

**SUPREME COURT OF CANADA**

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| **Citation:** M.M. *v.* United States of America, 2015 SCC 62, [2015] 3 S.C.R. 973 | **Date:** 20151211  **Docket:** 35838 |

Between:

M.M.

Appellant

and

Minister of Justice Canada on behalf of the United States of America

Respondent

- and -

Criminal Lawyers’ Association (Ontario) and

British Columbia Civil Liberties Association

Interveners

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Côté JJ.

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| **Reasons for Judgment:**  (paras. 1 to 172)  **Dissenting Reasons:**  (paras. 173 to 282) | Cromwell J. (McLachlin C.J. and Moldaver and Wagner JJ. concurring)  Abella J. (Karakatsanis and Côté JJ. concurring) |

M.M. *v.* United States of America, 2015 SCC 62, [2015] 3 S.C.R. 973

M.M. Appellant

v.

Minister of Justice Canada on behalf of the

United States of America Respondent

and

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**Indexed as:** M.M. ***v.* United States of America**

2015 SCC 62

File No.: 35838.

2015: March 17; 2015: December 11.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner and Côté JJ.

on appeal from the court of appeal for quebec

*Extradition — Committal hearings — Evidence — Role of extradition judge — Test for committal — Principle of double criminality — Mother of three children facing child abduction charges in U.S. — Whether extradition judge applied correct principles in relation to double criminality and to own role in assessing reliability and sufficiency of evidence — Whether extradition judge should consider evidence about possible defences and other exculpating circumstances in deciding whether to commit for extradition — Whether evidence justified mother’s committal — Extradition Act, S.C. 1999, c. 18, ss. 3(1), 29(1)(a).*

*Extradition — Surrender order — Judicial review — Extradition Act providing that Minister of Justice shall refuse to order surrender if unjust or oppressive having regard to all relevant circumstances — Minister ordering mother’s surrender for extradition to U.S. to face child abduction charges — Whether Minister gave appropriate consideration to defence of necessity available under Canadian law but not available under law of requesting state — Whether Minister gave appropriate consideration to effect of extradition on best interests of children — Whether Minister’s decision to surrender was reasonable — Extradition Act, S.C. 1999, c. 18, s. 44(1)(a).*

M is the mother of three children. The family was living in Georgia when the parents divorced. The Georgia courts awarded the father sole custody of the children. M was given no visitation rights and was permitted no further contact with the children. However, when the father reported the children missing in 2010, Georgia police located M with her children in a battered women’s shelter in Quebec and arrested her. After being placed in foster care, the children were returned to M’s care following her release on bail. The U.S. sought M’s extradition to face prosecution in Georgia for the offence of interstate interference with custody. The Minister of Justice issued an Authority to Proceed (“ATP”) with extradition, listing the corresponding Canadian offences of abduction in the *Criminal Code*. The Quebec Superior Court dismissed the U.S.’s application for M’s committal for extradition. The Court of Appeal for Quebec, however, set aside M’s discharge and ordered her committal for extradition (the “committal order”). The Minister of Justice ordered M’s surrender for extradition, and the Court of Appeal dismissed her application for judicial review of the Minister’s decision (the “surrender order”). M appeals both the committal and the surrender orders.

Held (Abella, Karakatsanis and Côté JJ. dissenting): The appeal should be dismissed in relation to both the committal order and the surrender order.

*Per* McLachlin C.J. and Cromwell, Moldaver, and Wagner JJ.: With respect to the committal order, the extradition judge applied incorrect principles in relation to the double criminality requirement and her role in assessing the reliability of the evidence before her. The extradition judge erred in law in weighing and relying on evidence of defences and other exculpatory circumstances, in finding that the requesting state’s evidence did not justify committal, and in relation to her analysis of the Canadian offences. With respect to the surrender order, potential defences and the best interests of children are relevant to the Minister of Justice’s decision making. In this case, the Minister appropriately considered the children’s best interests and raised on his own motion the question of Georgia law in relation to M’s possible defence of qualified necessity. As such, the Minister’s decision to send M to Georgia for trial was reasonable.

The extradition process serves two important objectives: the prompt compliance with Canada’s international obligations to its extradition partners, and the protection of the rights of the person sought. This requires a careful balancing of the broader purposes of extradition with those individual rights and interests. Extradition is a three-phase process (ATP, committal and surrender) and, at each stage, concern to balance these interests is apparent. Also underlying all three phases is the broad principle of double criminality expressed in s. 3(1)(*b*) of the *Extradition Act*, that is, the principle that Canada should not extradite a person to face punishment in another country for conduct that would not be criminal in Canada.

The committal phase of the extradition process serves an important, but circumscribed and limited screening function. The extradition judge is to determine whether there is evidence of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offence set out in the ATP; if not, the person must be discharged: s. 29(1)(*a*) and (3) of the *Extradition Act*. This incorporates the test that a justice conducting a preliminary inquiry must apply under Canadian law when deciding whether to commit an accused for trial. The extradition judge’s role is to determine whether there is a *prima facie* case of a Canadian crime, not to become embroiled in questions about possible defences or the likelihood of conviction. Committal hearings are not trials; they are intended to be expeditious procedures to determine whether a trial should be held.

The extradition judge’s role, like that of the preliminary inquiry justice, is not concerned with defences or other matters on which the accused bears an evidential or persuasive burden. While the role of the extradition judge at the committal phase has evolved as a result of legislative amendments and the requirements of the *Charter*, the basic principles governing extradition have remained the same. There is nothing in the jurisprudence suggesting any change in the extradition judge’s statutorily defined role. Moreover, the jurisprudence did not and could not change by judicial decree the statutory requirement that the requesting state has only to show that the record would justify committal for trial in Canada.

Overall, the correct approach is a restrained view of the role of the extradition judge in assessing the reliability of evidence. The extradition judge’s starting point is that the requesting state’s certified evidence is presumptively reliable. This presumption may only be rebutted by showing fundamental inadequacies or frailties in the material relied on by the requesting state. It is only where the evidence supporting committal is so defective or appears so unreliable that it would be dangerous or unsafe to act on it that the extradition judge is justified in refusing committal on this basis. In order to admit evidence from the person sought for this purpose, the judge must be persuaded that the proposed evidence, considered in light of the entire record, could support such a conclusion.

In this case, the extradition judge erred in concluding that the requesting state’s evidence in the certified record of the case (“ROC”) was insufficient to require committal. She gave no weight to the presumption of reliability of the ROC. The ROC supported committal here. The circumstantial evidence and the reasonable inferences that could be drawn from it were sufficient to conclude that a reasonable jury properly instructed could return a verdict of guilt. The ROC permitted reasonable inferences that M had taken the children from the parent who had lawful care of them, and was sufficient to support a reasonable inference that M had abducted the children in violation of a custody order with the intent to deprive the father of their possession.

The extradition judge also erred in law in relation to the requirements for a *prima facie* case and in relation to her analysis of the Canadian offences. With respect to s. 280(1) of the *Criminal Code* (abduction of a person under 16), her conclusions that the children left of their own volition, that they were not taken out of the father’s possession by M, that “all of the evidence” indicates that the three children ran away from their father’s residence and that their elder sister drove them to Canada are wrong in law and in fact. With respect to the law, depriving parents of the “possession” of their children is not limited to circumstances in which the parents were in physical control of the children. The essence of the offence is interference with the parent’s exercise of his or her right of control over the child. The prosecution would not have to establish that M physically took the children. As well, the extradition judge failed to recognize that there was conflicting evidence concerning how the children came to be with M in Canada. The record before the extradition judge could not reasonably be thought to meet the threshold of showing either that the evidence in the ROC was so unreliable that it should be discarded or that the inferences relied upon by the requesting state were unreasonable.

With respect to the qualified defence of necessity under s. 285 of the *Criminal Code*, again the extradition judge erred both in law and in fact. With respect to the law, it was not part of the extradition judge’s role to consider whether there might be valid defences to the Canadian offences. As for the facts, the extradition judge did not consider that s. 285 requires that there be danger of imminent harm either to the children or to M herself. There was evidence of neither.

At the surrender stage of the proceedings, the Minister of Justice must not surrender a person for extradition if this would be “unjust or oppressive”, pursuant to s. 44(1)(*a*) of the *Extradition Act*. The basic concern which underlies the broader principle of double criminality, which operates at the ATP and committal phases of the extradition process, may also inform the Minister’s surrender decision. The Minister engages in a weighing exercise of all the relevant circumstances. This is a vitally important role because it provides an additional safeguard of the rights of the person sought and addresses matters that may not be properly considered at the two earlier stages of the extradition process. The Minister has a role to play at the surrender stage in assessing the potential consequences for the person sought of being subjected to the law of the requesting state. Where surrender would be contrary to the principles of fundamental justice, it will also be unjust and oppressive.

In exercising this power to surrender, the Minister must consider, when relevant, the best interests of children who are or may be affected by the extradition and whether there is a significant difference in jeopardy between domestic and foreign law. With respect to this latter consideration, the rationale of the broad principle of double criminality may inform the Minister’s exercise of this authority to refuse surrender if there are defences available in Canada that are not available in the requesting state.

Thus, the availability of possible defences that fall outside of the scope of the double criminality inquiry required at the first two phases of the extradition process can nonetheless be relevant at the third. It follows from this that the Minister should consider, when relevant, how the person sought would be affected by the unavailability of a comparable defence in the requesting state.

However, it does not follow that every difference in the availability of defences or in jeopardy makes extradition unjust or oppressive or contrary to the principles of fundamental justice. There is generally speaking nothing unjust in surrendering a person to face the legal consequences of their acts in the place where they were committed. Differences in legal systems — even substantial differences — should not, generally speaking, constitute grounds for refusing surrender. Before the unavailability of a defence could engage the threshold for refusal, the person sought must show: (1) that there is, in fact, a difference of substance in the respective laws of the requested and requesting state so that the defence is available in Canada but no comparable defence is available in the requesting state; (2) that there is a reasonable prospect of success were the defence to be raised if he or she were tried for the same conduct in Canada; and (3) that the difference between the laws of the two countries must lead to a significantly greater jeopardy for the person sought in the requesting state. If these three elements are present, then the Minister is required to weigh the potential difference in defences along with all the other relevant considerations in making his or her surrender decision. The onus of persuasion remains on the person sought. The Minister’s ultimate conclusion will be treated with deference on judicial review.

In this case, the Minister’s decision was not unreasonable because M did not meet any of the three threshold requirements. First, M did not show that there is any difference in substance between the law in Canada and in Georgia. Given the fact that the U.S. authorities advised the Minister that M could rely on a defence of coercion at her trial in Georgia, there is no reason to assume that there is a significant substantive difference between coercion and necessity. The record contains nothing to support the assertion that there is no defence in Georgia comparable to the statutory necessity defence. Second, the material in the record does not show a reasonable prospect of success on the Canadian qualified defence of necessity if M were tried for the alleged conduct in Canada. This defence is available only if there was “imminent harm”. The material before the Minister did not provide any basis to think that the imminent harm requirement was present here. Furthermore, M’s position on the facts changed dramatically in her submissions to the Minister, such that these contentions could not reasonably be thought to be entitled to much weight. Third, M failed to show that she faced significantly greater jeopardy in Georgia than in Canada.

On the issue of the best interests of the children, the Minister, in making a surrender decision, can consider personal circumstances, including the hardship extradition will create for families, and it is necessary to do so where the material puts these considerations in play. This obligation extends to considering the best interests of children who will or may be affected by extradition when the material on record shows that this is a relevant concern. However, the best interests of children on surrender for extradition must be considered in light of other important legal principles and the facts of the individual case. The legal principle of the best interests of the child may be subordinated to other concerns in appropriate contexts; its application is inevitably highly contextual; and society does not always deem it essential that the best interests of the child trump all other concerns. For example, the consequences of a parent having to face criminal charges elsewhere cannot in themselves be unjust or oppressive.

In this case, the Minister was required to consider the best interests of the children in making his surrender decision. The Minister’s key conclusions were that the best interests of the children were unclear, that the impact of extradition on the children was also unclear and that there were important considerations favouring surrender for extradition. These key conclusions were reasonable and they led to a reasonable decision to surrender M. On any reasonable view of the record, what would be best for these children was anything but clear given their unhappy, unstable and complicated family history and the apparent problems of both parents. With respect to the impact of M’s extradition on the children, there was nothing before the Minister and nothing in the record before this Court providing any further information about the children’s welfare or M’s parenting abilities after the children were returned to her care, nothing that suggested to the Minister that the children would be returned to their father’s care if their mother were surrendered, nothing in the material about whether M would be incarcerated pending her trial in Georgia or what impact her pending criminal charges could have on her relationship with the children, and no evidence about other possible family placements either in Canada or in the United States.

*Per* Abella, Karakatsanis and Côté JJ. (dissenting): No one can be extradited unless his or her conduct would have constituted an offence that is punishable in Canada. This is known as the principle of double criminality, a cornerstone of the extradition process in Canada.Its purpose is to ensure that no one is surrendered from Canada to face prosecution in another country for conduct that does not amount to a criminal offence in this country. Double criminality is based on ensuring that a person’s liberty is not restricted as a consequence of offences not recognized as criminal by the requested state. In other words, where a person is extradited for conduct not amounting to a criminal offence in Canada, the principle of double criminality is offended. Given the context of extradition proceedings and the liberty interests involved, the threshold for committal for extradition is higher than the threshold that applies to preliminary inquiries in criminal proceedings. To justify committal in extradition proceedings, the evidence must be such that a reasonable, properly instructed jury could return a guilty verdict.

Section 285 of the *Criminal Code* states that no one will be found guilty of an offence under ss. 280 to 283 of the *Criminal Code* if the taking or harbouring of any young person was necessary to protect him or her from danger of imminent harm. The result of s. 285 is that an accused who would otherwise be guilty of an offence under ss. 280 to 283, but whose conduct falls under the conditions specified in s. 285, is not criminally liable for his or her actions. In the words of s. 3(1)(*b*) of the *Extradition Act*, the conduct would not have constituted a punishable offence. Consideration of the s. 285 defence where a person is sought for extradition under ss. 280 to 283 is a necessary component of determining whether a punishable offence has occurred in Canada.

Removing consideration of s. 285 from the scope of the extradition judge’s review would fail to give proper effect to the principle of double criminality. If the double criminality requirement is to achieve its purpose of ensuring that a person is not surrendered to face prosecution for conduct that would not amount to a criminal offence in Canada, s. 285 must be taken into account when deciding whether a person’s conduct would constitute a crime if committed in this country and so justify committal. To preclude its consideration is to unduly narrow the role of the extradition judge in ensuring that double criminality is met, and in providing a meaningful process safeguarding the liberty interests of the person sought for extradition.

The defence that it was necessary to rescue the children to protect them from imminent harm is not available in the state of Georgia. The children were 9, 10 and 14 years old. The extradition judge found that the children were afraid of their father and that he had physically and mentally mistreated them. She also found that the children had run away from their father without any assistance or even the knowledge of their mother, that it was more than a week before they contacted her for help and that the mother’s actions in taking the children after they ran away were to protect them from further harm.

Based on a meaningful judicial assessment of the whole of the evidence, the extradition judge correctly determined that the evidence did not reveal conduct that would justify committal. Given the clear wording of s. 285, the mother could not be found guilty on the charge of abduction since her intent was to protect the children from danger of imminent harm at the hands of their father. No reasonable jury in Canada, properly instructed, could therefore return a verdict of guilty on the charge of abduction of the children against the mother in the circumstances. Committal,as the extradition judge concluded, is therefore not justified.

Section 44(1)(*a*) of the *Extradition Act* requires the Minister of Justice to consider *all* the relevant circumstances in deciding whether surrender would be unjust or oppressive. Even if one were to accept that the requirements for double criminality have been met, this does not relieve the Minister of his responsibility to consider that a statutory defence that goes to the very heart of the offence is available in Canada and not in Georgia. Such a consideration falls squarely within the Minister’s statutory safety valve function at the surrender stage and is therefore a necessary consideration when discretion is exercised under s. 44(1)(*a*).

So too are the best interests of the children. In her submissions to the Minister, the mother noted that the children fled from their abusive father and would face serious risks of harm if they were returned to him. The father left the children to take care of themselves most of the time and was physically and mentally abusive. This abuse was the reason the children ran away from the home, leading them to live in an abandoned house for over a week before contacting the mother. If the children were forced back to the United States or separated from her, they would either suffer additional abuse or face the absence of any parental figure.

It is contrary to the best interests of the children to extradite the mother. There is no dispute that the children should not be returned to their abusive father. To surrender the mother for her conduct in protecting the children is to penalize them for reaching out to her by depriving them of the only parent who can look after them. Moreover, because the defence of rescuing children to protect them from imminent harm does not exist in Georgia, the mother will not be able to raise the defence she would have been able to raise had she been prosecuted in Canada.

If extradited, the mother could face up to 15 years imprisonment if convicted of the interference with custody charges. Yet theMinister makes no reference to the impact of the mother’s surrender on the family. Instead, he observed that the availability of foster care adequately compensates for the mother’s potential imprisonment in Georgia. This represents an inexplicable rejection of the cornerstone of this country’s child welfare philosophy, namely, to attempt whenever reasonably possible to keep children and parents together. The Minister expressed uncertainty as to the children’s best interests. This ought to have led him to err on the side of the children’s right to be with a loving parent, not on the side of surrendering the mother to face a criminal process where a key defence would be unavailable.

In light of all the instability and trauma the children have experienced, it is obvious that what would be least harmful for them would be to remain in Canada with the mother who put herself in legal jeopardy to protect them, instead of being relegated to foster care. What the Minister considered instead was the mother’s conduct three years prior to the incident in question, which led to her losing custody and access. This history should not be denied, but neither is it of any particular relevance in considering what she did in responding to the children’s desperate request, or to what her current relationship was to the children.The question is not whether she was an ideal parent, but whether her conduct in coming to her children’s rescue should deprive them of her care and deprive her of her liberty for up to 15 years.

The very charges the mother faces arose because she acted in what she saw as her children’s best interests. The evidence before the Minister unequivocally showed that the children fled from their father’s home because he was abusive and that they eventually contacted their mother for assistance. She did not remove them from his home. In fact, the evidence accepted throughout these proceedings is that the children ran away on their own without either the assistance or knowledge of the mother. Between returning to the abusive household, remaining in an abandoned home or reuniting with their mother, the children felt they had no alternative. Rightly or wrongly, the children believed that taking such measures would be less harmful to their well-being than remaining in their father’s abusive household. They cannot be judged for taking desperate measures to escape intolerable conditions which placed them in harm’s way. The Minister was obliged to take into serious consideration why the children contacted their mother for assistance. They had suffered harm. They had no place to go. Reaching out to their mother was the only realistic alternative for them. And responding to their pleas for safety was the only realistic alternative for the mother. In penalizing the mother for coming to the assistance of her children instead of ignoring their entreaties, the Minister was penalizing her for accepting her responsibility to protect the children from harm.

The Minister inadequately considered the children’s best interests, and his conclusions with respect to the availability of the s. 285 defence rendered his decision to order the mother’s surrender unreasonable. Limiting his assessment of the mother’s trial in Georgia to whether it would be procedurally fair instead of whether it would be unjust or oppressive to extradite her, sidesteps the proper analysis. Given the liberty interests at stake and the potential for criminal liability in circumstances that may not attract punishment in Canada, it is not enough to determine whether the trial in the requesting state will be procedurally fair. The presence of a statutory defence in Canada going directly to criminality where no analogous defence is recognized in the requesting state is, on its face, the very sort of factor that makes surrender unjust or oppressive.

There is little demonstrable harm to the integrity of Canada’s extradition process in finding it to be unjust or oppressive to extradite the mother of young children she rescued, at their request, from their abusive father. The harm, on the other hand, of depriving the children of their mother in these circumstances is profound and demonstrably unfair.

**Cases Cited**

By Cromwell J.

