Supreme Court Dismisses Afghan Detainee Appeal

On May 21, 2009 the Supreme Court of Canada denied application for leave to appeal in *Amnesty Canada International, et al v Chief of the Defence Staff for the Canadian Forces, et al*.[1] The ruling effectively upholds a December 2008 decision by the Federal Court of Appeal which held that during the armed conflict in Afghanistan, the *Canadian Charter of Rights and Freedoms* does not apply to the detention of non-Canadians by the Canadian Forces, or to their transfer to Afghan authorities, even if the detainees face a "substantial risk" of torture.[2]

In November 2007, the Federal Court granted Amnesty International Canada and the B.C. Civil Liberties Association standing to seek judicial review of the Canadian Forces' practice of releasing detainees to Afghan security forces.[3] The two organizations stated they initiated the litigation to "ensure that Canadian Forces are not complicit in the violation of human rights."[4] The Federal Court dismissed the application for judicial review in March 2008.[5]

The March 2008 decision interpreted section 32(1) of the *Charter* such that non-Canadians detained by Canadian Forces in Afghanistan do not enjoy the benefit of *Charter* protection for their rights. The court relied on *R v Hape*, in which the Supreme Court "ruled that the *Charter* does not generally apply to the actions of police officers investigating Canadian citizens overseas."[6] Writing for the majority in *Hape*, Justice LeBel stated: "it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law."[7]

The applicants argued that the Afghan government had "implicitly consented to an extension of Canadian jurisdiction on its soil."[8] However, the Federal Count found that Canadian Forces were acting in support of Afghan sovereignty; they had not been granted jurisdiction by the Afghan government.[9]

The applicants also proposed that the *Charter* applies to detainees on the basis that Canadian Forces had "effective military control of the person," a line of reasoning which has been advanced in European and British case law.[10] The court rejected the argument on the grounds that Afghanistan is governed by a legitimate, internationally recognized government, a situation different than that faced in previous Canadian military deployments in Somalia and the former Yugoslavia.[11]

Relying on Justice LeBel's statement in *Hape* – that "deference [to foreign states' laws] ends where clear violations of international law and fundamental human rights begin"[12] – the applicants contended that the*Charter* should apply to Afghan detainees because the substantial risk of torture they faced violated international law. The Federal Court rejected this reasoning, stating that "it cannot be that it is the nature or quality of the Charter breach that creates extraterritorial jurisdiction, where it does not otherwise exist."[13]

The majority in *Hape* did, however, "leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the Charter because of the impact of those activities on Charter rights in Canada."[14] Nevertheless, the Federal Court stated that it is "difficult to see how the conduct of the Canadian Forces in Afghanistan that is in issue in this case would have an impact on Charter rights in Canada."[15]

In the Federal Court of Appeal, Amnesty International and the BCCLA argued that the Supreme Court decision in *Canada (Justice) v Khadr*,[16] released after the Federal Court ruling, "confirmed that *Hape* did indeed find that the Charter applied extraterritorially in respect of fundamental human rights violations at international law."[17] However, the Federal Court of Appeal distinguished *Khadr* on the grounds that Omar Khadr is a Canadian citizen as opposed to "foreigners, with no attachment whatsoever to Canada or its laws, held in [Canadian Forces] detention facilities in Afghanistan."[18] The Federal Court of Appeal ultimately upheld the lower court decision.

A panel of three Supreme Court judges (Chief Justice McLachlin, and Justices Abella and Rothstein) ruled on the organizations' application for leave to appeal the Federal Court of Appeal decision.[19] The Supreme Court did not, as is normal practice, give reasons for dismissing the application; its refusal to hear the case, however, does not necessarily mean the Court thinks the lower court rightly decided the case.[20]

Grace Pastine, the Litigation Director of the BCCLA believes the Supreme Court denied the leave to appeal "because of a lack of facts about specific cases," which she states is a result of the federal government's refusal to grant access to counsel.[21] The BCCLA believes the Supreme Court's decision means that Canadian law on human rights protection for detainees will remain out of step with our allies in Afghanistan.[22] The United States Supreme Court has ruled repeatedly that detainees in U.S. facilities in Guantanamo Bay and Afghanistan have recourse to American courts.[23]

Alex Neve, Secretary General of Amnesty International Canada, is "hopeful that a

future case with more specific facts will force the courts to address this issue."[24]

Further Reading

Daina Young, "How Far Does the Charter Reach?" *Centre for Constitutional Studies* (13 Nov 2007).

Daina Young, "Supreme Court Rules on Application of the Charter Overseas" *Centre for Constitutional Studies* (19 June 2007).

Daina Young, "The Canada-Afghan Detainee Agreement" *Centre for Constitutional Studies* (2 April 2007).

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[1] "Judgments in Leave Applications" *Supreme Court of Canada* (21 May 2009).
[2] 2008 FCA 401.
[3] Daina Young, "How Far Does the Charter Reach?" *Centre for Constitutional Studies* (13 Nov 2007); 2007 FC 1147.
[4] "Decision by the Supreme Court to dismiss leave to appeal Afghanistan prisoners' case puts protection in limbo" *British Columbia Civil Liberties Association* (21 May 2009).
[5] 2008 FC 336.
[6] Daina Young, "Supreme Court Rules on Application of the Charter Overseas" *Centre for Constitutional Studies* (19 June 2007); 2007 SCC 26.
[7] 2007 SCC 26, at para. 65.
[8] *Supra* note 5 at para. 152.
[9] *Ibid*. at para. 158.
[10] *Al Skeini et al. v. Secretary of State for Defence*, [2007] UKHL 26; *Rasul v. Bush*, 542 U.S. 466 (2004);*Omar et al. v. Secretary of the United States Army et al.*, 479 F. 3d 1 (D.C. Cir. 2007); *Banković v. Belgium*, (2001) 11 BHRC 435, 2001–XII Eur. Ct. H.R. 333 (GC) and *Issa v. Turkey* (2004) 41 EHRR 567.
[11] *Supra* note 5 at paras. 204-06.
[12] *Supra* note 7 at para. 52.
[13] *Supra* note 5 at para. 311.
[14] *Supra* note 7 at para. 101.
[15] *Supra* note 5 at para. 326.
[16] 2008 SCC 28.
[17] *Supra* note 2 at para. 8.
[18] *Ibid*. at para. 14.
[19] *Supra* note 1.

[20] Hogg, Peter W., *Constitutional Law of Canada,* 2008 Student ed., (Toronto: Thomson Carswell) at 256.
[21] *Supra* note 4.
[22] *Ibid.*
[23] Paul Koring, "Supreme Court refuses detainee appeal" *Globe and Mail* (21 May 2009).
[24] *Supra* note 4.