44(1)(a) of the Act and Section 7 of the *Charter*
3. The s. 44(1)(a) inquiry may require the Minister to consider whether the surrender would violate s. 7 of the *Charter*. Under s. 7, “[e]veryone 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.” Where the surrender is found to be contrary to the principles of fundamental justice protected by s. 7, it will also be unjust or oppressive under s. 44(1)(a) and the Minister must refuse to make a surrender order: *Lake*,at para. 24; *M.M.*,at para. 115. Central to this appeal is whether Mr. Badesha and Ms. Sidhu face a substantial risk of torture or mistreatment in India that would render their surrenders unjust or oppressive under s. 44(1)(a). The question for this Court is whether it was reasonable for the Minister, in the circumstances, to conclude that, on the basis of the assurances he received from the Indian government, there was no substantial risk of torture or mistreatment which would offend the principles of fundamental justice.
4. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, the Court stated that the Minister’s assessment of whether the potential deportee faces a substantial risk of torture is a “fact-driven inquiry”, which requires consideration of the human rights record of the receiving state, among other factors: para. 39. In the extradition context, when evaluating whether there is a substantial risk of torture or mistreatment in the requesting state, it logically follows that the Minister can consider evidence of the general human rights situation in that state, which may include reports from reputable government and non-governmental organizations: see, e.g., *Chahal v. United Kingdom* (1996), 23 E.H.R.R. 413, at paras. 99-100; *Said v. the Netherlands*, July 5, 2005, *Reports* 2005-VI, at para. 54. Accordingly, I am unable to accept Goepel J.A.’s statement in his dissenting reasons that evidence of systemic human rights abuses in a receiving state amounts to a general indictment of that state’s justice system and is thus an “unsatisfactory underpinning for finding that an individual’s s. 7 *Charter* rights will be violated if surrendered”: C.A. reasons, at para. 125. With respect, I believe this statement is too sweeping in nature.
5. The Attorney General of Canada contends that “generic evidence” of human rights conditions in the receiving state cannot establish, on its own, that the person sought faces a substantial risk of torture or mistreatment. With respect, I disagree. The assessment of substantial risk decidedly requires that the Minister consider the “personal risk” faced by an individual: *Suresh*,at para. 39. But I would not foreclose the possibility that there may be cases in which general evidence of pervasive and systemic human rights abuses in the receiving state can form the basis for a finding that the person sought faces a substantial risk of torture or mistreatment.
   * 1. Diplomatic Assurances
6. In assessing whether there is a substantial risk of torture or mistreatment, diplomatic assurances regarding the treatment of the person sought may be taken into account by the Minister: *Suresh*,at para. 39. In certain cases, the Minister may be satisfied that assurances are required so that the person sought for extradition does not face a substantial risk of torture or mistreatment, which would offend the principles of fundamental justice. Where the Minister has determined that such a risk of torture or mistreatment exists and that assurances are therefore needed, the reviewing court must consider whether the Minister has reasonably concluded that, based on the assurances provided, there is no substantial risk of torture or mistreatment. In this regard, I would emphasize that diplomatic assurances need not eliminate any possibility of torture or mistreatment; they must simply form a reasonable basis for the Minister’s finding that there is no substantial risk of torture or mistreatment.
7. In *Othman (Abu Qatada) v. The United Kingdom*, No. 8139/09, ECHR 2012-I, the European Court of Human Rights (“ECHR”) examined whether the deportation of Mr. Qatada, which was made conditional on diplomatic assurances, was consistent with art. 3(1) of the *CAT*, which prevents expulsion where substantial grounds have been shown for believing that the person, if deported, faces a “real risk” of being subjected to ill-treatment: para. 185. The ECHR found that the proper inquiry to be conducted to determine whether the deportation is consistent with art. 3(1) is “whether the assurances obtained in a particular case are sufficient to remove any real risk of ill-treatment”: para. 186.
8. The reliability of diplomatic assurances depends crucially on the circumstances of the particular case. In *Suresh*, this Court stressed that a contextual approach should be taken when determining the reliability of assurances. The Court cautioned that assurances regarding the death penalty are easier to monitor and more reliable than those regarding torture: “We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past” (para. 124). Ultimately, however, the weight to be given to assurances involves the consideration of multiple factors. In evaluating the reliability of assurances, the Minister may take into account

the human rights record of the government giving the assurances, the government’s record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government’s ability to control its security forces. [*Suresh*, at para. 125]

1. In *Othman*, the ECHR took a similar contextual approach to determining the reliability of assurances:

. . . assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment. There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time . . . . [Emphasis added; para. 187.]