**Discussed:** *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77; **referred to:** *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Skogman v. The Queen*, [1984] 2 S.C.R. 93; *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828; *United States of America v. Shephard*, [1977] 2 S.C.R. 1067; *Mezzo v. The Queen*, [1986] 1 S.C.R. 802; *R. v. Charemski*, [1998] 1 S.C.R. 679; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *McVey (Re)*, [1992] 3 S.C.R. 475; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532; *R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635; *R. v. Russell*, 2001 SCC 53, [2001] 2 S.C.R. 804; *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601; *Dubois v. The Queen*, [1986] 1 S.C.R. 366; *United States of America v. Yang* (2001), 56 O.R. (3d) 52; *United States of America v. Graham*, 2007 BCCA 345, 243 B.C.A.C. 248; *France v. Diab*, 2014 ONCA 374, 120 O.R. (3d) 174; *R. v. Yebes*, [1987] 2 S.C.R. 168; *R. v. Burke*, [1996] 1 S.C.R. 474; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *United States of America v. Anderson*, 2007 ONCA 84, 85 O.R. (3d) 380; *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343; *United States of America v. Mach*, [2006] O.J. No. 3204 (QL); *United States of America v. Edwards*, 2011 BCCA 100, 306 B.C.A.C. 160; *Scarpitti v. United States of America*, 2007 BCCA 498, 247 B.C.A.C. 234; *United States of America v. Orphanou*, 2011 ONCA 612, 107 O.R. (3d) 365; *United States of America v. Ranga*, 2012 BCCA 81, 317 B.C.A.C. 207; *Canada (Attorney General) v. Bennett*, 2014 BCCA 145, 353 B.C.A.C. 311; *United States of America v. Aneja*, 2014 ONCA 423, 120 O.R. (3d) 620; *United States of America v. U.A.S.*, 2013 BCCA 483, 344 B.C.A.C. 302; *Canada (Attorney General) v. Viscomi*, 2014 ONCA 879, 329 O.A.C. 47; *Canada (Attorney General) v. Hislop*, 2009 BCCA 94, 267 B.C.A.C. 155; *Singh v. Canada (Attorney General)*, 2007 BCCA 157, 238 B.C.A.C. 213; *Canada (Minister of Justice) v. Gorcyca*, 2007 ONCA 76, 220 O.A.C. 35; *United States of America v. Lorenz*, 2007 BCCA 342, 243 B.C.A.C. 219; *Canada (Attorney General) v. Sosa*, 2012 ABCA 242, 536 A.R. 61; *Canada (Attorney General) v. Aziz*, 2013 BCCA 414, 342 B.C.A.C. 305; *United States of America v. Doak*, 2015 BCCA 145, 323 C.C.C. (3d) 219; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. Dawson*, [1996] 3 S.C.R. 783; *R. v. Vokey*, 2005 BCCA 498, 217 B.C.A.C. 231; *R. v. Flick*, 2005 BCCA 499, 217 B.C.A.C. 237; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *United States of America v. Johnson* (2002), 62 O.R. (3d) 327; *R. v. Hibbert*, [1995] 2 S.C.R. 973; *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14; *Perka v. The Queen*, [1984] 2 S.C.R. 232; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Canada (Minister of Justice) v. Thomson*, 2005 CanLII 5078; *Ganis v. Canada (Minister of Justice)*, 2006 BCCA 543, 233 B.C.A.C. 243; *Savu v. Canada (Ministre de la Justice)*, 2013 QCCA 554; *United States of America v. Thornett*, 2014 BCCA 464, 363 B.C.A.C. 311; *United States v. Pakulski*, 2015 ONCA 539; *H. (H.) v. Deputy Prosecutor of the Italian Republic*, [2012] UKSC 25, [2013] 1 A.C. 338; *H. v. Lord Advocate*, [2012] UKSC 24, [2013] 1 A.C. 413; *Adam v. United States of America* (2003), 64 O.R. (3d) 268; *United States v. Pakulski*, 2014 ONCA 81; *United States of America v. Johnstone*, 2013 BCCA 2, 333 B.C.A.C. 107; *United States of America v. Fong* (2005), 193 C.C.C. (3d) 533.

By Abella J. (dissenting)

*United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *United States of America v. Lépine*, [1994] 1 S.C.R. 286; *Canada (Justice) v. Fischbacher*, 2009 SCC 46, [2009] 3 S.C.R. 170; *Washington (State of) v. Johnson*, [1988] 1 S.C.R. 327; *McVey (Re)*, [1992] 3 S.C.R. 475; *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, [2000] 2 S.C.R. 519; *Thomson v. Thomson*, [1994] 3 S.C.R. 551; *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485; *In re D. (Abduction: Rights of Custody)*, [2006] UKHL 51, [2007] 1 A.C. 619; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3; *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14; *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609; *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532; *Caplin v. Canada (Justice)*, 2015 SCC 32, [2015] 2 S.C.R. 568; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *United States of America v. Taylor*, 2005 BCCA 440, 216 B.C.A.C. 137; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *Provost v. Canada (Procureur général)*, 2015 QCCA 1172; *Kunze v. Canada (Minister of Justice)*, 2005 BCCA 87, 209 B.C.A.C. 32; *Canada (Minister of Justice) v. Thomson*, 2005 CanLII 5078; *Savu v. Canada (Ministre de la Justice)*, 2013 QCCA 554; *United States of America v. Lucero‑Echegoyen*, 2013 BCCA 149, 336 B.C.A.C. 188; *Canada (Attorney General) v. Aziz*, 2013 BCCA 414, 342 B.C.A.C. 305; *United States of America v. Doak*, 2015 BCCA 145, 323 C.C.C. (3d) 219; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469.

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*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 280 to 283, 282, 285 [formerly s. 250.4; ad. 1980‑81‑82‑83, c. 125, s. 20].

*Extradition Act*, R.S.C. 1985, c. E‑23 [am. 1992, c. 13], s. 13.

*Extradition Act*, S.C. 1999, c. 18, ss. 3(1), (2), 15(1), (3), 24(2), 29, 31 to 37, 32(1), 40, 42, 43(2), 44 to 47.

*Immigration Act*, R.S.C. 1985, c. I‑2 [repl. 2001, c. 27].

*Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

*Immigration Regulations, 1978*, SOR/78‑172, s. 2.1 [ad. SOR/93‑44, s. 2].

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**Treaties and Other International Instruments**

*Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221 [the *European Convention on Human Rights*], art. 8.

*Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35, art. 13(b).

*Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 19.

*Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3, arts. 2, 10.

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APPEAL from two judgments of the Quebec Court of Appeal (Thibault, Doyon and Dutil JJ.A.), 2014 QCCA 681, [2014] AZ‑51061285, [2014] Q.J. No. 2910 (QL), 2014 CarswellQue 3081 (WL Can.), dismissing an application for judicial review of a surrender order made by the Minister of Justice; and (Morissette, Gagnon and Gascon JJ.A.), 2012 QCCA 1142, [2012] AZ‑50866680, [2012] Q.J. No. 5896 (QL), 2012 CarswellQue 6422 (WL Can.), setting aside a decision of Cohen J., 2011 QCCS 4800, [2011] AZ‑50778075, [2011] Q.J. No. 12453 (QL), 2011 CarswellQue 9861 (WL Can.). Appeal dismissed, Abella, Karakatsanis and Côté JJ. dissenting.

Julius H. Grey, Cornelia Herta‑Zvezdin, Clemente Monterosso and Iris Simixhiu, for the appellant.

Ginette Gobeil and Diba Majzub, for the respondent.

John Norris and Meara Conway, for the intervener the Criminal Lawyers’ Association (Ontario).

Brent Olthuis, Greg J. Allen and *Michael Sobkin*, for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and Cromwell, Moldaver and Wagner JJ. was delivered by

Cromwell J. —

1. Introduction
2. The extradition process serves two important objectives: the prompt compliance with Canada’s international obligations to our extradition partners, and the protection of the rights of the person sought. The latter objective places important limits on when extradition can be ordered. The appellant in this case says that these limits should prevent her extradition to the state of Georgia to face child abduction charges. She claims that she would have a good defence if prosecuted in Canada, that there is no comparable defence in Georgia, and that extraditing her would be contrary to the best interests of her children.
3. The first limit on which the appellant relies is that a person will not be extradited unless a Canadian judge finds that there is a case to meet against him or her. The appellant maintains that this requirement is not met here because she has a good defence to the charges and the evidence against her is weak. But the appellant’s position is based on a misconception of the extradition judge’s role. Fairness in extradition requires only that the judge find that there is evidence of conduct that, had it occurred in Canada, “would justify committal for trial”: *Extradition Act*, S.C. 1999, c. 18, s. 29(1)(*a*). The extradition judge is not to consider defences or weigh conflicting evidence other than in limited circumstances that do not exist here. The appellant in effect wants to turn the extradition process into a trial. But the extradition process is not a trial and, as the Court said nearly three decades ago, it should never be permitted to become one: *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at p. 515.
4. The appellant also invokes a second limit. At the ministerial phase of the extradition process, the Minister of Justice must not surrender a person for extradition if this would be unjust or oppressive: *Extradition Act*, s. 44. As I will explain, the appellant is right to say that potential defences and the best interests of her children are relevant to the Minister’s decision making and can be considered by the Minister. But, in this case, the Minister’s decision to send the appellant to Georgia for trial was reasonable, notwithstanding the appellant’s arguments.
5. It will become obvious that I take a markedly different view than my colleague Abella J. of both the content of the record and of the governing legal principles. As I see it, my colleague’s reasons propose to turn extradition hearings into trials. But the implications of that approach compellingly demonstrate why this should not be done.
6. Facts and Issues
7. The appellant is the mother of three children, a boy and two girls who were respectively 18, 15 and 13 at the time this appeal was heard. The family was living in Georgia when the parents separated and divorced. The Georgia courts awarded the father sole custody of the three children in June 2008. The appellant was given no visitation rights and was permitted no further contact with the children.
8. In October 2010, the father reported the children missing. That December, Georgia police located the appellant and her children in a battered women’s shelter in Quebec. She was arrested and initially denied bail pending her committal hearing. In February 2011, the U.S., on behalf of Georgia, sought her extradition to face prosecution in Georgia for interstate interference with custody. Later that same month, the Minister of Justice issued an Authority to Proceed (“ATP”) with extradition, listing the corresponding Canadian offences of abduction in contravention of a custody order (s. 282(1) of the *Criminal Code*, R.S.C. 1985, c. C-46) and abduction of a person under 16 (s. 280(1) of the *Criminal Code*). The children were placed in a foster family following a judgment from the Court of Québec: *Protection de la jeunesse* *— 113190*, 2011 QCCQ 11853 (Lise Gagnon J.C.Q., May 26, 2011).
9. In an oral decision rendered June 8, 2011 (with written reasons dated June 20), the Quebec Superior Court granted the appellant bail pending her committal hearing and, in an oral decision on July 8, 2011 (with written reasons dated August 10), dismissed the application for committal for extradition: 2011 QCCS 4800. On June 15, 2012, the Quebec Court of Appeal set aside the Superior Court’s order of discharge and ordered the appellant’s committal for extradition: 2012 QCCA 1142. On November 28, 2012, the Minister of Justice ordered the appellant’s surrender for extradition and, on April 4, 2014, the Court of Appeal dismissed the appellant’s application for judicial review of the Minister’s decision: 2014 QCCA 681. The most recent information that we have about the children is that the Minister understood that they had been returned to the appellant’s care in June 2011 following her release on bail.
10. The appellant appeals both the committal and the surrender orders.
11. Analysis
    1. Introduction
12. The appellant raises issues with respect to both the committal process and the surrender process. With respect to committal, the appellant submits that the Court of Appeal took too narrow a view of the extradition judge’s role at the committal hearing. Her submissions revolve around two main questions:
    * + 1. Should the extradition judge consider evidence about possible defences and other exculpating circumstances in deciding whether to commit for extradition?
        2. Applying the appropriate legal test for committal, did the evidence justify committal?
13. These two questions relate to some of the fundamental principles of extradition law. The first concerns the double criminality requirement of extradition — that the conduct alleged against the appellant must be criminal had it been committed in Canada. The second concerns the extradition judge’s role in assessing the weight to be given to the evidence relied on to support committal. This latter question was the subject of the Court’s decision in *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77, which has received varied treatment by our appellate courts. This appeal provides an opportunity to clarify and further develop the law in relation to the committal process.
14. With respect to the Minister’s surrender decision, the appellant raises two main issues concerning the question of whether the Minister’s decision was unreasonable:
    * + 1. Did the Minister fail to give appropriate consideration to the fact that a defence potentially available to the appellant under Canadian law is not available under the law of the requesting state?
        2. Did the Minister fail to give appropriate consideration to the effect of extradition on the best interests of the appellant’s children?
15. These issues relate to the Minister’s obligation to refuse surrender where extradition would be “unjust or oppressive” (*Extradition Act*, s. 44(1)(*a*)) or where extradition would unjustifiably limit the rights under the *Canadian Charter of Rights and Freedoms* of the person sought for extradition. They also raise questions about how the committal and surrender phases of the extradition process relate to each other.
16. Before turning to my analysis of these issues, it will be helpful to put them in the context of the purposes and scheme of our extradition law.
    1. Fundamental Principles of Extradition Law
       1. Introduction
17. Extradition law starts with a basic principle: while a person is in a country, he or she is subject to that country’s criminal law and should expect to be answerable to it (*United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 72). Extradition is the process by which one state assists another in putting that principle into practice. The *Extradition Act* implements, through domestic law, Canada’s international obligations to surrender persons found here so that they will face prosecution, or serve sentences imposed, in another country (I will limit my brief review here to extraditions which are sought for prosecution). Of course, Canada’s international obligations to surrender for extradition are subject to various conditions.
18. Extradition serves pressing and substantial Canadian objectives: protecting the public against crime through its investigation; bringing fugitives to justice for the proper determination of their criminal liability; and ensuring, through international cooperation, that national boundaries do not serve as a means of escape from the rule of law (*Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 10). To achieve these pressing and substantial objectives, our extradition process is founded on the 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, per Charron J. for a majority of the Court, quoting *Kindler* *v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 844, per McLachlin J. (as she then was). These principles “are foundational to the effective operation of the extradition process” (*Fischbacher*, at para. 51) and mandate the prompt execution of Canada’s international obligations.
19. That said, the rights and interests of persons sought for extradition must be protected. This requires a careful balancing of the broader purposes of extradition with those individual rights and interests. Extradition is a three-phase process and, at each stage, concern to balance these interests is apparent. Also underlying all three phases is the broad principle of double criminality, that is, the principle that Canada should not extradite a person to face punishment in another country for conduct that would not be criminal in Canada.
20. This broad principle of double criminality is expressed in s. 3(1)(*b*) of the *Extradition Act*: “A person may be extradited from Canada” if “the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada”. This broad principle, however, is given more precise meaning and is applied in more precise ways by other provisions of the *Extradition Act*.The *Extradition Act*, of course, must be read as a whole and the broad words of s. 3(1)(*b*) must be understood in light of the more specific provisions.
21. At the first two phases of the extradition process, the *Extradition Act* addresses double criminality in express statutory terms. At the third, the rationale underlying the broad principle of double criminality informs the exercise of the Minister’s power to refuse surrender for extradition where surrender would be “unjust or oppressive” under s. 44(1)(*a*) of the *Extradition Act*.
    * 1. The First Phase: the Authority to Proceed (‟ATPˮ)
22. The first phase of the extradition process relates to receipt of an extradition request from a foreign state and the decision of the Minister of Justice whether to proceed with it by issuing an ATP. The Minister’s role is to satisfy him- or herself that two basic requirements for extradition are met. The first is that, subject to any relevant extradition agreement, the offence for which extradition is sought is punishable in the requesting state for a maximum term of two years or more or by a more severe punishment: ss. 15(1) and 3(1)(*a*) of the *Extradition Act*. The second is to identify the Canadian offence or offences that would make the alleged conduct criminal in Canada. The *Extradition Act* directs that it is not relevant that the alleged conduct under foreign law “is named, defined or characterized . . . in the same way as it is in Canada”: s. 3(2).
23. At this stage in the process, the Minister is concerned in part with the foreign law aspect of the double criminality principle: he or she must be satisfied, among other things, that the offence for which extradition is sought is criminal in the requesting state. The Minister is also concerned with aspects of domestic criminal law because he or she must identify the corresponding Canadian offences: s. 15(3)(*c*) of the *Extradition Act*; *Fischbacher*, at para. 27.
24. In this case, the requesting state sought extradition for the Georgia offence of interstate interference with custody, in violation of § 16-5-45(c)(1) of the *Official Code of Georgia Annotated*. The Minister issued an ATP stating that the Canadian offences which correspond to the alleged conduct are abduction in contravention of a custody order (s. 282(1) of the *Criminal Code*) and abduction of a person under 16 (s. 280(1) of the *Criminal Code*).
    * 1. The Second Phase: Judicial Committal or Discharge
25. If, as here, the Minister issues an ATP, the extradition moves to the committal phase. This phase plays an important, although carefully circumscribed, role in protecting the rights of the person sought. That role is defined by s. 29(1)(*a*) and (3) of the *Extradition Act*. The extradition judge is to determine two things: (1) whether “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 (2) “that the person [before the court] is the person sought by the extradition partner” (s. 29(1)(*a*)). Committal is ordered if the judge finds that these conditions exist; if not, the person must be discharged: s. 29(1)(*a*) and (3). This means that the requesting state must show that it has evidence available for trial that would justify committal for trial in Canada for the Canadian offences specified in the ATP.
26. It is important to understand that s. 29(1)(*a*) codifies and defines the role of the extradition judge with respect to the double criminality principle. That role is not defined by the broad principle of double criminality enunciated in s. 3(1)(*b*). Rather, s. 29(1)(*a*) is a specific provision which addresses and exhaustively defines the extradition judge’s role. In my respectful view, the failure to recognize this is a fatal flaw in the appellant’s position in relation to the role of the extradition judge.
27. The appellant submits that the role of the extradition judge must be conceived of much more broadly than the role of the preliminary inquiry justice. As discussed below, I must reject this submission.
    * 1. The Third Phase: Ministerial Surrender or Refusal to Surrender for Extradition
28. If the extradition judge orders committal, the case moves back to the Minister to exercise the power under s. 40 of the *Extradition Act* to surrender or to refuse to surrender the person sought. This phase of the process, while of course subject to the requirements of the statute and the *Charter*, is essentially political in nature. In carrying out his or her duties, the Minister must take into account Canada’s international obligations and the requirement to act as a responsible member of the international community in responding to a request by an extradition partner: see, e.g., *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 64.
29. The *Extradition Act* provides a number of bases on which the Minister may or must refuse surrender: ss. 44 to 47. The provision relevant to this appeal provides that the Minister must refuse surrender if “the surrender would be unjust or oppressive having regard to all the relevant circumstances”: s. 44(1)(*a*). The jurisprudence holds that the Minister must also refuse surrender where the consequences of surrender would be contrary to the principles of fundamental justice under s. 7 of the *Charter* or, in the case of a Canadian citizen, be an unjustified infringement of the right to remain in Canada guaranteed by s. 6(1) of the *Charter*. In exercising this power, the Minister must consider, when relevant, the best interests of children who are or may be affected by the extradition and whether there is a significant difference in jeopardy between domestic and foreign law. With respect to this latter consideration, the rationale of the broad principle of double criminality may inform the Minister’s exercise of this authority to refuse surrender if there are defences available in Canada that are not available in the requesting state.
    1. Appeal From Committal for Extradition
       1. Issues and Overview
30. The committal appeal raises two main issues:
    * + 1. Should the extradition judge consider evidence about possible defences and other exculpating circumstances in deciding whether to commit for extradition?
        2. Applying the appropriate legal test for committal, did the evidence justify committal?
31. As I will explain, my view is that the extradition judge applied incorrect principles in relation to the double criminality requirement and her role in assessing the reliability of the evidence before her. She also erred, in my respectful view, in concluding that the evidence in the certified record of the case (“ROC”) was insufficient to require committal. The Court of Appeal was correct to set aside the appellant’s discharge and to order her committal for extradition.
    * 1. First Issue: Exculpatory Evidence and Defences at the Committal Stage
         1. Decisions and Submissions
            1. Extradition Judge
32. In opposing committal, the appellant sought admission of a great deal of evidence to show that she had not abducted the children but that they had run away from their father, at whose hands they suffered physical and mental abuse, and that the appellant harboured the children for their protection. Despite counsel for the requesting state’s opposition, the extradition judge admitted most of the evidence, holding that it was relevant and sufficiently reliable to be admissible.
33. The extradition judge then considered whether the requesting state’s evidence justified committal for trial in Canada for the offences of abduction of a person under 16 and abduction in contravention of a custody order (ss. 280(1) and 282(1) of the *Criminal Code*). She refused committal on both.
34. With respect to s. 280(1), the extradition judge found that the evidence showed that the appellant had not taken the children from their father but that they had run away. With respect to s. 282(1), the extradition judge found that there was no evidence that the appellant had harboured the children with the specific intent of depriving their father of custody. She came to this conclusion essentially by relying on the defence found at s. 285 of the *Criminal Code*, which reads:

