What Good Are Charter Rights to a Canadian Facing the Death Penalty Abroad?

Canada eliminated the death penalty in 1976, but Canadians still face constitutional questions regarding capital punishment. In *United States v Burns*,[1] the Supreme Court of Canada ruled that it is an infringement on the section 7 *Charter* right to life, liberty and security of the person to extradite a citizen to another nation to face the threat of execution. It is less clear to what extent the government is constitutionally obliged to make efforts to repatriate citizens facing the death penalty abroad.

Mohamed Kohail is a Canadian citizen who is facing the prospect of decapitation by sword in Saudi Arabia. For the past two years, Kohail has been in a Saudi jail while appealing a conviction for his part in a schoolyard brawl that resulted in the accidental death of another student. In a letter to Prime Minister Harper, Kohail made a direct and impassioned plea for the Canadian government to intervene on his behalf. Government officials claim to have responded with diplomatic efforts.[2]

Kohail's situation is reminiscent of William Sampson, another Canadian citizen who sought the aid of the Canadian government while under sentence of death in a Saudi jail. Mr. Sampson has been highly critical of what he sees as the Canadian government's lack of assertive action to repatriate Canadian's in foreign prisons.[3] He attributes his eventual release to the mediation of the British government.[4]

Sampson is generally regarded by Canadians to be innocent of wrongdoing, however there are others, such as Ronald Allan Smith a convicted murderer on death row in Montana, who have fewer sympathizers. Officials speaking for the Government of Canada have on several occasions publicly stated that the government has no duty to assist Smith. On November 1, 2007, then Minister of Public Safety, Stockwell Day, said, "We will not actively pursue bringing back to Canada murderers who have been tried in a democratic country that supports the rule of law."[5],

On January 31, 2008 the Parliamentary Secretary to the Minister of Foreign Affairs, Deepak
Obhrai, told Parliament, "In cases where Canadians face the death penalty abroad, the
Government of Canada, on a case by case basis, based on what is in the best

interest of Canada, will continue to consider whether to seek clemency."[6]

In March of 2009, the Federal Court decision in *Smith v Canada*[7] affirmed that the government has a duty to continue to seek clemency for Mr. Smith. The duty is based on a fair application of an existing government policy to seek clemency for all citizens facing capital punishment abroad. The court ruled that, while the government is free to change its policy, it may not single out any one citizen as unworthy of government support.

The Federal Court chose not to rule on section 7 *Charter* grounds because it could not identify any new government policy that would attract constitutional scrutiny, and "Charter questions should not be determined hypothetically."[8] However, the court did suggest that if there was sufficient evidence that government officials were acting in a manner that jeopardized a citizen's chances for clemency, by signalling approval or acquiescence with the carrying out of an execution, then *Charter* rights could come into play.[9]

Shortly after the *Smith* decision, the Federal Court ruled in *Khadr v Canada* that "the principles of fundamental justice obliged Canada to protect [a citizen imprisoned abroad] by taking appropriate steps to ensure that his treatment accorded with international human rights norms."[10] While this case does not directly address the issue of capital punishment, it does raise the question of what positive steps the Canadian government must take to protect its citizens from punishments that do not accord with international human rights norms.

While Canada's Department of Foreign Affairs reports that it is continuing to seek clemency for Mohamed Kohail, there have been allegations that Deepak Obhrai, Parliamentary Secretary to the Minister of Foreign Affairs, covered up evidence that Kohail had been tortured into confessing.[11] This could raise the questions of whether Canada has unconstitutionally acquiesced in human rights abuses. Meanwhile the death sentence hangs over Kohail's head and may be carried out any day without prior notice.[12]

Further Reading

Jim Young, "Kafkaesque" Adelrazik Saga Raises Mobility Rights Question, *Centre for Constitutional Studies*(12 May 2009).

Jonathan Maryniuk, Extradition, Deportation and Section 7 of the Charter, *Centre for Constitutional Studies*(August 2008).

[1][2001] 1 SCR 283.
[2] Sidhartha Banerjee, “Canadian sentenced to die pleaded for PM's aid” *The Globe and Mail* (21 May 2009).
[3] “Canadian government failed me: Sampson” *CBCnews.ca* (7 November 2003).
[4] Steve Maich, “I begged to confess” *Macleans* (31 October 2005).
[5] Hansard (1 Nov 2007) at 1435 (Hon. Stockwell Day).
[6] Hansard (31 Jan 2008) at 1820 (Hon. Deepak Obhrai).
[7] 2009 FC 228.
[8] *Ibid* at para 50.
[9] *Ibid* at para 53.
[10] 2009 FC 405 at para 75.
[11] “Harper Conservatives cover up torture allegations by Canadian facing the death penalty in Saudi Arabia” Newsroom of the Liberal Party of Canada (20 May 2009).
[12] Adam St. Patrick, “Chop Chop Square” *The Walrus* (May 2009).