1. The ECHR noted in *Othman* that the threshold question when evaluating the weight to be given to assurances is

whether the general human rights situation in the receiving State excludes accepting any assurances whatsoever. However, it will only be in rare cases that the general situation in a country will mean that no weight at all can be given to assurances . . . .

More usually, the Court will assess, firstly, the quality of the assurances given and, secondly, whether, in light of the receiving State’s practices, they can be relied upon. [paras. 188-89]

1. The ECHR set out a detailed list of contextual factors to be examined when assessing the reliability of diplomatic assurances. Many of these factors may be considered by Canadian courts. To be clear, these factors are not exhaustive and their relevance will depend on the circumstances of the particular case:
2. Whether the assurances are specific or are general and vague;
3. Who has given the assurances and whether that person can bind the receiving state;
4. If the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;
5. Whether the assurances concern treatment which is legal or illegal in the receiving state;
6. The length and strength of bilateral relations between the sending and receiving states, including the receiving state’s record in abiding by similar assurances;
7. Whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the individual’s lawyers;
8. 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
9. Whether the individual has previously been ill-treated in the receiving state.

(See *Othman*, at para. 189.)

1. I pause here to note that assurances may fulfill different purposes in relation to a person’s surrender. They are not always requested where the Minister has determined that there is a substantial or indeed *any* risk of torture or mistreatment in the requesting state. Therefore, they cannot be treated as proof that such a risk exists. For example, they may be requested by the Minister simply out of an abundance of caution: see, e.g., *Thailand (Kingdom) v. Saxena*, 2006 BCCA 98, 265 D.L.R. (4th) 55, at para. 56.
   * 1. Where the Surrender Has Been Found to Be Compliant With the *Charter*, the Minister Must Nonetheless Refuse the Surrender if He or She Is Satisfied That It Would Be Otherwise Unjust or Oppressive
2. Where the Minister is satisfied that the person sought for extradition does not face a substantial risk of torture or mistreatment and that his or her surrender is compliant with the *Charter*, the Minister must nonetheless refuse the surrender if he or she is satisfied that it would be otherwise unjust or oppressive: see *Németh*, at para. 56. As this Court observed in *Fischbacher*, where the surrender is constitutional, the Minister retains a “residual discretion to refuse surrender as being unjust or oppressive in view of the totality of the relevant circumstances, including, but not limited to, the circumstances alleged to make surrender inconsistent with the principles of the *Charter*”: at para. 39, quoting *Bonamie, Re*, 2001 ABCA 267, 293 A.R. 201,at para. 47. In this regard, the Minister may take into account the circumstances he considered when determining whether there was a s. 7 infringement or other *Charter* violation, including the circumstances of the person sought and the consequences of extradition. The Minister may also consider the seriousness of the alleged offence and the importance of Canada meeting its international obligations and not becoming a safe haven for fugitives from justice.
   1. The Reasonableness of the Minister’s Decision to Order the Surrenders of Mr. Badesha and Ms. Sidhu
3. In his reasons for ordering Mr. Badesha’s surrender, the Minister took note of the U.S. Department of State’s *India 2013 Human Rights Report* in which Indian prisons were described as being “severely overcrowded”, that medical care was often inadequate and that inmates were “physically mistreated” (see A.R., vol. IV, at p. 25). Given the findings in this report, the Minister found that Mr. Badesha’s surrender should be made conditional on assurances from India that: (1) Mr. Badesha would receive needed medical care and medications while in custody; and (2) India would “make every reasonable effort to ensure his safety while in custody in the Republic of India”. The Minister also made his surrender conditional on an assurance that India would provide immediate and unrestricted consular access to Mr. Badesha upon request.
4. With respect to Ms. Sidhu’s surrender, the Minister stated that reports before him raised “serious concerns with regard to the safety of inmates in Indian custody, particularly female inmates”. He also noted Ms. Sidhu’s health problems, including her heart condition. Accordingly, he made Ms. Sidhu’s surrender conditional on the same assurances that he requested India provide for Mr. Badesha.
5. The Minister was satisfied that, based on the assurances he received from India, Mr. Badesha and Ms. Sidhu would not face a substantial risk of torture or mistreatment. India provided an assurance which stated that “every reasonable effort will be made to meet the safety and medical needs” of Mr. Badesha and Ms. Sidhu, as required under India’s *Code of* *Criminal Procedure*. India also assured that consular access would be provided in accordance with India’s obligations under the *Vienna Convention on Consular Relations*. While this assurance did not explicitly provide for “immediate and unrestricted consular access” as requested by the Minister, he was satisfied that the assurance was sufficient to meet that condition.
6. As indicated, the central question in this case is whether it was reasonable for the Minister to find that, based on the assurances provided by India, surrendering Mr. Badesha and Ms. Sidhu would not violate s. 7 of the *Charter* or be otherwise unjust or oppressive. The role of a reviewing court in these circumstances is not to re-assess the relevant factors and substitute its own view for that of the Minister: *Lake*,at para. 41. Rather, the court must examine whether the decision falls within a range of reasonable outcomes. The question to be asked is: did the Minister consider the relevant facts and reach a defensible conclusion based on those facts (*Lake*,at para. 41)? In my respectful view, the answer in this case is yes.
   * 1. The Minister’s Reliance on the Assurances Regarding Health and Safety
7. The majority of the Court of Appeal held that the Minister failed to consider whether the assurances regarding health and safety meaningfully responded to the concerns they were intended to address. In the opinion of the majority, the assurances amounted to promises that the laws protecting prisoners in India would ensure that Mr. Badesha and Ms. Sidhu would not be mistreated. However, the reports submitted by Mr. Badesha and Ms. Sidhu documented human rights abuses that had occurred under these same laws. The only “realistic protection” the assurances gave against the risk of torture or mistreatment was consular monitoring, which the majority of the Court found was an inadequate safeguard to redress this risk. The Minister’s decision to order the surrenders of Mr. Badesha and Ms. Sidhu was therefore unreasonable.
8. Respectfully, in reaching this conclusion, the majority did not consider many of the relevant factors the Minister considered in assessing the reliability of the assurances. These factors formed a reasonable basis for the Minister’s conclusion that the surrenders of Mr. Badesha and Ms. Sidhu would not violate the principles of fundamental justice.
9. As discussed, the reliability of diplomatic assurances crucially depends on the context of the particular case. Along with consular monitoring, the Minister took into account the following factors in assessing the risk of torture or mistreatment faced by Mr. Badesha or Ms. Sidhu in this case:

* The Indian MEA provided information which confirmed that there were medical professionals and facilities available to inmates in prisons in the state of Punjab.
* The Canadian Department of Foreign Affairs received information from the Canadian High Commission in India that prisons in the state of Punjab have medical facilities for the basic medical care of inmates. Inmates requiring more specialized care are referred to outside hospitals.
* India’s efforts to enact domestic legislation that would permit them to ratify the *CAT*, the fact that they were party to the *International Covenant on Civil and Political* Rights, Can. T.S. 1976 No. 47, and efforts made by the Indian judiciary to address incidents of custodial violence demonstrated that India was committed to addressing the problem of violence and torture in Indian prisons.
* India would want to maintain its positive political relationship with Canada and the integrity of the extradition treaty with Canada.
* There were tools available to enforce the assurances. According to the Department of Foreign Affairs, if an extradition treaty partner were to act contrary to diplomatic assurances given to Canada, Canada could protest and take steps, including at a political level, to ensure compliance with the assurances. Canada could also take further measures including immediate notification of the termination of the agreement that was violated.
* The Department of Foreign Affairs informed the Minister that because treaties and agreements are a reflection of mutual confidence and trust between nations, a failure to honour diplomatic assurances could have negative implications on India’s relationships with other treaty partners.

Several of the above factors were endorsed in *Suresh* and *Othman* as indicators of the weight to be given to diplomatic assurances.