**285.** [Defence] No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm.

1. The extradition judge held that this defence could be considered at the committal stage of extradition proceedings because double criminality requires the extradition judge to proceed to a meaningful judicial assessment of all of the evidence based on Canadian law. Relying on s. 285, and in light of the evidence adduced by the appellant, the extradition judge ruled that “no reasonable jury could draw the inference, as submitted by the Requesting State, that the mother’s intent was to deprive the father of possession of these children”: para. 75 (CanLII). Moreover, the evidence showed that the appellant’s conduct would not be criminal if it had occurred in Canada.
   * + - 1. Court of Appeal
2. The Quebec Court of Appeal found that the evidence that the children had run away on their own and that the appellant harboured the children to protect them from future harm was exculpatory in nature. It was aimed at contradicting the ROC and laying the ground for a potential defence of the respondent. By taking such matters into consideration, the judge went beyond the proper role of an extradition judge as defined by *Ferras*.
   * + - 1. Submissions
3. The appellant submits that the Court of Appeal took too narrow a view of the extradition judge’s role and of the inquiry mandated by *Ferras*.In line with this reasoning, the intervener British Columbia Civil Liberties Association submits that an extradition judge must inquire as to the existence of exculpatory defences. Both the text of the *Extradition Act* and the expanded role of the extradition judge set out in *Ferras* mandate this broader inquiry which is also consistent with international law.
4. The respondent opposes this line of reasoning, noting that the Court has repeatedly emphasized the limited scope of the extradition judge’s role. Extradition hearings are not trials and extradition judges are not to consider and weigh evidence pertaining to defences. The extradition judge, by virtue of s. 29(1) of the *Extradition Act*, is concerned solely with determining whether there is sufficient evidence to justify committal. That determination does not involve looking at potential defences, and *Ferras* did not hold otherwise.
   * + 1. Analysis
          1. Scope of the Extradition Judge’s Role
5. The committal phase of the extradition process serves an important, but circumscribed and limited screening function. The role of the extradition judge is simply to decide whether he or she is satisfied that the person before the court is the person sought and whether “there is evidence admissible under [the *Extradition Act* and available for trial] 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”: s. 29(1)(*a*) of the *Extradition Act*; see also *Ferras*, at para. 50.
6. The reference to evidence that “would justify committal for trial in Canada” in s. 29(1)(*a*) of the *Extradition* *Act* incorporates the test that a justice conducting a preliminary inquiry must apply when deciding whether to commit an accused for trial in Canada: see, e.g., *Skogman v. The Queen*, [1984] 2 S.C.R. 93; *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828. This is also the test that applies to whether a trial judge should order a directed verdict of acquittal at the end of the Crown’s case: see e.g., *United States of America v. Shephard*, [1977] 2 S.C.R. 1067; *Mezzo v. The Queen*, [1986] 1 S.C.R. 802; *R. v. Charemski*, [1998] 1 S.C.R. 679.
7. Thus, the language of s. 29(1)(*a*) links the role of the extradition judge in relation to double criminality to the test for committal (and directed verdicts). The incorporation of the test for committal to trial is meant to make the extradition process efficient, permitting prompt compliance with Canada’s international obligations, while also ensuring that there is at least a *prima facie* case against the person of a Canadian crime: see, e.g., *United States of America v. Dynar*,[1997] 2 S.C.R. 462, at paras. 121‑22; *Ferras*,at para. 21. The extradition judge’s role is to determine whether there is a *prima facie* case of a Canadian crime, not to become embroiled in questions about possible defences or the likelihood of conviction. Extradition hearings are not trials; they are intended to be “expeditious procedures to determine whether a trial should be held”: *Dynar*,at para. 122, quoting *McVey (Re)*, [1992] 3 S.C.R. 475, at p. 551.
8. However, the role of the extradition judge at the committal phase has evolved as a result of amendments to other aspects of the *Extradition Act* and the requirements of the *Charter*. The result is that while the test for committal for trial continues to apply in extradition, the role of the extradition judge in applying that test differs in two respects from the preliminary inquiry context.
9. The first difference is that the extradition judge, unlike the preliminary inquiry justice, may grant *Charter* remedies that pertain directly to the circumscribed issues relevant to committal: see, e.g., *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *United States of America v. Kwok*, 2001 SCC 18, [2001] 1 S.C.R. 532. The second is that the extradition judge, unlike the preliminary inquiry justice, must engage in a limited weighing of the evidence to determine whether there is a plausible case. Thus, where the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case is considered insufficient for committal: *Ferras*, at para. 54. This ensures that the extradition process does not “deprive the person sought of the independent hearing and evaluation required by the principles of fundamental justice applicable to extradition”: *Ferras*, at para. 40; see also paras. 47‑49.
10. The appellant’s position is that the extradition judge is entitled to assess exculpatory evidence including evidence of necessity. It is clear that the preliminary inquiry justice cannot do so in the context of committal to trial and there can be little serious doubt that the change proposed by the appellant would constitute a significant alteration of long-settled principles about the nature of the extradition process. Therefore, the question of principle underlying the appellant’s position is whether we should further differentiate between the two roles by expanding the role of the extradition judge.
11. In my view, we should not take this step. The changes in the role of the extradition judge which occurred in *Kwok* and *Ferras* were based on legislative changes to the *Extradition Act*. Both decisions were clear that the basic principles governing extradition remained the same despite these amendments. In this case, there is no legislative or other development that supports the fundamental change proposed by the appellant.
12. In order to explain why I have reached this conclusion, it will be helpful to explore in more detail the role of the preliminary inquiry justice in relation to committal for trial. By virtue of s. 29 of the *Extradition Act*, that is also the framework that governs the role of the extradition judge. We must then consider how and why that role has changed before turning to evaluate the appellant’s submissions.
    * + - 1. The Test for Committal to Trial
13. The role the appellant proposes for the extradition judge has no parallel with that of the preliminary inquiry justice. A preliminary inquiry justice could not refuse to commit for trial on the basis of the sort of exculpatory evidence relied on by the appellant.
14. The test for committal for trial is whether there is any admissible evidence that could, if believed, result in a conviction: *Shephard*, at p. 1080; *Arcuri*, at para. 21. Where the evidence is circumstantial, the judge must conduct a limited weighing of the circumstantial evidence to assess whether, in light of all of the evidence including any defence evidence, it is reasonably capable of supporting the inferences that the Crown asks to be drawn: *Arcuri*,at para. 23.
15. The preliminary inquiry justice is concerned only with the essential elements of the offence and any other conditions on which the prosecution bears the evidential burden of proof: *Arcuri*, at para. 29; *R. v. Sazant*, 2004 SCC 77, [2004] 3 S.C.R. 635, at para. 16; *R. v.* *Russell*, 2001 SCC 53, [2001] 2 S.C.R. 804, at para. 24. The justice has no role to play with respect to matters on which the accused bears an evidential (or persuasive) burden. The rule was perhaps most clearly stated in a directed verdict case to which the same rule applies: there must be a committal for trial if there is “some evidence of culpability for every essential definitional element of the crime for which the Crown has the evidential burden” (*Charemski*, at para. 3 (emphasis in original), per Bastarache J. for a majority of the Court, referring to J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (1992), at p. 136). While the accused is entitled to present evidence by way of defence, the preliminary inquiry justice cannot weigh the merits of that evidence in reaching his or her decision as to whether to commit for trial: *Hynes*, at para. 52, per Major J., dissenting. Thus, where the Crown has adduced direct evidence on all the elements of the offence, the justice must commit even if the defence proffers exculpatory evidence: *Sazant*,at para. 16.
16. Nor is the preliminary inquiry justice to assess the quality, credibility or reliability of the evidence, with the exception of the limited weighing to assess whether the inferences which the Crown seeks to be drawn from circumstantial evidence are reasonable as contemplated in *Arcuri*: *R. v. Deschamplain*, 2004 SCC 76, [2004] 3 S.C.R. 601, at para. 15. So, for example, it is a jurisdictional error for the justice to refuse to commit because, in the judge’s view, the identification evidence did not establish identification beyond a reasonable doubt: *Dubois v. The Queen*, [1986] 1 S.C.R. 366, at pp. 378-79.
17. In light of these principles, a preliminary inquiry justice could not refuse to commit the appellant on the basis of the evidence on which she relies. The justice could not consider evidence of necessity because there is no evidentiary burden on the Crown with respect to those circumstances. Under s. 285 of the *Criminal Code*, the Crown does not have to make out a *prima facie* case of the absence of circumstances of necessity in order to have an accused committed for trial under ss. 280(1) and 282(1) of the *Criminal Code*. As for other exculpatory evidence, the preliminary inquiry justice could not assess its quality, credibility or reliability or rely on it to justify discharging an accused.
    * + - 1. The Role of the Extradition Judge Before *Kwok* and *Ferras*
18. Before *Kwok* and *Ferras*,the role of the extradition judge in deciding whether to commit closely resembled that of the preliminary inquiry justice. Thus, as in the case of committal for trial, the extradition judge had no discretion to refuse to extradite if there were any evidence supporting each of the elements of the offence alleged: *Shephard*, at p. 1080. An extradition judge had no jurisdiction to deal with defences unless the governing extradition treaty provided otherwise: *Schmidt*, at p. 515. Like the preliminary inquiry justice, the extradition judge (before the legislative amendments in 1992, as discussed in greater detail below) had no *Charter* jurisdiction. In short, the test for committal for extradition was tied closely to the test for committal for trial and, like the preliminary inquiry justice, the extradition judge had no role to play with respect to matters that were not part of the Crown’s *prima facie* case.
19. This link to the test for committal was stated explicitly in *Schmidt*: the purpose of the extradition hearing is to determine “whether there is such evidence of the crime alleged to have been committed in the foreign country as would, according to the law of Canada, justify his or her committal for trial if it had been committed here” (p. 515). More recently, the Court affirmed this link in *Fischbacher*: “The [extradition] judge must consider the evidence in light of Canadian law and determine whether it reveals conduct that would justify committal for the crime listed in the ATP if it had occurred in Canada” (para. 35).
20. Extradition judges also distinguished between sufficiency of evidence — which was their concern — and reliability, which was not. So, for example, material that “is so bereft of detail, such as the witness’ means of knowledge, that the judge cannot determine its sufficiency” would not justify committal: *United States of America v. Yang* (2001), 56 O.R. (3d) 52 (C.A.), at para. 63. Two examples given by the Court of Appeal in *Yang* are instructive. The first concerned a statement that police suspected the person sought of committing the offence. The court noted that without any basis being disclosed for this suspicion, that statement would not be sufficient to permit committal: para. 63. The second example concerned admissible hearsay evidence containing direct evidence of guilt. This, the court stated, would be sufficient for committal because the judge’s function does not include assessing the reliability of that evidence: para. 64.
21. The broad principle of double criminality and its underlying rationale are of fundamental importance to our extradition process, and as I have explained, they operate in specific ways at each of the three stages of our extradition process. However, at the committal stage, the extradition judge’s role with respect to double criminality has been given specific legislative expression in the test for committal under s. 29 of the *Extradition Act*. This provision gives precise statutory definition to the role of the extradition judge with respect to double criminality. It is s. 29 that delineates the judge’s role in determining whether the evidence meets the domestic component of double criminality and directly links that role to the test for committal at trial: *Fischbacher*, at para. 35. That test, as I have explained, does not permit the judge to consider aspects of the criminal conduct on which the accused bears an evidential burden: see, e.g., *Fischbacher*, at para. 52; *Schmidt*, at p. 515.
22. Basic fairness to the person sought does not require that the extradition process have all of the safeguards of a trial, “provided the material establishes a case sufficient to put the person on trial”: *Ferras*, at para. 21 (emphasis added). It bears repeating that defences and other matters on which the accused bears an evidential burden of proof play no part in deciding whether the Crown’s case is sufficient to put the person on trial.
    * + - 1. Changes to the Role of the Extradition Judge: *Kwok* and *Ferras*
23. *Kwok* and *Ferras* created significant differences between how the preliminary inquiry justice and the extradition judge apply the same legal test for committal. It is helpful in considering the new approach advocated by the appellant to examine briefly these differences, which, in my view, do not assist the appellant.

Charter Jurisdiction: Kwok

1. Before 1992, the extradition judge had no *Charter* jurisdiction. The decision to commit was reviewable by way of *habeas corpus* and the judge conducting that review had authority to apply the *Charter* to issues relevant to the committal decision: see *Kwok*, atparas. 4 and 35. The *Extradition Act*, R.S.C. 1985, c. E-23, was amended in 1992 (S.C. 1992, c. 13) so that the functions previously exercised by the extradition judge and the judge on review by means of *habeas corpus* were combined in the extradition judge: *Kwok*,at para. 39. In addition, the amended legislation specified that a superior court judge sitting as an extradition judge had, for the purposes of the *Constitution Act, 1982*, the same competence otherwise possessed by a superior court judge. The Court in *Kwok* held that the effect of these changes was to permit “the extradition judge to exercise the jurisdiction previously reserved for the *habeas corpus* judge, which includes remedies for the *Charter* breaches that pertain directly to the circumscribed issues relevant at the committal stage of the extradition process”: para. 57.
2. This change does not assist the appellant and the appellant does not suggest that it does. The Court noted that the decision in *Kwok* “leaves the powers and functions of the committal court substantially unchanged”: para. 57.

