How Far Does the Charter Reach?

On November 5, 2007, the Federal Court of Canada released a decision in the ongoing litigation concerning policies and procedures of the Canadian Forces in Afghanistan.

In early 2007, Amnesty International and the British Columbia Civil Liberties Association (the applicants) filed an application in the Federal Court of Canada seeking judicial review of the Canadian Forces' practice of releasing detainees to Afghan security forces. The applicants alleged violations of both Canada's international human rights obligations and sections 7 and 12 of the Canadian Charter of Rights and Freedoms.

The applicants applied for an injunction order prohibiting the transferring of prisoners until the case was heard. The order was scheduled to be heard in the Federal Court on May 3, 2007; however, on the morning of the hearing the federal government announced that a new agreement had been signed with Afghan officials which allowed Canadian personnel unrestricted access to detainees after their transfers. The agreement also provided that Afghan authorities would keep the prisoners in a limited number of facilities, and that Canadian officials would be informed of any changes in the prisoner's circumstances. In light of the new agreement the Federal Court judge declared the injunction was no longer a pressing issue and postponed the case. [i]

On November 5, 2007, Justice Mactavish of the Federal Court denied a motion advanced by the Chief of the Defence Staff for the Canadian Forces, the Minister of National Defence, and the Attorney General of Canada (the respondents). The respondents' motion requested an order striking the applicants' claim on the grounds that, "the applicants do not have standing to advance the issues… [and] that the application is bereft of any chance of success." [i] Justice Mactavish found against the respondents on both grounds.

On the issue of whether the applicants had standing the Court held that, although the rights groups were not directly affected by the conduct of the Canadian Forces in Afghanistan, the Court should use its discretion to grant public interest standing. In order to exercise its discretion to grant standing to parties with no personal interest in the proceedings, a Court must be satisfied that the parties have established three criteria:

1. The action raises a serious legal question;
2. The party seeking standing has a genuine interests in the resolution of the question; and
3. There is no other reasonable and effective manner in which the question may be brought to court. [ii]

Justice Mactavish also considered whether the applicants' position was "bereft of any chance of success," [iii] and noted that the application was framed entirely within the context of the Charter and relied on the assertion that the Charter applied to the actions of Canadian Forces acting overseas. The applicants' and respondents' positions both centered

on the Supreme Court's recent decision in R. v. Hape, a case which concerned the application of the Charter to the actions of Canadian police officers acting overseas. The respondents contended that, "the majority decision in Hape is 'crystal clear' that absent the consent of the foreign state in issue, the Charter has no application outside of Canada" [iv] and that "none of the judgments in Hape contemplate the extension of Charter rights to non-Canadians outside of Canada." [v]

The applicants conceded that Hape recognized "[a] general rule against the extraterritorial application of theCharter," [vi] but asserted that the majority recognized an exception to this general rule when fundamental human rights are at stake. In particular, the applicants cited the following passage from the Supreme Court's decision in Hape:

That deference ends where clear violations of international law and fundamental human rights begin. [vii]

The applicants also cited cases from both the United Kingdom and the United States where the courts held that domestic human rights legislation applied to individuals detained in Iraq.

In light of the arguments and evidence presented, Justice Mactavish concluded the following:

In the circumstances, and without opining in any way as to whether the Charter does or does not apply in the circumstances of the case, I cannot conclude that this application for judicial review is so clearly improper as to be bereft of any possibility of success. [viii]

The Court referred the proceedings to case management, where time limits and filing deadlines would be established.

Sources:

- Amnesty International Canada v. Canada (National Defence), 2007 FC 1147.
- R. v. Hape, 2007 SCC 26 (CanLII).

[i] Amnesty International Canada v. Canada (National Defence), 2007 FC 1147 at para. 2.
[ii] Ibid. at para. 39.
[iii] Ibid. at para 2.
[iv] Ibid. at para. 81.
[v] Ibid. at para. 82.
[vi] Ibid. at para.86.
[vii] R. v. Hape, 2007 SCC 26 (CanLII) at 59.
[viii] Amnesty International Canada v. Canada (National Defence), supra note 1 at para 99.