1. Furthermore, the Minister noted that there was no history of India not complying with assurances given to its treaty partners. He further observed there was no evidence of any corruption, intimidation or torture involved in India’s investigation of Mr. Badesha, Ms. Sidhu or any of the eleven co-accused in this matter. Nor was there any evidence that the seven co-accused found guilty at trial were mistreated while in prison in India. There was also no evidence that Ms. Sidhu and Mr. Badesha had personal characteristics that would make them part of a category of individuals who would be particular targets of ill-treatment in India because of their political or religious affiliations. This specific evidence of a personal risk to Mr. Badesha and Ms. Sidhu was not *required* for the Minister to find a substantial risk of torture. However, if such evidence had been presented, it would have militated in favour of a finding of substantial risk. In this case, no such evidence was presented. This is to be contrasted with the situation in *Othman* where the ECHR found it relevant that Mr. Qatada, a “high profile Islamist”, belonged to a group of prisoners who were frequently ill-treated in Jordan, and had claimed to have been previously tortured there: para. 192. Similarly, in *Chahal*,the ECHR noted that Mr. Chahal, a “well-known supporter of Sikh separatism” would be “a target of interest” for “hard-line elements in the security forces who have relentlessly pursued suspected Sikh militants in the past” in India: paras. 98 and 106.
2. Considered as a whole, the factors upon which the Minister relied provided a reasonable basis for his conclusion that the health and safety assurances would meaningfully respond to the concerns they were intended to address, such that the surrenders of Mr. Badesha and Ms. Sidhu would not violate principles of fundamental justice and would not be otherwise unjust or oppressive. The inquiry for the reviewing court is not whether there is nopossibility of torture or mistreatment, but whether it was reasonable for the Minister to conclude that there was no substantial risk of torture or mistreatment.
3. In my respectful opinion, the majority of the Court of Appeal did not consider the numerous factors that, as a whole, provided reasonable support for the Minister’s conclusion that Mr. Badesha and Ms. Sidhu would not face a substantial risk of torture or mistreatment in India, having regard to the assurances provided by India. In concluding otherwise, the majority effectively substituted its view for that of the Minister.
   * 1. The Minister’s Reliance on Consular Monitoring
4. With respect, the majority of the Court of Appeal also did not consider whether, in the particular circumstances of this case, it was reasonable for the Minister to take into account consular monitoring in concluding that there was no substantial risk of torture or mistreatment. The majority stated that consular monitoring “has its limits in mitigating the risks” of torture or mistreatment, because torture or mistreatment often takes place covertly and those who administer it are adept at concealing its visible signs and ensuring that authorities are not alerted.
5. I do not dispute this observation. However, the real question is not whether consular monitoring could eliminate any possibility of torture or mistreatment, but whether consular monitoring could be a factor in the Minister’s conclusion that Mr. Badesha and Ms. Sidhu would not face a substantial risk of torture or mistreatment. In certain cases, to be effective, monitoring may need to be carried out by a third-party organization, or provide for other protections, such as private and without notice interviews conducted by experts trained to detect physical and psychological signs of torture and ill-treatment (see, e.g., the monitoring agreed to by Jordan and the United Kingdom in *Othman*,at paras. 77 and 81). But given the circumstances in this case, which included India’s desire to maintain its extradition relationship with Canada and its relationships with other treaty partners, the fact there was no evidence of a history of India not complying with assurances given to partner nations, and the absence of evidence that Mr. Badesha and Ms. Sidhu had religious or political affiliations that would make them particular targets of torture or mistreatment, it was reasonable for the Minister to take into account consular monitoring in concluding that there was no substantial risk of torture or mistreatment.
6. Conclusion
7. Having regard to the factors the Minister considered and the contextual circumstances of this case, the Minister’s conclusion that Mr. Badesha and Ms. Sidhu would not face a substantial risk of torture or mistreatment while incarcerated in India was reasonable. The Minister’s further finding, based on the totality of the circumstances, that the surrender would not be otherwise unjust or oppressive was also reasonable. In the Minister’s view, there was no justifiable basis for Canada not to extradite according to its extradition treaty with India. The gravity of the alleged offence in this case was particularly relevant to the Minister. Mr. Badesha and Ms. Sidhu are wanted in India for alleged criminal conduct of the most horrific nature — namely, participation in a conspiracy to commit the honour killing of a family member. The Minister noted that the alleged offence “engages, first and foremost, the interests of the Republic of India to prosecute” Mr. Badesha and Ms. Sidhu and stressed the “importance of seeing justice done on India’s territory”.
8. In my opinion, the Minister considered the relevant facts and reached a defensible conclusion on the basis of those facts: *Lake*,at para. 41. The Minister’s decision to order the surrenders of Mr. Badesha and Ms. Sidhu therefore fell within a range of reasonable outcomes: para. 41. Accordingly, I would allow the appeal and restore the Minister’s surrender orders for Mr. Badesha and Ms. Sidhu.

*Appeal allowed.*

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Solicitors for the respondent Malkit Kaur Sidhu: Sugden, McFee & Roos, Vancouver.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: Simcoe Chambers, Toronto; David Asper Centre for Constitutional Rights, Toronto.

Solicitors for the intervener the South Asian Legal Clinic of Ontario: Bennett Jones, Toronto.

Solicitors for the interveners Canadian Lawyers for International Human Rights, the Canadian Centre for Victims of Torture and the Canadian Council for Refugees: Goldblatt Partners, Toronto.

1. By “mistreatment”, I mean forms of ill-treatment or abuse that offend against the principles of fundamental justice under s. 7 of the *Charter*. [↑](#footnote-ref-1)
2. In an Authority to Proceed, the Minister of Justice identifies the Canadian offences that make the conduct criminal in Canada. Extradition is permitted when the conduct underlying the alleged foreign offence, if it occurred in Canada, would constitute an offence in Canadian law, however named or characterized: s. 3(2) of the Act; see also *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170, at para. 4. [↑](#footnote-ref-2)