Ferras: Limited Weighing

1. *Ferras* decided that the extradition judge’s role with respect to weighing evidence must be somewhat enlarged compared to that of the preliminary inquiry justice. This change was spurred by legislative amendment (i.e., the *Extradition Act*, S.C. 1999, c. 18) as well as by the different demands of s. 7 of the *Charter* in the extradition, as opposed to the preliminary inquiry, context.
2. The legislative changes considered in *Ferras* related to what evidence could be admitted at the committal stage and the definition of the extradition judge’s role in the *Extradition Act* currently in force. With respect to evidence, the *Extradition Act* now provides for evidence to be admitted, even if not otherwise admissible under Canadian law, if contained in the certified ROC: s. 32(1)(*a*). With respect to the role of the extradition judge, the text of the previous *Extradition Act* had “cemented the analogy” between the role of the extradition judge and the role of a preliminary inquiry justice: *Ferras*, at para. 48. It directed the extradition judge to “hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada”: s. 13. The 1999 amendments to the *Extradition Act* modified this direction so that it simply provided the extradition judge with the same powers as a preliminary inquiry justice, “with any modifications that the circumstances require”: s. 24(2); see *Ferras*, atpara. 48. This weakened the strength of the analogy between the two roles.
3. The Court also noted some differences between the committal hearing and a preliminary inquiry that brought different *Charter* considerations into play. First, evidence at a preliminary inquiry is admitted according to Canadian rules of evidence and brings with it the “inherent guarantees of threshold reliability” required by those rules: *Ferras*, at para. 48. Evidence at an extradition hearing, however, by virtue of the expanded rules of admissibility noted in the previous paragraph, “may lack the threshold guarantees of reliability afforded by Canadian rules of evidence”: *ibid*. Second, as discussed earlier, the extradition judge, unlike the preliminary inquiry justice, has the authority to grant *Charter* remedies. Thus, while the extradition hearing and the preliminary inquiry are both pre-trial screening devices and both use the same test of sufficiency of evidence for committal, the Court found that these differences made it “inappropriate to equate the task of the extradition judge with the task of a judge on a preliminary inquiry”: *ibid*.
4. The analysis in *Ferras* of these differences led the Court to modify the role of the extradition judge. This adjustment was also prompted by the combination of the limited role of the extradition judge as set out in *Shephard* and the evidentiary provisions of the 1999 *Extradition Act* which “effectively removed much of an extradition judge’s former discretion to not admit evidence”: *Ferras*, at para. 41. The Court concluded that denying an extradition judge’s discretion to refuse committal for reasons of insufficient evidence would “violate a person’s right to a judicial hearing by an independent and impartial magistrate — a right implicit in s. 7 of the *Charter* where liberty is at stake”: para. 49. In light of this, the Court found that the test for committal under s. 29(1) of the *Extradition Act* granted the extradition judge discretion to refuse extradition on the basis of insufficient evidence: for example, where the reliability of the evidence certified was successfully impeached or where there was no evidence that the evidence was available (para. 50). This was a significant change from the jurisprudence before *Ferras*, which, as noted above, restricted the extradition judge’s inquiry to the sufficiency of the evidence.
   * + - 1. The Extradition Judge’s Role After *Ferras*
5. *Ferras* acknowledged both the importance and the limits of the committal process. It ensures that the person will not be extradited unless the requesting state makes out a *prima facie* case: see, e.g., *Dynar*, at para. 119. But this “modest screening device . . . is structured around the fundamental concept that the actual trial takes place in the requesting state”: *Yang*, at para. 47; see also *Ferras*, at para. 48. Fairness in this context does not require a trial, but simply that there is sufficient evidence to justify putting the person on trial: *Ferras*,at para. 21.
6. *Ferras* did not envisage any change in the test for committal; there was no challenge to that statutory test in s. 29 of the *Extradition Act* which links committal for extradition to the test for committal for trial. Nor did *Ferras* envisage any fundamental change in the nature of the committal process. The Court noted that the extradition judge’s role is not to determine guilt or innocence or to engage in the ultimate assessment of reliability: paras. 46 and 54. The evidence in the ROC is presumed to be reliable and “[u]nless rebutted, this presumption of reliability will stand and the case will be deemed sufficient to commit for extradition”: para. 66. In *Ferras*, the fact that some of the evidence was hearsay and came from unsavoury witnesses did not rebut this presumption. The Court underlined the point that “the issue is not whether the information in the record is actually true”: para. 68. The extradition judge’s limited weighing goes only to whether there is “a plausible case”: para. 54.
7. This means that there continues to be a high threshold for refusing committal on the basis that the supporting evidence is unreliable. It is only where the evidence supporting committal is “so defective or appears so unreliable” or “manifestly unreliable” that it would be “dangerous or unsafe” to act on it that the extradition judge is justified in refusing committal on this basis: *Ferras*, at paras. 54 and 40.
8. While the role of the extradition judge in scrutinizing evidence has been somewhat enhanced to ensure *Charter* compliance, it remains the case that an extradition hearing is not a trial and it should never be permitted to become one: *Schmidt*, at p. 515. The process is intended to be expeditious and efficient so as to “ensure prompt compliance with Canada’s international obligations”: *Dynar*,at para. 122.
9. There is nothing in *Ferras*, or in the analysis that underlies it, suggesting any change in the extradition judge’s statutorily defined role with respect to double criminality. Quite the reverse. *Ferras* reiterates that the test remains whether there is evidence that is sufficient to justify committal had the conduct occurred in Canada: see para. 46. The preliminary inquiry justice has never had any role to play in assessing potential defences or excuses or other aspects of the crime on which the accused bears an evidential (or for that matter, persuasive) burden of proof. Moreover, the Court since *Ferras* has affirmed that the test for committal — and therefore the extradition judge’s role with respect to double criminality — is whether the evidence “reveals conduct that would justify committal for the crime listed in the ATP if it had occurred in Canada”: *Fischbacher*, at para. 35. In saying this, the Court approved the statement in its earlier decision in *McVey (Re)*, at p. 528, that the extradition judge “is concerned with whether the underlying facts of the charge would, *prima facie*, have constituted a crime . . . if they had occurred in Canada”: *Fischbacher*, at para. 35. All of these affirmations demonstrate that the extradition judge’s role, like that of the preliminary inquiry justice, is not concerned with defences or other matters on which the accused bears an evidential or persuasive burden.
10. A fatal flaw in the appellant’s position and, respectfully, in the reasoning of my colleague Abella J. is to take *Ferras* as fundamentally changing the statutory test for committal. It did not. *Ferras*’s insistence on a meaningful judicial determination by the extradition judge speaks only to the rigour that an extradition judge must bring to the assessment of the evidence. *Ferras* did not — indeed could not — change by judicial decree the statutory requirement that the requesting state has only to show that the record would justify committal for trial in Canada. The committal for trial process has never been concerned with possible defences on which the accused bears an evidential or persuasive burden and *Ferras* provides no support for any fundamental change to this statutory test for committal.
11. Some appellate case law since *Ferras* has held that it may be helpful to speak of the test for committal in terms of the test for appellate review of whether a verdict after trial is reasonable: see, e.g., *United States of America v. Graham*, 2007 BCCA 345, 243 B.C.A.C. 248, at paras. 31-32. Respectfully, however, I am not convinced that this is a helpful way to think about whether the evidence justifies committal: see, e.g., *France v. Diab*, 2014 ONCA 374, 120 O.R. (3d) 174, at para. 139.
12. The scope of review for an unreasonable verdict is retrospective in nature. The appellate court examines the full trial record, sometimes supplemented by fresh evidence. The appellate court is not limited, as is the extradition judge, to the evidence of a bare *prima facie* case, presented in the ROC. The scope of review is also in some respects broader than the review for committal. The reviewing court is entitled to consider whether findings of credibility are supported on any reasonable view of the evidence, to intervene based on the bizarre nature of the evidence or the possibility of collusion and, in the case of a trial by judge alone, to assess reasonableness in light of the trial judge’s reasons for conviction: see, e.g., *R. v. Yebes*,[1987] 2 S.C.R. 168, at p. 186; *R. v. Burke*, [1996] 1 S.C.R. 474, at paras. 7 and 53; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at paras. 37 and 41. These bases of intervention have no parallel in the context of committal for extradition.
13. I respectfully conclude that it is not helpful to draw the analogy between the role of the extradition judge and that of an appellate court in determining whether a verdict after trial is unreasonable.
14. In general, courts of appeal have interpreted *Ferras* as requiring a restrained view of the role of the extradition judge in assessing the reliability of evidence. That is the correct approach.
15. In particular, I largely agree with the interpretation of *Ferras* given by Doherty J.A. writing for the court in *United States of America v. Anderson*, 2007 ONCA 84, 85 O.R. (3d) 380, at paras. 28-31. *Ferras* “does not envision weighing competing inferences that may arise from the evidence”, other than in the limited sense noted in *Arcuri* of considering that the inferences sought to be drawn from circumstantial evidence are reasonable: *Anderson*, at para. 28. *Ferras* does not contemplate that the extradition judge will decide whether a witness is credible or his or her evidence is reliable beyond determining that the evidence is not “so defective” or “so unreliable” that it should not be given any weight: *Anderson*, at para. 30. *Ferras* does not call upon the extradition judge to evaluate the relative strength of the case put forward by the requesting state. There is no power to deny extradition simply because the case appears to the extradition judge to be weak or unlikely to succeed at trial*. Ferras* requires the extradition judge, however, to remove evidence from consideration that appears to the judge to be “so defective” or “so unreliable” that it should be disregarded. This may be the result of problems inherent in the evidence itself, problems that undermine the credibility or reliability of the source of the evidence, or a combination of those two factors.
16. I also agree with Doherty J.A. that “it is only where the concerns with respect to the reliability of the evidence, whatever the source or sources, are sufficiently powerful to justify the complete rejection of the evidence, that these concerns become germane to the s. 29(1)(*a*) inquiry”: *Anderson*, at para. 30. The extradition judge’s starting point is that the certified evidence is presumptively reliable: see *Ferras*, at paras. 52-56. This presumption may only be rebutted by evidence showing “fundamental inadequacies or frailties in the material relied on by the requesting state”: *Anderson*, at para. 31.
    * + - 1. A Word About Process
17. In *Ferras* and its companion appeals, the persons sought did not adduce evidence directed to the unreliability of the information contained in the ROC. *Ferras*, therefore, did not have to consider in detail the practical issues that arise when the person sought seeks to adduce evidence for the purpose of undermining the reliability of the requesting state’s evidence. However, *Ferras* and other jurisprudence provide helpful guidance on those questions.
18. The starting point is that the person sought may adduce evidence if it is “relevant to the tests set out in subsection 29(1) if the judge considers it reliable”: *Extradition Act*, s. 32(1)(*c*). Thus, there are two requirements for evidence to be admissible under this provision: reliability and relevance.
19. The reliability requirement means that the evidence must possess “sufficient indicia of reliability to make it worth consideration by the judge at the hearing”: *Ferras*,at para. 53. This “threshold reliability” requirement is not an onerous standard. It imposes “no greater evidentiary hurdle to the person sought” than the evidentiary requirements governing the requesting state: *ibid*.
20. However — and this is a key point — the relevance requirement is linked directly to the test for committal under s. 29 of the *Extradition Act*. In other words, the evidence must be relevant to the *task of the extradition judge*, that is, whether the test for committal under s. 29(1) of the *Extradition Act* has been met. (This relevance requirement is the same whether the evidence is otherwise admissible under Canadian law or not.) To decide whether the proffered evidence is relevant in this sense, the extradition judge must consider the proposed evidence in the light of the *limited* weighing of evidence which he or she must undertake in applying the test for committal.
21. A significant procedural point follows from this, as I see it. Before the extradition judge embarks on hearing evidence from the person sought whose object is to challenge the reliability of the evidence presented by the requesting state, the judge may, and I would suggest generally should, require an initial showing that the proposed evidence is realistically capable of satisfying the high standard that must be met in order to justify refusing committal on the basis of unreliability of the requesting state’s evidence. This showing may be based on summaries or will-say statements or similar offers of proof. If the judge concludes that the proposed evidence, taken at its highest, is not realistically capable of meeting this standard, it ought not to be received. To paraphrase Charron J. in *R. v. Pires*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 31, there is no point in permitting the evidence if there is no reasonable likelihood that it will impact on the question of committal: see also *United States of America v. Mach*, [2006] O.J. No. 3204 (QL) (S.C.J.); *Anderson*, at paras. 37-46; *United States of America v. Edwards*, 2011 BCCA 100, 306 B.C.A.C. 160, at paras. 31-35.
22. I conclude that in order to 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.
23. I recognize that the extradition judge has a limited discretion exceptionally to admit evidence that is not, strictly speaking, relevant to the committal inquiry but will be relevant to the Minister’s task at the surrender stage of the proceedings. As recognized in *Kwok*, this may, in exceptional cases, be an efficient and expedient approach, fully recognizing that the extradition judge has no role in deciding the merits of the issue: paras. 6 and 74. Nothing that I have said is intended to eliminate this exceptional, discretionary power of the extradition judge.
24. It will be helpful to give some examples of evidence that may or may not meet the high threshold justifying a refusal of committal on the basis of unreliability of the evidence.
    * + - 1. Some Examples
25. Appellate courts have held, and in my view correctly, that some types of evidence are either irrelevant or not sufficiently cogent to be capable of allowing the person sought to successfully challenge the reliability of the evidence in the ROC.
26. For instance, generally speaking, proposed evidence that does nothing more than to invite the judge to assess the credibility of evidence contained in the ROC is not admissible: see, e.g., *Scarpitti v. United States of America*, 2007 BCCA 498, 247 B.C.A.C. 234, at paras. 40-43; *United States of America v. Orphanou*, 2011 ONCA 612, 107 O.R. (3d) 365, at paras. 33-39; *United States of America v. Ranga*, 2012 BCCA 81, 317 B.C.A.C. 207, at paras. 33-37; *Canada (Attorney General) v. Bennett*, 2014 BCCA 145, 353 B.C.A.C. 311, at para. 24; *United States of America v. Aneja*, 2014 ONCA 423, 120 O.R. (3d) 620, at paras. 31-46; *United States of America v. U.A.S.*, 2013 BCCA 483, 344 B.C.A.C. 302, at para. 38. It is generally not appropriate for the extradition judge to evaluate the credibility of witness evidence in relation to the facts of the alleged offence because such an inquiry “invites a comparison and weighing of alternatives that goes beyond the limited role of an extradition judge”: *Bennett*, at para. 24.
27. Courts have also held that, generally speaking, evidence which establishes a basis for competing inferences of guilt or innocence is inadmissible at the committal hearing. Evidence of that nature generally cannot rebut the presumed reliability of the ROC or show that inferences relied on by the requesting state are unreasonable: *Canada (Attorney General) v. Viscomi*, 2014 ONCA 879, 329 O.A.C. 47, at paras. 16-20; *Canada (Attorney General) v. Hislop*, 2009 BCCA 94, 267 B.C.A.C. 155, at para. 31; *Anderson*, at para. 28. As mentioned earlier, the test for committal does not require that guilt be the only possible inference that can be drawn from the evidence; it need only be a reasonable inference. The fact that evidence — either contained in the ROC or adduced by the person sought — can support inferences consistent with the innocence of the person sought is not relevant to the test for committal. Just as with the ultimate determination of credibility, the choice between competing inferences — provided the one relied on by the requesting state is reasonable — “is ultimately a decision for the fact finder at trial, not for the extradition judge”: *Hislop*, at para. 31.
28. Similarly, evidence that establishes a defence or attempts to establish a different or exculpatory account of events will generally be inadmissible as it does not affect the reliability of the requesting state’s evidence: *Singh v. Canada (Attorney General)*, 2007 BCCA 157, 238 B.C.A.C. 213, at para. 56; *Canada (Minister of Justice) v. Gorcyca*, 2007 ONCA 76, 220 O.A.C. 35, at paras. 15-20; *United States of America v. Lorenz*, 2007 BCCA 342, 243 B.C.A.C. 219, at paras. 46-47; *Canada (Attorney General) v. Sosa*, 2012 ABCA 242, 536 A.R. 61, at para. 20; *Canada (Attorney General) v. Aziz*, 2013 BCCA 414, 342 B.C.A.C. 305, at para. 36; *United States of America v. Doak*, 2015 BCCA 145, 323 C.C.C. (3d) 219, at paras. 51-56. Extradition judges should generally decline to consider different or innocent accounts of events as it requires an assessment of the evidence’s ultimate reliability, which is within the realm of the trier of fact: see *Doak*, at para. 55. It is for the foreign court to assume this role, not the extradition judge.
29. This is not to say that courts must always reject evidence which (1) invites the judge to assess credibility, (2) establishes a basis for competing inferences, or (3) provides for an exculpatory account of events. It is possible that such evidence may in certain, and likely fairly unusual, cases meet the high threshold for showing that the evidence of the requesting state should not be relied on. *Ferras* leaves open the possibility that, for example, evidence of virtually unimpeachable authenticity and reliability which contradicts the ROC could rebut the presumption of its reliability and could justify refusal to commit. Such situations I would expect to be very rare.
    * + 1. Application
30. As I have explained, there is nothing in *Ferras* to suggest that the extradition judge has a role to play with respect to defences on which the accused bears a burden of proof, including the excuse of qualified necessity set out in s. 285 of the *Criminal Code*. *Ferras* reiterates that the test remains whether there is evidence that is sufficient to justify committal for trial, as set out in s. 29 of the *Extradition Act*. That statutory direction is inconsistent with the consideration of defences because they (and other matters on which the accused has an evidential burden) have never formed part of the test for committal to trial in the preliminary inquiry context. Moreover, any scope for considering defences would undermine the limited burden of the requesting state to provide evidence of a *prima facie* case. And, from a practical standpoint, considering defences would fundamentally change the nature of the extradition hearing, making it more akin to a trial. *Ferras*, as we have seen, did not mandate any such fundamental re-imagining of the committal process; it simply enhanced the extradition judge’s authority to engage in limited weighing of the evidence in applying the test for committal under s. 29 of the *Extradition* *Act*.
31. Similarly, there is nothing in *Ferras* to support the contention that the extradition judge should generally weigh exculpatory evidence. Rather, *Ferras* holds that any weighing must only be in the context of deciding whether the evidence undermines the presumed reliability of the requesting state’s evidence to the point that it should be discarded.
32. Finally on this point, *Ferras* does not mandate, or even provide any support for, the change the appellant wants to the role of the extradition judge with respect to double criminality.
33. The extradition judge, respectfully, erred in law in weighing and relying on evidence of defences and other exculpatory circumstances. She gave no weight to the presumption of reliability of the ROC, accepted some accounts given by some of the children in relation to the facts of the offences and weighed the evidence and, having done so, rejected the evidence in the ROC.
34. The extradition judge also erred in law in relation to the requirements for a *prima facie* case and the elements of the necessity defence.
35. With respect to s. 280(1) of the *Criminal Code* (abduction of a person under 16), the extradition judge found that “a ‘meaningful judicial assessment’ of all of the evidence . . . indicates clearly that the children left of their own volition, and that they were not taken out of the father’s possession by anyone, and certainly not by [the appellant]”: para. 61, quoting *Ferras*, at para. 25. She found that “all of the evidence” indicates that the three children ran away from their father’s residence and that their elder sister drove them to Canada: para. 62. Respectfully, these conclusions are wrong in law and in fact.
36. First, the law. Depriving parents of the “possession” (s. 280(1) of the *Criminal Code*) of their children is not limited to circumstances in which the parents were in physical control of the children at the time of the taking. The essence of the offence is not a physical taking of the child, but interference with the parent’s exercise of his or her right of control over the child: see, e.g., *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. Dawson*, [1996] 3 S.C.R. 783; *R. v. Vokey*, 2005 BCCA 498, 217 B.C.A.C. 231; *R. v. Flick*, 2005 BCCA 499, 217 B.C.A.C. 237. Contrary to what the extradition judge assumed, in order to be found guilty of taking the children out of the lawful possession of their father, the prosecution would not have to establish that the appellant physically took the children.
37. As for the facts, the extradition judge failed to recognize that there was conflicting evidence adduced on behalf of the appellant concerning how the children came to be with her in Canada. There was evidence supporting the version of events that the extradition judge adopted. There was also evidence, however, supporting the proposition that the appellant had taken the children to Canada precisely for the purpose of keeping them away from their father. The extradition judge admitted a Youth Court judgment dated May 26, 2011, which indicated that at the end of November 2010, “[t]he children . . . left Georgia with their mother and moved to Canada”: para. 49, quoting the Youth Court judgment, at para. 10. The extradition judge also admitted a report by Quebec’s Director of Youth Protection (“DYP”) from January 2011. The oldest child is reported to have told the DYP that they “left Georgia with their mother and moved to Canada”: A.R., vol. III, at p. 98. The middle child said that they stayed with friends or family “until their departure for Canada with their mother”: *ibid.*, at p. 99. The appellant herself told the DYP that “this is not the first time” that she has taken the children without authorization and that she “took her children to Canada with no regards to the interdiction of contact . . . . [s]he is aware that her actions were illegal”: *ibid.*, at p. 101. The record before the extradition judge could not reasonably be thought to meet the threshold of showing either that the evidence in the ROC was so unreliable that it should be discarded or that the inferences relied on by the requesting state were unreasonable.
38. With respect to s. 282(1) of the *Criminal Code* (abduction in contravention of a custody order), the extradition judge found that the appellant could not be found guilty in Canada of this offence because she would be entitled to the qualified defence of necessity under s. 285 of the *Criminal Code*. Again, the extradition judge erred both in law and in fact.
39. With respect to the law, it was not part of the extradition judge’s role to consider whether there might be valid defences to the Canadian offences. In order to obtain a committal for trial, the prosecution does not have to negate defences, such as the excuse set out in s. 285, on which the accused bears the evidential burden. As for the facts, the extradition judge did not consider that s. 285 requires that there be danger of imminent harm either to the children or to the appellant. There was evidence of neither.
    * + 1. Conclusion
40. The extradition judge exceeded her role by failing to give weight to the presumption of reliability of the ROC, and in weighing evidence that was incapable of showing that evidence in the ROC was so unreliable that it should be rejected or of showing that the inferences relied on by the requesting state were unreasonable. The extradition judge also erred in law in relation to her analysis of the Canadian offences.
    * 1. Second Issue: Was the Evidence in the ROC Sufficient to Justify Committal?
         1. Decisions and Submissions
41. The extradition judge found that the ROC, taken at face value, was not sufficient to justify committal for either offence. She found that it did not provide “any evidence whatsoever” of two of the essential elements of the offence of the abduction of a person under the age of 16 (s. 280(1) of the *Criminal Code*): para. 61. There was no evidence that the appellant took the children or that she did so out of the possession of and against the will of their father. With respect to the offence relating to abduction in contravention of a custody order (s. 282(1) of the *Criminal Code*), the extradition judge found that the ROC contained “no evidence whatsoever” that the appellant had received or harboured the children with the specific intent of depriving their father of possession: para. 67.
42. The Court of Appeal disagreed with both of these conclusions and held that the ROC supported reasonable inferences of the existence of all of the essential elements of the Canadian offences. The extradition judge erred, the court held, by evaluating the relative strength of the case and by assessing witness credibility rather than deciding whether there was some evidence available for trial that was not manifestly unreliable on every essential element of the parallel Canadian crime.
43. The appellant submits that the Court of Appeal was wrong to overrule the extradition judge. I disagree.
    * + 1. Analysis
44. As the Court of Appeal found, the ROC supported committal. The ROC stated that the children, while in the sole custody of their father, were reported by him as missing on October 30, 2010 and that he had given no authority for anyone to take the children. They were found by a Georgia police officer in Gordon County, Georgia, in a car driven by the appellant on November 9, 2010, even though there was a court order that she could have no contact with them. The ROC further stated that the children were still missing in the middle of December 2010 and that they were tracked to a women’s shelter using the internet service provider logins of the two oldest children. The three missing children and the appellant were found in the shelter. This circumstantial evidence and the reasonable inferences that could be drawn from it were sufficient to conclude that a reasonable jury properly instructed could return a verdict of guilt regarding the abduction of a person under 16 offence (s. 280(1) of the *Criminal Code*): Court of Appeal judgment, at para. 15 (CanLII).
45. The ROC permitted reasonable inferences that the appellant had taken the children out of the possession of and against the will of the parent who had lawful care or charge of them, as is prohibited by s. 280(1) of the *Criminal Code*. Similarly, the ROC established that the appellant was aware that the father had full custody and that she did not have the right to be in contact with the children. Again, this is sufficient to support a reasonable inference that the appellant had abducted the children in violation of a custody order with the intent to deprive the father of their possession contrary to s. 282(1) of the *Criminal Code*.
46. As the Court of Appeal found, by setting aside the circumstantial evidence offered by the requesting state and the reasonable inferences that could be drawn from it, the extradition judge went beyond the limited weighing of the evidence allowed by *Ferras*. The Court of Appeal rightly intervened.
47. I would dismiss the appeal relating to the committal order.
    1. Appeal From the Surrender Decision
       1. Introduction and Issues
48. The issues here concern judicial review of the Minister’s decision to surrender the appellant for extradition. The appellant says that the Minister’s surrender decision was unreasonable and that the Court of Appeal was wrong to find otherwise. She makes two main points, one concerning the apparent absence in Georgia of a defence of necessity to the abduction charges and the other in relation to the best interests of the children. The questions at issue raised by the appellant can be stated as follows:
    * + 1. Did the Minister fail to give appropriate consideration to the fact that a defence potentially available to her under Canadian law is not available under the law of the requesting state?
        2. Did the Minister fail to give appropriate consideration to the effect of extradition on the best interests of the appellant’s children?
49. The appellant contends that the Minister did not give adequate consideration to either question and that as a result his decision is unreasonable. Both of these matters, in her submission, should have engaged the Minister’s duty to refuse surrender set out in s. 44(1)(*a*) of the *Extradition Act*. It provides that the Minister “shall refuse to make a surrender order” if he or she is satisfied that “the surrender would be unjust or oppressive having regard to all the relevant circumstances”.
50. There is no dispute that the standard of review that the Court of Appeal had to apply to the Minister’s decision was reasonableness. This standard was authoritatively described in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41:

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. . . . If . . . the Minister has identified the proper test, the conclusion he has reached in applying that test should be upheld by a reviewing court unless it is unreasonable. . . . Given the Minister’s expertise and his obligation to ensure that Canada complies with its international commitments, he is in the best position to determine whether the factors weigh in favour of or against extradition. [Emphasis added.]

The ultimate question on appeal, therefore, is whether the Minister’s decision was unreasonable. In my view, it was not. I will address the necessity defence and best interests of the child separately, but we must recognize that the Minister was obliged to consider these matters individually and cumulatively: *Fischbacher*, at para. 37, quoting *United States of America v. Johnson* (2002), 62 O.R. (3d) 327 (C.A.), at para. 45.

* + 1. The Decisions Below
       1. The Minister’s Decision

1. The appellant submitted to the Minister that ordering her surrender would be “unjust or oppressive” because she had a defence to the charges and that extradition would be contrary to her children’s best interests. On the first issue, the Minister noted that the Court of Appeal had determined there was sufficient evidence to order the appellant’s committal; that it was not his role to question the sufficiency of this evidence; that defences should be left to the foreign trial court to consider; and that, although she would be unable to raise a defence of necessity before the Georgia court, she could raise a defence of coercion. On the second issue, he concluded that “[t]he best interests of [the appellant’s] children are by no means clear” (Minister’s decision, at p. 4 (A.R., vol. I, at p. 69)); that the impact of extradition on the children was unclear; and that there were important considerations favouring her surrender. Considering these matters separately and cumulatively alongside a number of other relevant factors, he determined that the appellant’s surrender would not be unjust or oppressive.
   * + 1. Quebec Court of Appeal
2. The Court of Appeal concluded that the Minister’s decision was reasonable. He had appropriately considered the children’s best interests and had carefully analyzed submissions based on the Superior Court’s findings related to the children’s situation. The decision contained no reviewable error warranting the court’s intervention.
   * 1. First Issue: Defences
        1. Submissions
3. The appellant submits that the Minister’s decision to surrender is unreasonable because it did not take into consideration the fact that the defence of necessity, on which the appellant relies, does not exist in the requesting state. The appellant submits that this issue is of fundamental importance, and if the defence is not taken into consideration at the committal stage, then it must necessarily become relevant at the ministerial stage. While the Minister did mention that the defence of coercion was available in the requesting state, the appellant contends that this is irrelevant as it does not take into account the same factors as s. 285 of the *Criminal Code*.
4. The respondent asserts that the Minister was right in noting that the appellant will receive a fair trial in the requesting state despite her inability to raise a necessity defence at trial. Moreover, the Minister was attentive to the appellant’s situation, as he received information from the U.S. Department of Justice that the appellant would be able to raise the defence of coercion. The fact that the defences afforded to the appellant under Canadian and U.S. law are not identical does not make surrender unjust or oppressive.
   * + 1. Analysis
          1. Legal Principles
5. The principle of double criminality, as discussed above, operates at the first two phases of the extradition process. In deciding whether to issue an ATP, the Minister addresses the foreign component of double criminality: *Fischbacher*, at para. 35. The extradition judge, at the judicial phase, addresses the domestic side of double criminality, to the extent of deciding whether the evidence “reveals conduct that would justify committal for the crime listed in the ATP if it had occurred in Canada”: *ibid*.
6. The appellant’s position is that a broad principle of double criminality also operates at the surrender stage of the process. This position is developed in greater detail by the intervener Criminal Lawyers’ Association (Ontario). I agree that the basic concern which underlies the broad principle of double criminality may also inform the Minister’s determination of whether extradition would be unjust or oppressive or contrary to the principles of fundamental justice at the surrender stage of the extradition process.
7. At the surrender stage, the Minister must determine “whether it is politically appropriate and not fundamentally unjust for Canada to extradite the person sought”: *Fischbacher*, at para. 36. This requires consideration of all the relevant circumstances, both individually and cumulatively, to determine whether surrender would be unjust or oppressive: *Fischbacher*,at para. 37, quoting *Johnson*, at para. 45. Thus, the Minister engages in a weighing exercise of all the relevant circumstances that favour surrender versus those that do not: *Fischbacher*,at para. 38.
8. This is a vitally important role because it provides an additional safeguard of the rights of the person sought and addresses matters that may not be properly considered at the two earlier stages of the extradition process. Thus, while the ATP process and the limited screening function at the judicial phase of the process may, without more, lead to harsh results, it is for the Minister to decide whether Canada will comply with the treaty obligation to surrender where matters offend against public policy:A. W. La Forest, *La Forest’s Extradition to and from Canada* (3rd ed. 1991), at p. 70.
9. The Court has repeatedly affirmed that the Minister has a role to play at the surrender stage in assessing the potential consequences for the person sought of being subjected to the law of the requesting state. There are circumstances in which “the manner in which the foreign state will deal with the [person sought] on surrender . . . may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances”: *Schmidt*, at p. 522. Where surrender would be contrary to the principles of fundamental justice, it will also be unjust and oppressive under s. 44(1)(*a*): see, e.g., *Burns*, at para. 68; *Lake*,at para. 24.
10. The Court has also recognized that the availability of possible defences that fall outside of the scope of the double criminality inquiry required at the first two phases of the extradition process can nonetheless be relevant at the third. In *Schmidt*, the Court decided that the special pleas of *autrefois acquit* and *res judicata* could not be raised during the judicial phase. The Court added, however, that “the underlying considerations involved in these pleas” should not be ignored in considering whether surrender should be refused on the grounds that it would violate the principles of fundamental justice or be otherwise unjust or oppressive: pp. 527-28. And most recently, in *Fischbacher*, the Court affirmed that a significant discrepancy in jeopardy between Canada and the requesting state may be a relevant consideration when deciding whether surrender is unjust or oppressive or contrary to the principles of fundamental justice:

It is well established that in exceptional circumstances, the panoply of relevant factors that inform a surrender decision may include a significant discrepancy between the jeopardy faced by the person sought in the requesting state and that which he would face if convicted in Canada in respect of the same conduct . . . . [para. 54]

1. Considering defences that are potentially available in Canada but not in the requesting state is consistent with this jurisprudence. It is also consistent with both the rationale of the double criminality principle and with the conduct-based approach to double criminality adopted by our *Extradition Act*. The underlying concern is that “an act shall not be extraditable unless it constitutes a crime according to the laws of both the requesting and the requested States”: I. A. Shearer, *Extradition in International Law* (1971), at p. 137 (emphasis added).
2. It follows from this that the Minister should consider, when relevant, how the person sought would be affected by the unavailability of a comparable defence in the requesting state to that available in Canada. This analysis should be done in considering whether surrender would be unjust or oppressive or otherwise contrary to the principles of fundamental justice.
3. That said, it does not follow that every difference in the availability of defences or in jeopardy makes extradition unjust or oppressive or contrary to the principles of fundamental justice. Rather, the text of s. 44 of the *Extradition Act*, the underlying purposes of extradition and the jurisprudence show that it is only where, in light of all of the circumstances, the consequences of surrender are “simply unacceptable” that the Minister must intervene: see, e.g., *Lake*, at paras. 18 and 31. Section 44 refers to surrender being “unjust or oppressive”, which is clearly a high test. Moreover, that test must be applied in light of a “panoply of relevant factors”: *Fischbacher*, at para. 54. These include not only the circumstances of the person sought, but the principles of comity and reciprocity that underlie extradition.
4. The assessment must also account for the fact that the very existence of an extradition arrangement with a foreign country entails a determination that “the general system for the administration of justice in the foreign country sufficiently corresponds to our concepts of justice to warrant entering into the treaty in the first place”: *Schmidt*,at p. 523. There is generally speaking nothing unjust in surrendering a person to face the legal consequences of their acts in the place where they were committed. Differences in legal systems — even substantial differences — should not, generally speaking, constitute grounds for refusing surrender. As La Forest J. wrote for a majority of the Court in *Schmidt*:

. . . I see nothing unjust in surrendering to a foreign country a person accused of having committed a crime there for trial in the ordinary way in accordance with the system for the administration of justice prevailing in that country simply because that system is substantially different from ours with different checks and balances. The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country. [Emphasis added; p. 522.]

1. It follows, in my view, that before the unavailability of a defence could engage the threshold for refusal under s. 44(1)(*a*) of the *Extradition Act* or be considered contrary to the principles of fundamental justice, the person sought must show three things. If this threshold is met, the Minister must, of course, weigh this along with all other relevant considerations in reaching a decision. The elements of the threshold are these.
2. First, it must be clear that there is, in fact, a difference in the respective laws of the requested and requesting state so that the defence is available in Canada but no comparable defence is available in the requesting state. The difference must be one of substance and not merely a matter of different labels or slight variations in the way the defence is defined. If the threshold is met, the nature of the defence will also be part of the overall weighing in the final decision making. For example, the Canadian defence of duress goes to the moral involuntariness of the accused’s conduct and the complete absence of any similar defence may be seen as at odds with a foundational principle of Canadian penal policy.
3. Second, there must be a reasonable prospect of success were the defence to be raised if the accused were tried for the same conduct in Canada. Once again, if the threshold is met, the apparent strength of the defence will also be considered in the overall weighing of the relevant considerations.
4. Finally, the difference between the laws of the two countries must lead to a significantly greater jeopardy for the person sought in the requesting state. This is assessed by considering the potential disparity in criminal consequences for the requested person that would flow from the unavailability of the defence.
5. Consider some possible scenarios as illustrations. The relevant defence might be a partial defence to murder in Canada, but there may be little or no difference between the potential sentences for manslaughter in Canada and for murder in the requested state. If this is so, the unavailability of the partial defence will not result in a significantly greater jeopardy. For example, provocation in Canada is a partial defence, reducing what would otherwise be murder to manslaughter. A requesting state may not recognize the partial defence of provocation, but may take the circumstances of provocation into account in sentencing. As a result, in this scenario, the unavailability of the partial defence might well be given less weight. Another scenario is that the unavailable defence is a full defence to the crime, thereby making the difference between conviction and acquittal. Returning to the example of duress, it is under Canadian law a full defence based on the moral involuntariness of the accused’s conduct. The absence of any comparable defence in the requesting state would result in significantly greater jeopardy.
6. If these three elements are present, then the Minister is required to weigh the potential difference in defences along with all the other relevant considerations in making his or her surrender decision. Particularly where the defence appears strong and its unavailability under the law of the requesting state is at odds with Canadian penal policy, this factor will generally be given significant weight. The onus of persuasion remains on the person sought. The Minister’s ultimate conclusion will be treated with deference on judicial review.
   * + - 1. Application
7. The Minister’s reasons for ordering surrender do not meaningfully engage with the appellant’s arguments as advanced in this Court. This is explained by the fact that the focus of the appellant’s submissions to the Minister in relation to the qualified defence of necessity under s. 285 of the *Criminal Code* were entirely different from what has been advanced before us. The appellant’s position on this point to the Minister was simply that she had such a strong defence to the charges under Canadian law that it would be unjust and oppressive to put her on trial in Georgia. The appellant’s written submissions to the Minister focused exclusively on the conditions specified in s. 285 and how they applied to the facts of her case. There was no mention of the absence of an equivalent defence in Georgia.
8. Responding to this position, the Minister correctly noted that the Court of Appeal had determined there was sufficient evidence to order the appellant’s committal and that it was not his role to question the sufficiency of the evidence for committal. He also referred to a body of jurisprudence indicating that he should not entertain defences, as they should be left for the foreign court to consider: see, e.g., *Singh*. These considerations provide a reasonable basis for the Minister not to refuse surrender on the ground that the appellant claimed to have a good defence under Canadian law.
9. It seems that the Minister went on to raise on his own motion the question of Georgia law in relation to the appellant’s possible defence of qualified necessity. I do not say this in any way critically; it was of course appropriate for the Minister to raise this question. The Minister caused inquiries to be made with the Office of International Affairs of the U.S. Department of Justice concerning the possible defences that the appellant may raise at her trial and the likely sentences she would face, if convicted. He ultimately received information that the appellant would not be able to raise a defence of necessity, but that she could raise the defence of coercion before the trial court in Georgia. This information was included in the Minister’s decision. Beyond this, we know nothing about the differences between Georgia law and Canadian law. In particular, we know nothing about the differences, if any, between the Georgia defence of coercion and the qualified defence of necessity under s. 285 of the *Criminal Code*.
10. The question, therefore, is whether the Minister’s decision is unreasonable because he did not go on to consider further the possible differences in defences. In my view, the Minister’s decision was not unreasonable because the appellant did not meet any of the three threshold requirements described above which could engage the Minister’s power to refuse surrender under s. 44(1)(*a*).
11. First, the appellant did not show that there is any difference in substance between the law in Canada and in Georgia. We know nothing about the alleged differences, if any, between the Canadian offences and the Georgia offences and nothing about the differences, if any, between the types of defences available in each jurisdiction. Given that we know nothing about the elements of the Georgia offence of “interstate interference with custody” beyond the fact that the Minister identified ss. 280(1) and 282(1) of the *Criminal Code* as being the corresponding Canadian offences, we cannot assume that Georgia law provides for no lawful excuse that might include the appellant’s conduct in the circumstances that she alleges it occurred. And we certainly know nothing about the Georgia law of “coercion”.
12. We do know that under our own criminal law, the excuses of duress — often referred to as coercion — and necessity are closely related. As the Court said in *R. v. Hibbert*, [1995] 2 S.C.R. 973, at para. 54, “the similarities between the two defences are so great that consistency and logic require that they be understood as based on the same juristic principles”. Both are excuses based on the idea of normative involuntariness: *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, at para. 17, citing *Hibbert*, at para. 54; see also *Perka v. The Queen*, [1984] 2 S.C.R. 232. Given the close relationship between the two excuses under our own law and the fact that the U.S. authorities advised the Minister that the appellant could rely on a defence of coercion at her trial in Georgia, I see no reason simply to assume that there is a significant substantive difference between the two. The appellant asserts that “[t]he availability of the defence of duress in Georgia is irrelevant as it does not take into account the same factors as s. 285 of the *Criminal Code*”: A.F., at para. 55. However, there is no basis in the record for this assertion, and the appellant’s contention is nothing more than speculation.
13. In short, the record contains nothing to support the assertion that there is no defence in Georgia comparable to the statutory necessity defence under our *Criminal Code*. All we know is that the Minister was advised that the appellant “will not be able to raise a defence that it was necessary to remove her children to protect them from danger of imminent harm [but that she] may raise the defence of coercion before the trial court in Georgia”: Minister’s decision, at p. 6.
14. Second, the material in the record, considered as a whole, does not show a reasonable prospect of success on the Canadian qualified defence of necessity if the appellant were tried for the alleged conduct in Canada.
15. This Court has not pronounced on the precise ambit of the qualified defence of necessity provided for in s. 285 of the *Criminal Code*. However, that section is clear that the defence is available only if the “taking, enticing away, concealing, detaining, receiving or harbouring of any young person” was necessary either to protect the young person from danger of “imminent harm” or if the person charged was escaping from the danger of “imminent harm”. The material before the Minister did not provide any basis to think that either of these imminent harm requirements was present here.
16. The appellant’s position before the extradition judge was that she had not abducted the children but had joined them in Canada after they had fled here on their own. While in my respectful view the extradition judge should not have got into this issue as she did, she found that “all of the evidence indicates that the three children ran away from their father’s residence at the end of October 2010 without consulting their mother and without her knowledge, and that they stayed alternately in an abandoned house or with friends, with assistance from their 29-year-old elder sister O., who drove them to Canada”: para. 62. While the extradition judge’s decision had been reversed by the Court of Appeal, her purported factual findings provided no basis to think that the children were at imminent risk of harm when the appellant, according to this version of her position, intervened and still less that the appellant was escaping from danger of imminent harm.
17. The appellant’s position on the facts changed dramatically in her submissions to the Minister. In those submissions, she submitted that “when she fled to Canada with the children in November [2010], [she] felt that she didn’t have a choice, as the children begged her to take care of them and help them to run away from the danger that the custody of their father represents to them. . . . In taking her children to Canada, she was saving them from an imminent danger of physical and mental abuse by their father”: A.R., vol. III, at pp. 111-12 (emphasis added). Given the appellant’s very different position on the facts before the extradition judge, these contentions could not reasonably be thought to be entitled to much weight.
18. Third, the appellant failed to show that she faced significantly greater jeopardy in Georgia than in Canada.
19. I conclude that the appellant’s submissions to the Minister in relation to possible Canadian defences to the charges, considered in light of all of the material, could not reasonably be thought to meet the requirements that could engage the threshold for refusal under s. 44(1)(*a*) of the *Extradition Act* or on the basis that the surrender would be contrary to the principles of fundamental justice.
20. In reaching this conclusion, I have considered that the detailed framework which I propose in my reasons was not available to the appellant when making her submissions to the Minister. However, as I have noted, the focus of her submissions to the Minister was on the availability of a defence in Canada, not on the absence of a comparable defence in Georgia. In essence, the appellant asks us to find the Minister’s decision to be unreasonable on the basis of a point which was not raised directly with him. The appellant did so while pointing to nothing beyond speculation to support the contention now advanced. In these circumstances, applying the framework to the appellant’s submissions is not procedurally unfair to her and the development of this framework provides no basis for ordering reconsideration by the Minister.
    * 1. Second Issue: Best Interests of the Children
         1. Submissions
21. The appellant contends that the Minister did not properly consider the effect of extradition on the best interests of her children, which she says require her to stay in Canada. She contends that the Minister did not give sufficient weight to the fact that if the appellant is extradited, the children will be placed in foster care without any relatives caring for them. She submits that since obtaining full custody of her children in Canada, she has been an exemplary mother, and that her extradition would break up their family — facts that the Minister did not acknowledge or to which he gave insufficient weight. The appellant says her actions saved her children from their abusive father and that it would shock the conscience of Canadians to order her surrender for extradition in circumstances where she had to choose between saving her children and retaining her freedom.
22. The respondent’s position is that the Minister appropriately considered the children’s best interests, which he found to be unclear. His treatment of this factor in his decision is consistent with Canadian appellate jurisprudence, international instruments, foreign jurisprudence, and his duty to take into consideration all relevant circumstances when making his surrender decision.
    * + 1. Analysis

Legal Principles

1. The legal question underpinning the appellant’s position concerns the role the best interests of children should play in the Minister’s decision with respect to surrender for extradition.
2. The respondent accepts that, in making a surrender decision, the Minister can consider personal circumstances, including the hardship extradition will create for families. I would add that it is necessary for the Minister to do so where the material before him or her puts these considerations in play. This obligation extends to considering the best interests of children who will or may be affected by extradition.
3. That said, however, the best interests of children on surrender for extradition must be considered in light of other important legal principles and the facts of the individual case: *Fischbacher*, at paras. 37-38. As the Court said in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, “the legal principle of the ‘best interests of the child’ may be subordinated to other concerns in appropriate contexts”; its application “is inevitably highly contextual”; and “[s]ociety does not always deem it essential that the ‘best interests of the child’ trump all other concerns in the administration of justice”: paras. 10-11.
4. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, is the leading authority from this Court concerning the obligation to give serious consideration to the best interests of children when exercising discretionary powers that may affect them. In *Baker*,the Court considered the role of the children’s interests in ministerial decisions on humanitarian and compassionate (“H & C”) applications under the *Immigration Act*, R.S.C. 1985, c. I-2 (now the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27). The Minister was authorized to exempt people from certain requirements and to facilitate their admission to Canada “owing to the existence of compassionate or humanitarian considerations”: *Immigration Regulations, 1978*, SOR/78-172, s. 2.1 (added by SOR/93-44, s. 2). As the Court noted, “the H & C decision is one that provides for an exemption from regulations or from the Act, [and] in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country”: *Baker*, at para. 15. In other words, the Minister has broad discretion to exempt persons on H & C grounds in a context in which his or her decision “affects in a fundamental manner the future of individuals’ lives” and “may also have an important impact on the lives of any Canadian children of the person . . . since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections”: *ibid*.
5. To reach its conclusion on the role of the best interests of the child, the Court took into account this broad grant of discretion regarding H & C applications as well as the purposes of the *Immigration Act*, the ministerial guidelines for making H & C decisions, and relevant international instruments. It held that “for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them”: *Baker*, at para. 75. The best interests of the child will not always outweigh other considerations. But, in Ms. Baker’s case, “failure to give serious weight and consideration to the interests of the children constitute[d] an unreasonable exercise of the discretion”: para. 65.
6. As in *Baker*, international instruments touching on the rights of children inform the role the best interests of the child should play in the Minister’s surrender decision. For example, the values and principles underlying the international *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, and other instrumentsrecognize the importance of being attentive to children’s interests and rights when making decisions that affect their future: *Baker*,at para. 71. I accept that in the context of s. 44(1)(*a*), such instruments weigh in favour of requiring the Minister to give careful consideration to the best interests of a child who may or will be impacted by an individual’s extradition.
7. However, *Baker* also calls for an examination of the nature of the statutory power and the purpose of the legislative scheme when considering the impact of the best interests of the child on the exercise of statutory authority. When we do that here, we see that the Minister must consider the best interests of children who may or will be affected by surrender for extradition when the material before him or her shows that this is a relevant concern. However, the Minister must do so in light of all of the circumstances, including the realities of the impact on children of the criminal processes under domestic law and the importance of complying with Canada’s international obligations to its extradition partners.
8. Unlike the H & C process, extradition directly concerns important bilateral international obligations to extradition partners and ultimately the viability of international mutual assistance in criminal matters. The Minister, in considering whether to surrender such a person for extradition, “must take into account the requirements of good faith and honour of Canada in responding to the request under an extradition treaty and must weigh the political and international relations ramifications of the decision whether or not to surrender”: *Németh*, at para. 64.
9. Moreover, the criminal law context of extradition differentiates it from H & C discretion in the immigration context. Under Canadian domestic law, parents sometimes go to jail. They are denied bail before trial and sentenced to imprisonment upon conviction where the demands of criminal justice require it. And this is so even when incarceration has serious, negative effects on the individual’s children. Given this reality of domestic criminal justice, it follows that the consequences of having to face criminal charges cannot in themselves be unjust or oppressive: see, e.g., *Canada (Minister of Justice) v. Thomson*, 2005 CanLII 5078 (Ont. C.A.), at para. 7.
10. It is clear from our jurisprudence that the “unjust or oppressive” test set out in s. 44(1)(*a*) of the *Extradition Act* and the deferential standard of judicial review of a surrender order create a high threshold: the Minister will not lightly be found to have unreasonably ordered surrender. This same threshold applies to the impact of extradition on the best interests of children. This is confirmed by Canadian appellate authority on the point. So, for example, the British Columbia Court of Appeal spoke of the need for the person sought to “meet a high threshold to warrant a s. 44(1)(a) refusal by the Minister”: *Ganis v. Canada (Minister of Justice)*, 2006 BCCA 543, 233 B.C.A.C. 243, at para. 31. Likewise, the Quebec Court of Appeal stated that [translation] “[t]he consequences for the applicant’s children cannot prevent his surrender unless they cause it to be unjust or oppressive, to shock the conscience or simply to be unacceptable”: *Savu v. Canada (Ministre de la Justice)*,2013 QCCA 554, at para. 99 (CanLII). See also *United States of America v. Thornett*, 2014 BCCA 464, 363 B.C.A.C. 311, at para. 38, and *United States v. Pakulski*, 2015 ONCA 539,at paras. 8-9 (CanLII).
11. The international authorities to which we have been referred confirm this view. So, for example, the Supreme Court of the United Kingdom upheld the extradition of parents even in the face of an impact on children that was considered to be “heart-rending”: *H. (H.) v. Deputy Prosecutor of the Italian Republic*, [2012] UKSC 25, [2013] 1 A.C. 338. And this result was reached in the context of a requirement that extradition be consistent with the guaranty of a right to respect of the fugitive’s family life in art. 8 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, which provides that “[e]veryone has the right to respect for his private and family life”. Similarly, in *H. v. Lord Advocate*, [2012] UKSC 24, [2013] 1 A.C. 413, the demands of the interests of criminal justice and of treaty obligations that favoured extradition ultimately outweighed the children’s best interests: para. 58. The Supreme Court in these cases also thoroughly reviewed the jurisprudence of the European Court of Human Rights concerning the interaction of art. 8 and extradition. That court has “repeatedly said that it will only be in exceptional circumstances that an applicant’s private or family life in a contracting state will outweigh the legitimate aim pursued by his or her extradition”: *H*., at para. 59; see also *H. (H.)*, at paras. 113-14.
12. To be clear, the high threshold that applies generally under s. 44(1)(*a*) of the *Extradition Act* does not diminish the Minister’s obligation to carefully assess the impact of surrender on children. But it does underline the point that the weighing of those considerations must take account of other important principles of extradition law viewed in light of all of the circumstances of the particular case.
    * + 1. Application
13. In this case, the Minister was required to consider the best interests of the children in making his surrender decision. The Minister’s key conclusions were that the best interests of the children were unclear, that the impact of extradition on the children was also unclear and that there were important considerations favouring surrender for extradition. In my view, these key conclusions were reasonable and they led to a reasonable decision to surrender the appellant.
14. I turn first to the best interests of the children and the Minister’s comment that they were unclear. On the material before him this was not only a reasonable conclusion, but an understatement. On any reasonable view of the record, what would be best for these children was anything but clear given their unhappy, unstable and complicated family history and the apparent problems of both parents.
15. The Minister noted a number of salient points from the record to support his conclusion. Because of the appellant’s chronic substance abuse problems, the Georgia courts had awarded the father sole custody and had denied the appellant visitation rights. According to the ROC, she had been arrested for driving under the influence while her children were in the car. On May 26, 2011, the children had been placed in foster care. From the time of the appellant’s arrest on December 23, 2010 through to June 8, 2011, the children were not in the care of either parent, but the Minister understood that they were returned to the appellant’s care on June 8, 2011. I note that it is unclear what the source of this information is. So far as I am able to tell, there was nothing before the Minister and nothing in the record before us providing any further information about the children’s welfare or the appellant’s parenting abilities after the children were returned to her care.
16. A review of further information in the record suggests that the Minister reasonably assessed it in reaching his conclusion that the children’s best interests were unclear. From the ROC, it appears that the appellant and the children’s father were divorced in 2001 with the appellant being awarded sole custody and the father visitation rights. In November 2005, the father was given temporary custody; the children apparently were removed from the appellant’s care because of her chronic substance abuse problems. She was found to have absconded from the jurisdiction with the children in violation of a court order in December 2007; an arrest warrant was issued for her in January 2008; she was convicted of interference with custody in August 2008 and sentenced to 12 months of probation; and she violated her probation by leaving the jurisdiction without permission.
17. It also appears that for some period of time between 2004 and 2008, the children were placed in foster care because neither parent could care for them. The Georgia court found that the father had been the sole provider for the children since November 2005 and as of June 2008 he was considered to be fit and capable of providing for them. The appellant was said not to have provided any support for the children since their removal from her home in 2005. The ROC also reveals that at the time she was alleged to have been arrested for driving under the influence while her children were passengers — an allegation to which the Minister referred in his decision — she was still subject to a non-contact order. After the children and the appellant arrived in Canada in late 2010, they lived in a shelter. The DYP indicated that during this period the appellant was found with marijuana in her purse, although she denied that it was hers. Following the appellant’s arrest and detention in December 2010 in connection with the extradition proceedings, the children were placed in foster care. When the foster care placement was extended in May 2011, the Court of Québec observed that the appellant’s past “clearly shows she has been capable of contravening Court orders before and jeopardizing the children’s stability”: para. 21 (CanLII).
18. The record also contains disquieting information about the father. There were allegations of physical abuse and neglect and indications that he was not pursuing with any vigour the children’s return to him. In May 2011, the Court of Québec found that the claims of physical abuse by the father had to be taken seriously and that the authorities in Georgia could not confirm that the children would be safe from abuse there: para. 15.
19. All of this information in the record, taken together with the facts to which the Minister referred in his decision, supports the view that he reasonably concluded the children’s best interests were unclear.
20. With respect to the impact of the appellant’s extradition on the children, the Minister noted that the children “were returned to [the appellant’s] care” in June 2011, but nothing suggested to him that the children would be returned to their father’s care if their mother were surrendered: Minister’s decision, at p. 4. Rather, the DYP would determine whether the children should be placed in the care of a responsible family member or, if necessary, in foster care. This assessment must be considered in light of the fact that there was nothing in the material about whether the appellant would be incarcerated pending her trial in Georgia or what impact her pending criminal charges could have on her relationship with the children. There was no evidence about other possible family placements either in Canada or in the United States.
21. Before this Court, the appellant submits that since obtaining “full custody of her children in Canada . . . [she] has been an exemplary mother”, and that the Minister did not acknowledge this: A.F., at para. 71. As I noted earlier, there is no information about the appellant’s behaviour or the children’s welfare past June 2011. There is no basis for finding the Minister’s decision to be unreasonable because he did not address the appellant’s care for the children since they were returned to her, as there was no evidence of that before him. To the extent that the appellant had information on this issue that she believed to be relevant but had not placed before the Minister, it seems to me that the appropriate avenue to pursue would have been to ask the Minister to accept additional evidence and reconsider the decision: *Extradition Act*, ss. 42 and 43(2); see also *Adam v. United States of America* (2003), 64 O.R. (3d) 268 (C.A.), at paras. 17-26; *United States v. Pakulski*, 2014 ONCA 81, at paras. 7-9 (CanLII); *United States of America v. Johnstone*, 2013 BCCA 2, 333 B.C.A.C. 107, at paras. 7-8, 27 and 61; and *United States of America v. Fong* (2005), 193 C.C.C. (3d) 533 (Ont. C.A.), at paras. 31-38.
22. In my view, the Minister reasonably concluded, based on the information he had before him, that the potential impact on the children of the appellant’s extradition was unclear.
23. In addition to his consideration of what was in the best interests of the children, the Minister also took into account that persons accused of crimes in Canada cannot escape criminal prosecution only on the basis that prosecution against them may have negative consequences on their spouses, children or other family members. This was an appropriate matter for him to consider. The Minister also took into account that it is an important principle of public policy that parents not be allowed to abduct their children in violation of a custody order or use international borders to separate their children from their custodial parent. This too was an appropriate matter for him to take into account.
24. Related to this last point, the appellant submits that she should not be punished for legitimately saving her children from a real threat and that it would be unjust and oppressive for a person in the appellant’s situation to have to choose between saving her children and retaining her freedom.
25. In my view, the record did not make out even a reasonable basis to think that the appellant had to abduct the children in order to protect them from their father’s alleged physical abuse. And, as the Minister rightly pointed out, it was not his role to question the sufficiency of evidence for committal. It was not unreasonable for the Minister to give little weight to the appellant’s position that she was in effect forced to do what she did to protect the children.
26. In my view, the Minister’s decision reviewed the relevant facts and stated and applied the correct legal principles to the submissions and evidence that were placed before him. He gave serious consideration to the best interests of the children and weighed them with the other relevant considerations in concluding that the appellant’s surrender would not be unjust or oppressive in these circumstances.
27. To conclude, I agree with the Court of Appeal that the Minister’s decision is reasonable and contains no reviewable error that would justify intervention on judicial review.
28. I would dismiss the appeal in relation to the Minister’s surrender order.
29. Disposition
30. I would dismiss both the appeal in relation to the committal order and the surrender order.
31. Having considered the appellant’s submission regarding costs, I would make no order as to costs.

The reasons of Abella, Karakatsanis and Côté JJ. were delivered by

1. Abella J. (dissenting) — This is a case about three young children who reached out to their mother to rescue them from a violent and abusive father after running away and living several days in an abandoned house. She now faces the possibility of up to 15 years in jail if extradited to the United States for that rescue.
2. The issue in this appeal is whether Canada should extradite the mother. Under our extradition law, no one can be extradited unless his or her conduct would have constituted an offence that is punishable in Canada. This is known as the principle of double criminality, a cornerstone of the extradition process in Canada.Its purpose is to ensure that no one is surrendered from Canada to face prosecution in another country for conduct that does not amount to a criminal offence in this country.
3. It is not an offence in Canada to deprive a parent of custody if it was necessary to protect a child from imminent harm. As a result, the committal judge found that the mother would not be guilty of a criminal offence in this country.
4. It is also self-evidently contrary to the best interests of the children to extradite her. There is no dispute that the children should not be returned to their abusive father. To surrender the mother for her conduct in protecting the children is to penalize them for reaching out to her by depriving them of the only parent who can look after them. Moreover, because the defence of rescuing children to protect them from imminent harm does not exist in Georgia, the mother will not be able to raise the defence she would have been able to raise had she been prosecuted in Canada. Surrender in these circumstances is, with respect, Kafkaesque.
5. I would accordingly allow the appeal.

Background

1. M.M. and R.P. were married in 1996 and divorced in 2001. They had three children, who were born in 1996, 2000 and 2001. At the time of the divorce, the family was living in the state of Georgia, in the United States.
2. M.M., the mother, was initially awarded sole custody of the children after the divorce. The father, R.P., had visiting rights. In 2005, the father took temporary custody of the children. On June 19, 2008, a Georgia court gave him sole custody of the children because of the mother’s substance abuse problems. The order provided that she was to have no visitation rights or contact with the children.
3. On October 30, 2010, the father reported the three children missing. They were 9, 10 and 14 years old. According to the children, they ran away because of their father’s abusive treatment and violence. They did so without consulting their mother and without her knowledge, and stayed alternately in an abandoned house or with friends. The children did not contact their mother until around November 9. That same day, in Georgia, the mother was pulled over with the three children in her car by police, who suspected her of driving under the influence. Unaware that the children had been reported missing, the police officer left the children in the care of a colleague until a relative chosen by the mother could pick them up.
4. Several weeks later, the mother and the children were found in a battered women’s shelter in Quebec. The mother was born in Quebec and, like her children, is a dual citizen of Canada and the United States.
5. The social worker representing the Quebec Director of Youth Protection made numerous attempts to reach the father in the ensuing months to no avail. Although he once informed the social worker that he was working with an American group to have the children sent back to the United States, the father told another social worker the next day that he had no intention of coming to Canada to pick them up. His phone service was later disconnected and there is no record of his whereabouts. His physical and emotional abuse of the children is not in dispute.
6. On December 22, 2010, the mother was charged in Georgia with interstate interference with a custody order, aggravated stalking, and contributing to the delinquency of a minor. A warrant for her arrest was issued.
7. On December 23, 2010, the mother was arrested in Canada at the shelter. Two months later, based on an extradition request from the United States, an authority to proceed was issued on the interference with custody charges, seeking the mother’s committal for the corresponding Canadian offences of (1) abduction of a person under 16, contrary to s. 280 of the *Criminal Code*, R.S.C. 1985, c. C-46, and (2) abduction in contravention of a custody order, contrary to s. 282. These provisions state:

280. (1) Every one who, without lawful authority, takes or causes to be taken an unmarried person under the age of sixteen years out of the possession of and against the will of the parent or guardian of that person or of any other person who has the lawful care or charge of that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section and sections 281 to 283, “guardian” includes any person who has in law or in fact the custody or control of another person.

. . .

282. (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

(2) Where a count charges an offence under subsection (1) and the offence is not proven only because the accused did not believe that there was a valid custody order but the evidence does prove an offence under section 283, the accused may be convicted of an offence under section 283.

1. A statutory defence to charges under ss. 280 and 282 is recognizedin s. 285 of the *Criminal Code*:

285. No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm.

1. Shortly after her arrest, the mother sought interim release. The request was denied. Her second request, however, was granted.
2. The extradition judge, Cohen J., ultimately refused to issue an order for the mother’s committal for extradition. In refusing the request, she noted that the role of an extradition judge is not merely to act as a “rubber stamp” of the executive, but to ensure that a person sought for extradition receives a meaningful judicial assessment of his or her case on the basis of the evidence and the law.
3. The extradition judge accepted evidence of a series of admissions made in connection with the mother’s first request for interim release; prior testimony from the oldest child at the hearing for the mother’s second request for interim release; a judgment from the Youth Division of the Court of Québec on a motion for the children’s protection; and two reports from social workers in Canada and the United States filed as exhibits in the proceedings before the Youth Court. This evidence indicated that the children were afraid of their father and that he had physically and mentally mistreated them. It also confirmed that the children had run away from their father without any assistance or even the knowledge of their mother, and that it was more than a week before they contacted her for help.
4. As a result of this evidence, Cohen J. concluded that the s. 280(1) offence of abduction of a person under 16, had not been made out. In her view, the evidence clearly indicated that the children had left their father of their own volition. There was no evidence that the mother had taken the children, or caused them to be taken, out of the possession of and against the will of their father without lawful authority. The only evidence supporting this conclusion was a statement in a summary of the evidence available for trial prepared by the United States saying that the father’s testimony would be that he suspected the mother of taking the children without his authority. The extradition judge found this evidence to be so defective and unreliable as not to be worthy of consideration.
5. As for the s. 282(1) offence of abduction in contravention of a custody order, the extradition judge held that there was insufficient evidence of the mother’s specific intent to deprive the father of possession of the children. On the contrary, the evidence indicated that the motherrefused to receive or harbour the children after they ran away.
6. Cohen J. was also of the view that, given the “clear wording” of s. 285, the mother could not be found guilty on the charge of abduction since her intent was to protect the children from danger of imminent harm at the hands of their father. No reasonable jury in Canada, properly instructed, could therefore return a verdict of guilty on the charge of abduction of the children against the mother in the circumstances.
7. The order for committal was accordingly refused.
8. The Quebec Court of Appeal allowed the appeal and ordered the mother’s committal. In its view, the role of an extradition judge is limited, and precludes weighing the probative value of the evidence. In this case, the extradition judge erred by considering whether there was, in essence, a reasonable likelihood of conviction. She failed to discuss unrefuted admitted facts from the record of the case, namely that the children went missing while in their father’s custody and that they were found in their mother’s car on November 9, 2010. In the Court of Appeal’s view, the evidence established the essential elements to justify committal.
9. In addition, the Court of Appeal held that the extradition judge erred by taking into account the defence set out in s. 285 of the *Criminal Code*. It concluded that while “in due course” a defence along the lines of s. 285 may be open to the mother, the extradition judge went beyond her proper role in considering it at the committal stage.
10. In the mother’s submissions to the Minister of Justice, she argued that her surrender would be unjust and oppressive both because her extradition would not be in the best interests of her children, and because she had a strong defence to the equivalent Canadian charges under s. 285 of the *Criminal Code*. She noted in particular that she had taken good care of her children, that she was saving them from imminent danger of physical and mental abuse by bringing them to Canada, and that they would face a serious risk of harm if they were to return to their abusive father in Georgia.
11. The Minister ordered her surrender. He noted that the “best interests of the child” is not a principle of fundamental justice and that a person accused of a crime in Canada cannot escape criminal prosecution solely because it may have negative consequences on his or her family. In any event, he found that the best interests of the children were unclear, and that there was no evidence suggesting that the children would be returned to their father’s care if the mother were extradited. Moreover, the Minister was of the view that if the mother were extradited, the Quebec Director of Youth Protection could determine what was in the children’s best interests, and that if no family member could take care of them, foster care would be available.
12. In addition, he concluded that the s. 285 defence did not alter the criminal nature of the conduct,nor was it a relevant consideration in determining whether the mother’s conduct met the requirements of double criminality. In his view, defences should be left for consideration by the foreign court. While he acknowledged that no defence equivalent to s. 285 is recognized under Georgia law, he noted that the mother could nonetheless raise the defence of coercion. In his view, it was not his role to question the sufficiency of the evidence for committal.
13. The Quebec Court of Appeal dismissed the mother’s application for judicial review of the Minister’s surrender order. It concluded that the Minister’s decision was reasonable because he took into consideration and evaluated all the relevant circumstances, including the best interests of the children. The Minister also properly balanced the mother’s personal circumstances and the consequences of extradition for the mother and her children against such factors as the importance for Canada to meet its international obligations and for Canada not to be used as a safe haven by fugitives. The mother’s surrender to the United States would therefore not be unjust or oppressive, nor would it result in a violation of her constitutional rights.
14. This Court, in *United States of America v. Ferras*, [2006] 2 S.C.R. 77, clarified the test for committal in extradition proceedings, clearly distinguishing it from the lower threshold for committal in preliminary inquiries. That test is whether there is “sufficient evidence upon which a reasonable jury, properly instructed, could convict”: para. 65.In my view, that threshold for committal was not met in this case.
15. And although it is not strictly necessary, given my view that committal was not justified, I would also set aside the Minister’s surrender order. In my respectful view, he did not take into sufficient account the best interests of the children who, having sought their mother’s assistance in escaping from their father’s violence, would find themselves without a parent if she were extradited for helping them. Nor did the Minister take proper account of the fact that Georgia does not recognize a defence analogous to s. 285.

Analysis

1. Extradition is often characterized as taking place over threephases. At the first stage, the Minister must decide, after receiving an extradition request from a foreign state, whether to proceed with the matter by issuing an authority to proceed. If an authority to proceed is issued, the next phase is the committal stage, where the extradition judge determineswhether the requirement of double criminality is met and, therefore, whether committal is justified. If committal is ordered, the matter reverts to the Minister to decide whether to order surrender: see *Extradition Act*, S.C. 1999, c. 18, s. 40. The power to order or refuse surrender is discretionary, but is subject to the provisions of the *Extradition Act* and the *Extradition Treaty between Canada and the United States of America*, Can. T.S. 1976 No. 3 (“*Treaty*”), and must be exercised in accordance with the *Canadian Charter of Rights and Freedoms*. Most pertinently for purposes of this case, s. 44(1)(*a*) of the *Extradition Act* provides that the Minister must refuse surrender if he is satisfied that the surrender would be “unjust or oppressive having regard to all the relevant circumstances”.
2. Canada is a signatory to a number of extradition treaties, including the *Treaty*, which governs extradition between Canada and the United States. The *Treaty* and other extradition treaties are implemented into domestic law in the *Extradition Act*.
3. “Double criminality” is a precondition to surrender under Canada’s extradition treaties (e.g., Articles 2 and 10 of the *Treaty*), and is codified at s. 3(1) of the *Extradition Act*. Section 3(1) provides:

3. (1) A person may be extradited from Canada in accordance with this Act and a relevant extradition agreement on the request of an extradition partner for the purpose of prosecuting the person or imposing a sentence on — or enforcing a sentence imposed on — the person if

(a) subject to a relevant extradition agreement, *the offence in respect of which the extradition is requested is punishable* by the extradition partner, by imprisoning or otherwise depriving the person of their liberty for a maximum term of two years or more, or by a more severe punishment; and

(b) the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada,

(i) in the case of a request based on a specific agreement, by imprisonment for a maximum term of five years or more, or by a more severe punishment, and

(ii) in any other case, by imprisonment for a maximum term of two years or more, or by a more severe punishment, subject to a relevant extradition agreement.

1. Double criminality therefore incorporates both a domestic and foreign component. Section 3(1)(*a*) of the *Extradition Act* requires that the offence upon which extradition is requested be punishable in the requesting state by a loss of liberty of two or more years. Section 3(1)(*b*) provides that the conduct underlying the foreign offence must constitute an offence punishable in Canada byat least two years.
2. As McLachlin J. explained in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 845, Canada “will not extradite for acts which are not offences in this country”. The underlying purpose of the double criminality requirement is to ensure that “no one in Canada [is] surrendered for prosecution outside this country for behaviour that does not amount to a crime in this country”: *United States of America v. Lépine*, [1994] 1 S.C.R. 286, at p. 297. Stated otherwise, “[t]he purpose of double criminality is to safeguard the liberty of an individual whose extradition is sought by ensuring that he or she is not surrendered to face prosecution in another country for conduct that would not amount to a criminal offence in the country of refuge”: *Canada (Justice) v. Fischbacher*, [2009] 3 S.C.R. 170, at para. 26.
3. The principle of double criminality is internationally recognized as central to extradition law: *Fischbacher*, at para. 26. Resting in part on the concept of reciprocity, it ensures that a person’s liberty is notat riskas a consequence of an offence which is not criminal in the requested state: *Washington (State of) v. Johnson*, [1988] 1 S.C.R. 327, at p. 341 (citing Ivan A. Shearer, *Extradition in International Law* (1971), at pp. 137-38).
4. That is because double criminality is based, in part, on ensuring that “a person’s liberty is not restricted as a consequence of offences not recognized as criminal by the requested State”: Shearer, at p. 137. As Prof. Shearer explains, the rule of reciprocity ensures that a state is not required to extradite someone for an offence for which it, in return, “would never have occasion to make demand”: p. 138. In other words, where a person is extradited for conduct not amounting to a criminal offence in the requested state, the principle of double criminality is offended.
5. Responsibility for deciding whether the foreign component of double criminality has been met falls to the Minister. When the Minister receives an extradition request for a person sought to face trial, he or she must determine whether the conduct described in the extradition request satisfies the conditions set out in s. 3(1)(*a*) of the *Extradition Act* before he or she can issue an authority to proceed: *Extradition Act*,s. 15(1). Section 15(3) of the *Extradition Act* provides that the authority to proceed must include three components, including that the conduct must amount to an offence punishable in Canada in accordance with s. 3(1)(*b*).
6. The authority to proceed authorizes the Minister to seek an order of committal before an extradition judge. The function of the extradition hearing is to determine whether the domestic component of double criminality is met, as required by s. 3(1)(*b*) of the *Extradition Act*. Section 29(1) of the *Extradition* *Act* provides:

**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;

1. Section 29(1) of the *Extradition Act* requires a judge to order committal if there is sufficient evidence to justify committal for trial in Canada had the offence occurred in this country. The requirement, however, must be read harmoniously with the rest of the Act. In particular, s. 3(1)(*b*) provides in part that the conduct of the person, had it occurred in Canada, must constitute “an offence that is punishable in Canada”. Effect must be given to s. 3(1)(*b*) and the animating principle of double criminality in determining the scope of the extradition judge’s role in deciding whether to order committal. As a result, the function of the extradition hearing is

to determine whether there is sufficient evidence that a fugitive accused has committed an act in the requesting state that would, if committed in Canada, constitute a Canadian crime . . . . In short, . . . what the extradition judge must determine is whether the conduct of the accused would constitute a crime if it had been committed in this country. [Emphasis in original.]

(*McVey (Re)*, [1992] 3 S.C.R. 475, at p. 526)

1. This Court most recently discussed an appeal of a committal order in*Ferras*, where it held that before a person can be ordered for committal, there must be a “meaningful judicial determination” of whether the case for extradition has been established, namely, “whether there is sufficient evidence to permit a properly instructed [Canadian] jury to convict”: para. 26. An extradition judge is not merely “a rubber stamp”, but must instead “judicially consider the facts and the law and be satisfied that they justify committal before ordering extradition”: para. 25.
2. Given that both committal hearings and preliminary inquiries are pre-trial screening procedures directed at assessing the sufficiency of evidence, a parallel had previously been drawn between the two. Notably, however, *Ferras* explained that there are significant differences between the two procedures:

It is important as well to note the differences between extradition hearings and domestic preliminary inquiries. Both are pre-trial screening devices and both use the same test of sufficiency of evidence for committal: whether evidence exists upon which a reasonable jury, properly instructed, could return a verdict of guilty .. . .  Previously, the *Extradition Act* cemented the analogy between the two proceedings by directing that an extradition judge “hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada”  *. . . .* The new Act, however, does not maintain this close parallel in proceedings. Section 24(2) of the Act states: “For the purposes of the hearing, the judge has, subject to this Act, the powers of a justice under Part XVIII of the *Criminal Code*, with any modifications that the circumstances require.” *This grants the extradition judge the same powers as a preliminary inquiry judge, but requires the judge to exercise those powers in a manner appropriate to the extradition context. The judge no longer follows “as nearly as may be” the procedure of a preliminary inquiry. A second difference comes from the different rules for admitting evidence.* Evidence is admitted on a preliminary inquiry according to domestic rules of evidence, with all the inherent guarantees of threshold reliability that those rules entail.  In contrast, evidence adduced on extradition may lack the threshold guarantees of reliability afforded by Canadian rules of evidence. A third difference comes from the ability of extradition judges to grant *Charter* remedies. *These differences make it inappropriate to equate the task of the extradition judge with the task of a judge on a preliminary inquiry.* [Emphasis added; para. 48.]

*Ferras* thus clearly distinguished committal hearings from preliminary inquiries, eschewing the latter’s threshold in extradition proceedings.

1. Given the context of extradition proceedings and the liberty interests involved, the threshold for committal for extradition is higher than the threshold that applies to preliminary inquiries for committal to a criminal trial. This is reflected in the expanded ability of the extradition judge to admit and assess evidence led at the committal hearing:

Section 29(1) of the *Extradition Act* . . . requires the extradition judge to be satisfied that the evidence would justify committal for trial in Canada, had the offence occurred here. Canadian courts in recent decades have adopted the practice of leaving a case or defence to the jury where there is any evidence to support it, and have discouraged trial judges from weighing the evidence and refusing to put a matter to the jury on the basis that the evidence is not sufficiently reliable or persuasive . . . . This may explain . . . that the extradition judge has no discretion to refuse to extradite if there is any evidence, however scant or suspect, supporting each of the elements of the offence alleged. *This narrow approach to judicial discretion should not be applied in extradition matters, in my opinion.* The decision to remove a trial judge’s discretion reflects confidence that, given the strict rules of admissibility of evidence on criminal trials, a properly instructed jury is capable of performing the task of assessing the reliability of the evidence and weighing its sufficiency without the assistance of the judge. The accused is not denied the protection of the trier of fact reviewing and weighing the evidence. The effect of applying this test in extradition proceedings, by contrast, is to deprive the subject of any review of the reliability or sufficiency of the evidence. Put another way, the limited judicial discretion to keep evidence from a Canadian jury does not have the same negative constitutional implications as the removal of an extradition judge’s discretion to decline to commit for extradition. In the latter case, removal of the discretion may deprive the subject of his or her constitutional right to a meaningful judicial determination *before* the subject is sent out of the country and loses his or her liberty. [Emphasis added; para. 47.]

1. To justify committal in extradition proceedings, therefore, the test is clear: there must not only be evidence on each element of the offence, the evidence must be such that a reasonable, properly instructed jury could return a guilty verdict. As this Court stated in *Ferras*:

Section 29(1)’s direction to an extradition judge to determine whether there is admissible evidence that would “justify committal” requires a judge to assess whether admissible evidence *shows the justice or rightness* in committing a person for extradition. It is not enough for evidence to merely exist on each element of the crime. The evidence must be demonstrably able to be used by a reasonable, properly instructed jury to reach a verdict of guilty. If the evidence is incapable of demonstrating this sufficiency for committal, then it cannot “justify committal”*.* The evidence need not convince an extradition judge that a person sought is guilty of the alleged crimes. That assessment remains for the trial court in the foreign state. However, it must establish a case that *could go to trial* in Canada. This may require the extradition judge to engage in limited weighing of the evidence to determine, not ultimate guilt, but sufficiency of evidence for committal to trial. [Emphasis in original; para. 46.]

1. In determining whether committal is justified, the extradition judge must consider both what evidence is admissible under the *Extradition Act* and whether that evidence justifies committal: *Ferras*, at para. 36.Sections 31 to 37 of the *Extradition Act* provide the framework for the admissibility of evidence in the extradition context. Of particular note, s. 32(1) provides in part that evidence admissible under Canadian law is admissible at an extradition hearing. In addition, evidence adduced by the person sought for extradition that is “relevant” to the test for committal set out in s. 29(1) is admissible if the judge considers it “reliable”, notwithstanding the fact it might otherwise not be admissible under Canadian law: s. 32(1)(*c*).
2. The central issue in this case with respect to the committal order is, as a result, whether “a reasonable, properly instructed jury” could “reach a verdict of guilty”. In my view, this necessarily involves consideration of the statutory defence in s. 285 of the *Criminal Code*, which states in part that no one will be found guilty of an offence under ss. 280 to 283 of the *Criminal Code* if the taking or harbouring of any young person was necessary to protect the young person from danger of imminent harm.
3. The statutory defence now codified at s. 285[[1]](#footnote-1) was first added to the *Criminal Code* in 1982 as part of a larger series of amendments to the *Code* related to sexual offences and other offences against the person: *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s. 20. At that time, the defence was limited to circumstances where the young person was in danger of imminent harm and did not extend to an accused who himself or herself was in danger. In describing the purpose of the provision and another new defence, Jean Chrétien, then-Attorney General and Minister of State for Social Development, said:

Defences are provided for where the absconding parent has the consent of the custodial parent, and also for the rare case in which the absconding parent can persuade a court that his motive was to save the child from “danger of imminent harm”.

(*House of Commons Debates*, vol. XVII, 1st Sess., 32nd Parl., August 4, 1982, at p. 20040)

1. The information publicly distributed by the Department of Justice when the provision came into effect emphasized that the legislation was aimed at protecting children:

The legislation also strengthens the *Criminal Code* provisions against taking a child without the consent of the person who has legal custody of that child. *“The new law puts the child first”* said [then-Minister of Justice and Attorney General] Dr. [Mark] MacGuigan, “and recognizes that children have rights: the right to security, stability and continuity in their lives.”

. . .

The new law attempts to stop th[e] practice [of child stealing or abduction]. It accepts that children have rights. They have the right to security, stability, and continuity in their lives. The law protects children from their own parents.

. . .

*If the child is in immediate danger, this is a justification for taking the child. The accused must prove to the court that there was a danger of harm.*

[Emphasis added.]

(*Information on Bill C-127* (1983), news release, “Sexual Offences Bill Proclaimed Law”, January 4, 1983, and brochure, “Abduction: Stealing Children”)

1. In 1985, the *Criminal Code* was revised and the provision was recodified as s. 285. In 1993, it was amended and expanded to apply in circumstances where either the young person or the accused is escaping from danger of imminent harm: *An Act to amend the Criminal Code and the Young Offenders Act*, S.C. 1993, c. 45, s. 6. As the then-Minister of Justice Pierre Blais said, the amendment served to ensure that a defence was available to battered spouses fleeing violence who decide to take their children with them: *House of Commons Debates*, vol. XV, 3rd Sess., 34th Parl., May 6, 1993, at p. 19017; Senator Erminie Cohen, *Debates of the Senate*, vol. IV, 3rd Sess., 34th Parl., June 16, 1993, at p. 3536.
2. Internationally, Canada is a signatory to a number of international instruments which, like s. 285, recognize the primacy of protecting children from harm. The *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, for example, which Canada ratified in 1991, provides that state parties must “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation . . . while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”: art. 19. The fact that 195 countries have now accepted the *Convention* speaks to the reality that “protecting children from harm [is] a universally accepted goal”: *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, at para. 73.
3. Similarly, The Hague *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 (‟*The Hague Convention*ˮ), also underscores the importance of keeping children safe from harm. It states that an order to return a child who has been wrongfully removed from his or her habitual residence may be refused if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”: art. 13(b).
4. In *Thomson v. Thomson*, [1994] 3 S.C.R. 551, La Forest J. explained that this risk must “be a weighty one”, but also acknowledged that “from a child centred perspective, harm is harm”: p. 597; and see *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485 (C.A.). See also *In* *re D. (Abduction: Rights of Custody)*, [2007] 1 A.C. 619 (H.L.), where it was similarly observed that “limitations on the duty to return must be restrictively applied”, but that there will nevertheless be “circumstances in which a summary return would be so inimical to the interests of the particular child that it would also be contrary to the object of the Convention”: para. 51.
5. Like the *Convention on the Rights of the Child* and *The Hague* *Convention*, s. 285 is aimed at protecting children from harm. Just as the *Convention on the Rights of the Child* obligates states to take action to protect a child from violence and abuse, and *The Hague* *Convention* guards against a child being returned to a situation of grave risk of harm or another intolerable situation, s. 285 shields an individual who takes a child out of necessity to protect him or her from danger of imminent harm. Section 285 thus creates a statutory defence to ensure that children are protected from harm.
6. It should not, as a result, represent or be seen as a codification of the common law defence of necessity. Contrary to the Crown’s submissions, I see no basis for imposing its exceptionally high threshold into the s. 285 context. Narrowing the defence in s. 285 by importing the tripartite requirements to satisfy the common law necessity test would undermine the text and purpose of the provision. Section 285 requires proof that the taking be “necessary to protect the young person from danger of imminent harm”. As the legislative history discussed earlier in these reasons makes clear, the provision is aimed at “put[ting] the child first” and excusing an accused’s conduct where there is “danger of harm”: *Information* *on Bill C-127*.
7. In fact, nowhere in the legislative history is there any mention that s. 285 was intended to incorporate any aspect of the common law defence of necessity. Instead, as previously noted, the words of the then-Minister of Justice confirm that the intention was to provide for the “rare case in which the absconding parent can persuade a court that his motive was to save the child from ‘danger of imminent harm’”. The focus, therefore, is clear — the rescue of children in danger.
8. Importing common law barriers from the necessity defence test thus contradicts both the language and, in particular, the child-centred purpose of the provision. This is not a licence to abduct children, it is a defence from criminal liability where their safety urgently requires rescue. In the rare case where the evidence shows that the taking “was necessary to protect the young person from danger of imminent harm” or that “the person charged with the offence was escaping from danger of imminent harm”, the defence will be made out. Had Parliament intended to allow the common law defence of necessity to apply to ss. 280 and 282, there would have been no need to enact s. 285. With great respect, to consider s. 285 as incorporating the defence of necessity renders s. 285 redundant.
9. The result of s. 285 is that an accused who would otherwise be guilty of an offence under ss. 280 to 283 but whose conduct falls under the conditions specified in s. 285 is not criminally liable for his or her actions. In the words of s. 3(1)(*b*) of the *Extradition Act*, the conduct would *not* have constituted a punishable offence.
10. In order for the s. 285 defence to preclude committal, therefore, the evidence presented at the extradition hearing must be sufficiently compelling as to s. 285’s application to the facts of the case that a reasonable, properly instructed jury could not convict. This is consistent with the standard for committal set out in *Ferras*, where the Court held that a meaningful judicial determination of whether the test for committal has been satisfied requires “sufficient evidence to permit a properly instructed jury to convict”: para. 26.
11. In other words, if a properly instructed jury could not convict in this case by reason of s. 285, the conduct would not constitute “an offence that is punishable in Canada” pursuant to s. 3(1)(*b*) of the *Extradition Act*. As a result, the requirement of double criminality is not met.
12. It is true that an extradition hearing is intended to be an expedited process that ensures Canada’s prompt compliance with international obligations at a minimum of expense: *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 122. At the same time, however, “[o]ne of the most important functions of the extradition hearing is the protection of the liberty of the individual”: *Dynar*, at para. 121. A meaningful judicial determination of whether the double criminality requirement is met should not be sacrificed on the altar of potential concerns of expediency, comity and cost. These concerns are adequately addressed in the existing extradition process and not undermined by consideration of the viability of a s. 285 defence. In any event, they must be counterbalanced against the need for a meaningful judicial assessment of the case based on the evidence and the law so that the liberty interests of the person sought for extradition are fully respected and protected.
13. The task, therefore, for the extradition judge in deciding whether committal is warranted is to determine whether the evidence as a whole

discloses a case on which a jury could convict. If the evidence is so defective or appears so unreliable that the judge concludes it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.

(*Ferras*, at para. 54)

1. Applying these principles, the extradition judge in this case accepted evidence that she concluded met the threshold test of reliability and was relevant to the issue of committal. Based on a meaningful judicial assessment of the whole of the evidence, she determined that the evidence did not reveal conduct that would justify committal. In my view, she was right to do so.
2. Consideration of the s. 285 defence where a person is sought for extradition on a corresponding Canadian offence under ss. 280 to 283, is a necessary component of determining whether a punishable offence has occurred in Canada. This requires an assessment of potential exonerating factors in order to determine whether the impugned conduct is indeed criminal. Removing consideration of s. 285 from the scope of the extradition judge’s review would fail to give proper effect to the principle of double criminality. If the double criminality requirement is to achieve its purpose of ensuring that a person is not surrendered to face prosecution for conduct that would not amount to a criminal offence in Canada, s. 285 must therefore be taken into account when deciding whether a person’s conduct would constitute a crime if committed in this country and so justify committal.To preclude its consideration is to unduly narrow the role of the extradition judge in ensuring that double criminality is met, and in providing a meaningful process safeguarding the liberty interests of the person sought for extradition.
3. There is ample evidence in this case to support the conclusion that, in light of s. 285, a reasonable and properly instructed jury in Canada could not return a guilty verdict on the abduction charges. As the extradition judge concluded, the evidence clearly indicated that the children left their father of their own volition and that he was abusive. The judgment from the Youth Division of the Court of Québec, concurring with an analysis of the situation made by one of the social workers, found that the children were abused by the father and were at risk for further violence if they were returned to Georgia.More specifically, the social worker noted that the father had admitted to using violence in order to correct his two daughters and that information obtained from Georgia Social Services illustrated that their services could not confirm that the children would be safe from abuse if taken back to Georgia.
4. The children similarly reported to the social worker that their father was abusive, often using belts to hit them. The youngest child stated that the father often told the children that they were bad and created reasons to punish them. The oldest child reported that both his siblings were regularly victims of abuse at the hands of their father, and that he too was abused by the father when he was younger. Both the oldest and middle children explained that they left their father’s home together with their younger sister at the end of October 2010 following an altercation between the middle child and the father in which he physically abused her. The children were only 9, 10 and 14 years old at the time. The mother similarly told the social worker that the father had a violent past and that she took the children to Canada solely out of a desire to protect them. Moreover, the oldest child told the social worker that he would rather remain in Canada because he believes he is safe here. Both the youngest and middle child similarly reported that they were afraid of being physically abused if they were to return to their father.
5. Further corroboration of abuseand harm came from the testimony of the oldest child at a hearing for the mother’s interim release. He testified that he and his younger sisters had been physically and mentally abused by the father, stating that “there were incidents with our father, we never had a good relationship and we could not be around him, we did not feel comfortable or safe”. According to the oldest child, the father threatened the children and beat them with a belt. They decided to run away from their father’s home without the mother’s assistance or knowledge, and lived on their own for more than a week before contacting their mother.
6. The extradition judge’s unequivocal conclusion based on this evidence was that a reasonable, properly instructed Canadian jury, given the clear wording of s. 285, could not return a verdict of guilty because “the mother’sintent in receiving and harbouring the children after they ran away from their father was to protect the children from further, imminent harm”:

In the circumstances and based upon the facts summarized above, no reasonable jury could draw the inference, as submitted by the Requesting State, that the mother’s intent was to deprive the father of possession of these children, especially as they left of their own volition and not as a result of any actions on her part.

1. I agree. In my view, the evidence in this case is sufficiently compelling that a properly instructed jury could not convict the mother of offences under ss. 280 and 282 of the *Criminal Code* had her conduct occurred in Canada given the operation of s. 285. This evidence suggests that the children left the father’s home on their own volition and that the mother’s actions in taking the children after they ran away were to protect them from further danger of imminent harm. The double criminality requirement is accordingly not met and the mother’s committal is not warranted in light of the evidence.
2. As a result, even under the common law defence of necessity, no reasonable and properly instructed jury could find that the tripartite test required to engage the defence of necessity is met on the facts of this case. This Court has long held that the common law defence of necessity requires evidence that the accused was faced with a danger of imminent peril or harm, that there was no reasonable legal alternative to the accused’s conduct and that there is proportionality between the harm caused by the accused and the harm avoided by resorting to the impugned conduct: *R. v. Latimer*,[2001] 1 S.C.R. 3, at paras. 28-34; *R. v. Ryan*,[2013] 1 S.C.R. 14. The committal judge found that the evidence, including admissions by the father, “clearly indicates that he physically abused the three children”. The evidence was that the children were at “serious risk” of further abuse. The children remained at risk even after they had run away, as they were living in an abandoned house, itself a vulnerable situation, and would have been returned to their father if they had been found. This evidence was uncontradicted. On the issue of whether there was a reasonable legal alternative, the mother could have surrendered her children to the government, or sought to vary the custody order. However, she knew the father to be abusive, yet he retained sole custody. Obviously, the government would either have returned the children to him, at least in the short term, or placed them in foster care. In the circumstances of this case, no jury could find this to be a reasonable option for a parent. Finally, no jury could find that the harm of depriving an abusive father of custody, and who is not interested in having the children returned to him, outweighs the harm of children being abused.
3. I am aware that there is a trilogy of cases from this Court suggesting that common law and *Charter* defences should not be addressed by extradition judges, but left instead for determination in the foreign court: *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Argentina v. Mellino*, [1987] 1 S.C.R. 536; *United States v. Allard*, [1987] 1 S.C.R. 564. These cases, however, dealt with procedural, not statutory defences which go to whether the conduct itself constitutes an offence.
4. In *Schmidt*, for example, a person sought for extradition to the United States argued that she should not be extradited to face charges under Ohio law principally on the ground that she was acquitted in respect of the same activity under United States federal law and thus her committal would violate the principle of *autrefois acquit*, either under the *Charter* or at common law. In rejecting the argument, La Forest J., writing for the majority, held that a judge at an extradition hearing “has *no jurisdiction to deal with defences that could be raised at trial*” unless the *Extradition Act* or the applicable extradition treaty otherwise provides: p. 515 (emphasis added). In his view, importing defences into the extradition hearing more appropriately dealt with at trial could “seriously affect the efficient working of a salutary system devised by states for the mutual surrender of suspected wrongdoers”: p. 516.
5. And in *Mellino*, La Forest J., again writing for the majority, concluded that “[i]t would cripple the operation of our extradition arrangements if extradition judges were to arrogate the power to consider *defences that should properly be raised at trial*”: p. 555 (emphasis added). In that case, the person sought for extradition requested a stay of the proceedings on the grounds that a 17-month delay between his discharge at a first extradition hearing and the institution of second extradition proceedings was an abuse of process and infringed s. 7 of the *Charter*.
6. Finally, in *Allard*, another case involving a request to stay proceedings on *Charter* grounds, La Forest J. held that a judge acting in an extradition matter is not a court of competent jurisdiction under s. 24(1) of the *Charter* to order a stay of proceedings. He again reiterated that “[t]he various *defences to* [*a*] *charge are for the consideration of the judge at the trial* in the [requesting state]”: p. 571 (emphasis added). Canadian courts, accordingly, “need not enquire into whether the prosecution will conform to our procedures or if there are *defences that could be raised if the trial took place in Canada*”: pp. 571-72 (emphasis added).
7. *Schmidt*, *Mellino* and *Allard* are thus clearly distinguishable from the case at bar in that they are concerned with procedural and *Charter* defences, not a statutory defence like s. 285 going directly to criminality. As the British Columbia Civil Liberties Association submitted, the species of exculpatory defence before the Court in this case *does* engage criminality. Pursuant to s. 285, a person cannot be found guilty of an offence under ss. 280 to 283 where the taking was necessary to protect the young person from danger of imminent harm. Unlike the *Charter* and procedural defences in *Schmidt*, *Mellino* and *Allard*, s. 285 is a statutory defence that defines the criminal conduct. In my view, an extradition judge must accordingly consider the defence in assessing whether the double criminality requirement is met before ordering committal.
8. In addition, to the extent *Schmidt*, *Mellino* and *Allard* may suggest the extradition judge should not consider any defences when deciding whether to order committal, these decisions have been overtaken by this Court’s subsequent jurisprudence in the extradition and *Charter* context. It is beyond dispute that the function of the extradition hearing is to determine whether the domestic component of double criminality is met: *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281, at para. 63; *Fischbacher*, at para. 35. As set out in s. 3(1)(*b*) of the *Extradition Act*, this requires in part that “the conduct of the person, had it occurred in Canada, would have constituted an offence that is punishable in Canada”. Barring an extradition judge from considering s. 285 could result in an order for committal in circumstances where the double criminality requirement is not met, thereby jeopardizing the liberty of the individual, a vital interest this country’s extradition process is designed in part to protect.
9. This makes it crucial to observe that if the mother is extradited, the s. 285 defence that it was necessary to rescue the children to protect them is not available in the state of Georgia. While this fact does not alter the analysis of whether the domestic component of double criminality is met, it is relevant to the philosophy behind the earlier cases from this Court deferring consideration of defences to the trial in the requesting state. Where, as here, a defence like the one in s. 285 *cannot* be raised in the requesting state, the ratio of those cases disintegrates.
10. Whether common law defences generallyshould be considered as part of the double criminality inquiry is not before this Court and is best left for determination in a case where the issue is squarely raised. In any event, in this case there is a statutory defence which is clearly available on the facts and would lead a reasonable and properly instructed jury not to return a verdict of guilty on charges under ss. 280(1) and 282(1). Committal,as the extradition judge concluded, is therefore not justified.
11. Where committal is not justified, the extradition judge must order the person’s discharge and the matter does not go to the Minister to decide whether or not to order surrender: see *Extradition Act*, s. 29(3). While it is therefore not strictly necessary to deal with the surrender order, in my view, the approach the Minister used raises concerns not only about how to approach the best interests of children, but also on the interplay between those interests and the nature of the crime the mother was charged with — a crime which, in Canada, attracts a singularstatutory defence. His decision to order surrender was, as a result, unreasonable.
12. The surrender stage of the extradition process is an executive function requiring the Minister to review the case *in its entirety* to determine whether or not to order the individual’s surrender and, if so, on what basis: *Fischbacher*, at para. 36. The Minister’s general powers on the question of surrender are set out in s. 40(1) of the *Extradition Act*:

**40.** (1) The Minister *may*, within a period of 90 days after the date of a person’s committal to await surrender, personally order that the person be surrendered to the extradition partner.

1. Despite s. 40(1), the Minister’s surrender powers are not entirely discretionary: *Sriskandarajah v. United States of America*,[2012] 3 S.C.R. 609, at para. 12. As this Court explained in *Németh*, the discretion whether to order or to refuse surrender “is structured and, in some circumstances, constrained” by the *Extradition Act*, the applicable treaty and the *Charter*: para. 65. The Court also held that the Minister’s surrender powers under the *Extradition Act* “should be interpreted and applied . . . in light of Canada’s international undertakings”: para. 54.
2. The Minister acts as a safety valve to preclude extradition even where the formal legal requirements for committal appear to have been met. As the *Extradition Act* makes clear, the Minister’s role includes the protection of the liberty and human rights of the person sought for extradition, which explains why the Minister “must comply with the *Charter* on all matters incidental to surrendering a fugitive”: *United States of America v. Kwok*, [2001] 1 S.C.R. 532, at para. 5; see also *Németh*, at para. 70.
3. Parliamentary debates leading to the passage of the revised *Extradition Act* in 1999 further indicate that limitations on the Minister’s power to surrender include “humanitarian considerations”, and that these limitations “provide an important safeguard for the person sought”: Peter Adams, Parliamentary Secretary to Leader of the Government in the House of Commons, *House of Commons Debates*, vol. 135,No. 162, 1st Sess., 36th Parl., November 30, 1998, at p. 10591. The then-Minister of Justice, Anne McLellan, confirmed that the revised *Extradition Act* “sets out clearly, for the first time, a minister’s responsibilities and duties to ensure that the human rights and fair treatment of the fugitive will be safeguarded”: House of Commons Standing Committee on Justice and Human Rights, *Evidence*, No. 096, 1st Sess., 36th Parl., November 4, 1998 (online), at 16:40. This parliamentary intent was also confirmed by the Minister’s Parliamentary Secretary, Eleni Bakopanos, who said that “the safeguards referred to in the [revised *Extradition Act*] are provided in addition to any protection under the Canadian Charter of Rights and Freedomswhich the person sought may have”: *House of Commons Debates*,vol. 135, No. 135, 1st Sess., 36th Parl., October 8, 1998, at p. 9006.
4. Section 44(1) of the *Extradition Act* sets out the grounds on which the Minister *must* refuse to order surrender, including if it would be “unjust or oppressive having regard to all the relevant circumstances”. In *Németh*, thisCourt noted that Parliament’s use of the mandatory language contained in s. 44 leaves the Minister “no discretion” to depart from the grounds articulated in that provision, even to give effect to a treaty obligation: para. 69. In addition to the grounds set out in s. 44(1) of the *Extradition Act*, the Minister must also refuse to order surrender where doing so would “shock the conscience” of Canadians and thereby violate s. 7 of the *Charter*: *Caplin v. Canada (Justice)*, [2015] 2 S.C.R. 568, at para. 1.
5. Despite the inevitable overlap between the inquiries under s. 44(1) of the *Extradition Act* and s. 7 of the *Charter*, their distinct and independent significance must be emphasized: *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761, at para. 24. Notably, while s. 44(1) is not limited to conduct that would constitute a breach of the *Charter*, it is nonetheless the case that where surrender would be contrary to the principlesof fundamental justice, it will also be unjust and oppressive within the meaning of s. 44(1): *Németh*, at para. 71. Section 44(1), however, allows the Minister to refuse surrender even where no *Charter* breach is alleged or established: *Fischbacher*, at para. 39; *Németh*, at para. 71. The Minister retains a residual discretion under s. 44(1) to refuse surrender as being “unjust or oppressive” in view of the totality of the circumstances, including but not limited to circumstances which would render the surrender inconsistent with *Charter* principles: *Fischbacher*, at para. 39.
6. The words “unjust” and “oppressive” are not defined in the *Extradition Act*, but take their meaning from the extradition context. Parliament has broadly worded s. 44(1) to require the Minister to “hav[e] regard to all the relevant circumstances”, favouring a broad interpretation of the provision. Moreover, as Cromwell J. made clear in *Németh*, at para. 71, s. 44(1)(*a*) extends to preclude surrender where extradition would not only breach the *Charter* rights of the person sought, but extends to other circumstances where surrender would not amount to a *Charter* breach: see also *Fischbacher*, at para. 39.
7. In *United States of America v. Taylor* (2005), 216 B.C.A.C. 137, Finch C.J.B.C. explained that a surrender would be “unjust” if it “would be undeserved, unfounded, or disproportionate in all the circumstances”: para. 36. On the other hand, he defined the term “oppressive” to mean “that the decision to surrender was made in disregard of the merits of the case, was clearly unreasonable or that the Minister exercised his statutory power arbitrarily, or in a way that overwhelmed the applicant’s efforts to resist surrender”: para. 36. As he noted, “In applying these broad, indeed somewhatsubjective, tests one must ask to whom the applicant’s surrender would appear to be unjust or oppressive, and why right thinking Canadians would consider it to be so”: para. 37.
8. In deciding whether surrender would be unjust or oppressive, regard must therefore be had to “all the relevant circumstances”: *Extradition Act*, s. 44(1)(*a*). In *Fischbacher*, Charron J. explained that the “relevant circumstances” for determining whether surrender is unjust or oppressive will vary from case to case, and set out a list of non-exhaustive considerations which may factor into the analysis:

Reaching a conclusion on surrender requires the Minister to undertake a balancing of all the relevant circumstances, weighing factors that militate in favour of surrender against those that counsel against. The circumstances that will be “relevant” to a surrender decision will vary depending on the facts and context of each case. Some of these factors may include: any representations made by the person sought on the question of surrender in accordance with s. 43(1) of the Act, the conduct of the proceedings in the requesting country before and after the request for extradition, the potential punishment facing the individual if surrendered, humanitarian issues relating to the personal circumstances of the individual, the timeliness and manner of prosecuting the extradition proceedings in Canada, the need to respect the constitutional rights of the person sought and Canada’s international obligations under the *Treaty* and as a responsible member of the international community: see *Bonamie, Re*, 2001 ABCA 267, 293 A.R. 201, at para. 54, and *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, at para. 34. [para. 38]

1. In *Fischbacher*, Charron J. further explained that, in exercising his discretion to order or refuse surrender, the Minister may also consider the law of the requesting state, including its attendant penalty and the possible consequences the person sought may face: para. 54. Reflecting the Minister’s duty to consider the totality of relevant circumstances, the Minister must also “compare the likely sentence that would be imposed in a foreign state with the likely sentence that would be imposed in Canada”: *R. v. Anderson*,[2014] 2 S.C.R. 167, at para. 27 (emphasis deleted).Other cases have suggested that the potential hardship to the person sought and the impact of surrender on his or her family may also factor into the analysis: see, e.g., *Taylor*, at para. 39; *Provost v. Canada (Procureur général)*,2015 QCCA 1172, at para. 50 (CanLII); *Kunze v. Canada (Minister of Justice)* (2005), 209 B.C.A.C. 32; *Canada (Minister of Justice) v. Thomson*, 2005 CanLII 5078 (Ont. C.A.); *Savu v. Canada (Ministre de la Justice)*, 2013 QCCA 554, at paras. 98-99 (CanLII).
2. Consistent with s. 44(1)’s humanitarian purpose, the scope of the Minister’s inquiry should not be unduly restricted, particularly where the weakness in the requesting state’s case is evident and serious hardship would face the individual if surrendered: *United States of America v. Lucero-Echegoyen* (2013), 336 B.C.A.C. 188, at paras. 26 and 29; *Canada (Attorney General) v. Aziz* (2013), 342 B.C.A.C. 305, at para. 63; *United States of America v. Doak* (2015), 323 C.C.C. (3d) 219 (B.C.C.A.), at paras. 71-72. Animating the exercise of the Minister’s discretion is a persistent concern that a person not be surrendered in circumstances that are unjust or oppressive.
3. While it is not the role of the court judicially reviewing the Minister’s surrender decision “to re-assess the relevant factors and substitute its own view”, the decision “will not be rational or defensible if he has failed to carry out the proper analysis”: *Lake*, at para. 41. Reviewing courts must accordingly determine whether the Minister considered the relevant facts and reached a defensible conclusion based on those facts: *Lake*, at para. 41; see also *Németh*, at para. 10. In other words, “[r]easonableness does not require blind submission to the Minister’s assessment”: *Lake*, at para. 41. In my view, the Minister’s inadequate consideration of the children’s best interests and his conclusions with respect to the availability of the s. 285 defence rendered his decision to order the mother’s surrender unreasonable.
4. In her submissions to the Minister, the mother noted that the children fled from their abusive father and would face serious risks of harm if they were returned to him. She highlighted the fact that the father left the children to take care of themselves most of the time and that he was physically and mentally abusive. Her submissions further made clear that this abuse was the precise reason the children ran away from the home, leading them to live in an abandoned house for over a week before contacting the mother. According to the mother, if the children were forced back to the United States or separated from her, they would either suffer additional abuse, or face the absence of any parental figure.
5. Although the Minister turned his mind to the mother’s submissions on these issues, the formalistic manner in which they were analyzed does not reflect the kinds of considerations required in structuring the exercise of discretionary administrative action implicating the interests of children. To that effect, and while said in a different context, I agree withLeBel J.’s comment in *Agraira v. Canada (Public Safety and Emergency Preparedness)*,[2013] 2 S.C.R. 559, that those considerations include “such matters as children’s rights, needs, and best interests” as well as “maintaining connections between family members”: para. 41. This is particularly true in light of the “[r]ecognition of the *inherent* vulnerability of children [which] has consistent and deep roots in Canadian law”: *A.B. v. Bragg Communications Inc.*,[2012] 2 S.C.R. 567, at para. 17 (emphasis in original). As L’Heureux-Dubé J. foundationally observed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Minister should have “consider[ed] [the] children’s best interests as an important factor, give[n] them substantial weight, and [been] alert, alive and sensitive to them”: para. 75.
6. Yet because the Minister found that the children’s interests were unclear to him, he was unsure of how to address them. He therefore decided that the Director of Youth Protection would determine what was in their best interests *after* the mother’s extradition and, if necessary, place them in foster care.
7. The Minister’s uncertainty as to the children’s best interests ought to have led him to err on the side of the children’s right to be with a loving parent, not on the side of surrendering the mother to face a criminal process where a key defence was unavailable. What is “best” for a child is not always identifiable with crystalline clarity, but what is harmful often is: Joseph Goldstein, Anna Freud and Albert J. Solnit, *Beyond the Best Interests of the Child* (new ed. 1979). In light of all the instability and trauma the children had experienced, it is obvious that what would be least harmful for them would be to remain in Canada with their mother.
8. What the Minister considered instead was the mother’s history of drug and alcohol use, leading to her loss of custody and access. This history should not be denied, but neither is it of any particular relevance in considering what she did in responding to what was obviously the children’s desperate request or what her current relationship to the children was.The question is not whether she was an ideal parent, but whether her conduct in coming to her children’s rescue should deprive them of her care and deprive her of her liberty for up to 15 years.
9. It is true, as the Minister noted, that individuals cannot avoid criminal liability simply because it may have negative consequences on their children. But the very charges the mother faces arose because she acted in what she saw as her children’s best interests. The evidence before the Minister unequivocally showed that the children fled from their father’s home because he was physically and mentally abusive. That is why, after years of enduring this abuse, they eventually contacted their mother for assistance. She did not remove them from his home. In fact, the evidence accepted throughout these proceedings is that the children ran away on their own without either the assistance or knowledge of the mother.
10. The Minister appears to skate over both the harm to which the children were subject while living with the father and the fact that the mother’s apprehension of the children was clearly motivated by her desire to rescue them from harm. As such, he essentially penalized the children for escaping a situation of harm and reaching out to their mother for assistance. Yet it is difficult to see what choices they — or she — realistically had.He also penalized the mother for coming to the assistance of her children instead of ignoring their entreaties. This amounts to penalizing her for accepting her responsibility to protect the children from harm.
11. There was extensive evidence in the committal proceedings about the children’s strong relationship with their mother, including evidence that the mother “has always taken good care” of them. This can also be inferred from the fact that the children contacted her to rescue them from harm. In this case, to offer a measure of stability after suffering years of harm, where the very offence involves rescuing the children from a violent father, the children should be permitted to remain in the care of the mother who put herself in legal jeopardy to protect them, instead of relegated to foster care.
12. At the end of the day, there is little demonstrable harmto the integrity of our extradition process in finding it to be unjust or oppressive to extradite the mother of young children she rescued, at their request, from their abusive father. The harm, on the other hand, of depriving the children of their mother in these circumstances is profound and, with respect, demonstrably unfair.
13. Between returning to the abusive household, remaining in an abandoned home, or reuniting with their mother, the children clearly felt they had no alternative. Rightly or wrongly, the children evidently believed that taking such measures would be less harmful to their well-being than remaining in their father’s abusive household. Should they have done so? We can hardly judge them for taking desperate measures to escape intolerable conditions placing them in harm’s way. Should the mother have responded and assisted them? It is hardly realistic to expect a parent to do otherwise.
14. The Minister was obliged to take into serious consideration why the children contacted their mother for assistance. They had suffered harm. They had no place to go. Reaching out to their mother was the only realistic alternative for them. And responding to their pleas for safety was the only realistic alternative for the mother.
15. None of this appears to have been acknowledged in the Minister’s decision, which lacks any of the compassionate considerations which are such a significant part of the Minister’s responsibilities at the surrender stage.
16. Moreover, the Minister failed to address the uncertainty of the father’s whereabouts, his almost complete lack of interest in these proceedings and his indifference with respect to the interests of his children. Between the period of December 29, 2010 and May 26, 2011, for example, a social worker made 15 attempts to reach the father, leaving various messages on his answering machine. The social worker reported that the father only called back once to inquire into the judicial proceedings against the mother, and his phone number was subsequently disconnected. She further stated that the father never expressed the wish to have the children return to his home.
17. If extradited, the mother could face up to 15 years imprisonment if convicted of the interference with custody charges. The result of her having responded to the children’s pleas for assistance would, if she were sent to the United States, risk depriving the children not only of their mother who took them out of harm’s way, but of *any* parent throughout their remaining childhood. Yet, theMinister makes no reference to the impact of the surrender on the importance of maintaining family unity. And his observation that the availability of foster care adequately compensates for the mother’s potential imprisonment in Georgia represents, with respect, an inexplicable rejection of the cornerstone of this country’s child welfare philosophy, namely, to attempt whenever reasonably possible to keep children and parents together.
18. No less problematic, in my view, is how the Minister dealt with the mother’s s. 285 defence and the unavailability of an analogous defence in Georgia.The Minister acknowledged both that s. 285 would be available to the mother on these facts if she were facing prosecution in Canada, and that there was no s. 285-like defence in Georgia. Citing *Schmidt*, *Mellino* and other case law, the Minister concluded that Canadian courts have held that defences should be left for consideration by the requesting state’s trial court. According to the Minister, the unavailability of an analogous defence to s. 285 did not mean that the mother would receive an unfair trial; on the contrary, in his view, she would have the opportunity to challenge the prosecution’s case and present available defences and evidence.
19. With respect, the Minister’s position seems to me to be inherently contradictory. Asserting that defences should be raised in the requesting state, but at the same time acknowledging that no defence analogous to s. 285 is available to the mother in Georgia, led the Minister to unduly narrow his discretion. Section 44(1)(*a*) requires him to consider *all* the relevant circumstances in deciding whether surrender would be unjust or oppressive. Even if one were to accept that the requirements for double criminality have been met, this does not relieve the Minister from his responsibility to consider that a statutory defence that goes to the very heart of the offence is available in Canada and not in Georgia. In my view, such a consideration falls squarely within the Minister’s statutory safety valve function at the surrender stage, and is therefore a necessary consideration when discretion is exercised under s. 44(1)(*a*).
20. Limiting his assessment of the mother’s trial in Georgia to whether it would be procedurally fair instead of whether it would be unjust or oppressive to extradite her, sidesteps the proper analysis. As the Criminal Lawyers’ Association (Ontario) submits, the Minister cannot ignore substantive differences between the Canadian legal system and the foreign legal system simply because the foreign system is otherwise procedurally fair. It is true that the extradition process does not require that there be mirror conformity between the requesting state’s criminal justice system and the system in place in Canada: *Kindler*, at p. 844. However, given the liberty interests at stake and the potential for criminal liability in circumstances that may not attract punishment in Canada, it is not enough to determine whether the trial in the requesting state will be *procedurally* fair.
21. As Charron J. observed in *Fischbacher*, “the conduct of the proceedings in the requesting country before and after the request for extradition” may be a relevant factor in deciding whether to order surrender: para. 38. The presence of a statutory defence in Canada going directly to criminality where no analogous defence is recognized in the requesting state is, on its face, the very sort of factor that makes surrender unjust or oppressive. Surely, as our Court has held, if the Minister must compare the likely sentence that would be imposed in the requesting state with the likely sentence that would be imposed in Canada, he must also evaluate the likely defences that can and cannot be raised in both countries: *Anderson*, at para. 27.This does not require perfect symmetry between Canadian laws and the laws of the requesting state. As McLachlin J. observed in *Kindler*, the extradition process “must accommodate differences between our system of criminal justice and the systems in place in reciprocating states”: p. 844.
22. That said, where a person sought for extradition faces a consequence he or she would not face in this country because a statutory defence is not recognized under the requesting state’s law, the basic demands of justice mandate consideration of the implications of this fact. Such an approach is consistent with this Court’s understanding of the important liberty interests at stake in the extradition process. Extradition constitutes a serious denial of liberty: *Ferras*, at para. 12. As a result, “extradition practices have been tailored as much as possible for the protection of the liberty of the individual”: *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at p. 1490. Extradition to a country that does not recognize a defence analogous to s. 285 is therefore an important consideration in the extradition process.
23. Moreover, as indicated in the portion of these reasons dealing with the committal order, to the extent cases like *Schmidt* and *Mellino* can be read to preclude consideration of defences in the extradition context, this case is clearly distinguishable because it involves a statutory defence which directly engages criminality, not a *Charter* or procedural defence.In addition, unlike *Schmidt* and *Mellino* where this Court suggested that the extradition judge has no jurisdiction to deal with defences that could be raised at trial, itis beyond dispute that the mother will not be able to raise a defence analogous to s. 285 before the trial court in Georgia. And finally, unlike *Schmidt* and *Mellino* which dealt with committal, this case is also an appeal from a surrender decision, where the scope of the Minister’s role as an important safety valve is far wider than that of the extradition judge, hence the words “unjust” and “oppressive”and “all the relevant circumstances”.This injustice to the mother is compounded by the serious consequences for the children if she is extradited.
24. For all of these reasons, in my respectful view the Minister’s decision to order the mother’s surrender was unreasonable.
25. I would accordingly allow the appeal with costs to the mother throughout and order her immediate discharge.

*Appeal dismissed,* Abella*,* Karakatsanis *and* Côté JJ. *dissenting.*

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1. Formerly s. 250.4. [↑](#footnote-ref-1)