Omar Khadr Sues Canada for Torture; Repatriation Order Under Appeal

In the Federal Court of Canada on May 13, 2009, lawyers for Omar Khadr were granted leave to amend his statement of claim against Canada to include damages for a violation of section 12 of the *Charter*. [1] Essentially, Khadr has received approval to sue the Government of Canada for torture.

Section 12 of the *Charter* guarantees the right not to be subjected to cruel and unusual treatment or punishment. In 2002, the Supreme Court of Canada specified that torture is inherently repugnant under any circumstances and comes within the purview of section 12.[2]

Khadr's action, which alleges breaches of several *Charter* sections and seeks damages, was initiated in March of 2004. In 2004 there was no evidence to support a claim based on section 12. Since then, new information has come to light.[3]

New Evidence, New Orders, New Appeals?

On June 25, 2008, the Federal Court ordered[4] the disclosure of documents which revealed that Khadr's American jailers had subjected him to a sleep deprivation regime, euphemistically referred to as "the frequent flyer program."[5] The documents indicated that a Canadian official had been advised of Khadr's treatment prior to commencing an interview with him. In fact, on at least one occasion the very purpose of sleep deprivation was to assist Canadian officials:

> *This is not a case where the plaintiff was directly subjected to cruel and unusual treatment or punishment by Canadian officials. Nonetheless, the plaintiff may also be able to establish a sufficient causal connection between the actions of the Canadian officials and the treatment he experienced at the hands of the American military. The information disclosed last year was to the effect that he was subjected to sleep deprivation in preparation for the visit of the Canadian officials, to soften him up for their interrogation.[6]*

The decision by a Foreign Affairs official to proceed with the interview implicates Canada in cruel and unusual treatment, as it is defined in international law.[7]

This latest Federal Court decision follows an earlier order arising from the evidence disclosed in 2008. In an April 23, 2009 decision,[8] the Federal Court considered the newly released evidence and ordered the Government of Canada to seek Khadr's repatriation from American authorities:

> *The ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the Charter. To mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable.[9]*

After some conflicting messages in late April,[10] the government has asked the Federal Court of Appeal to reverse the order that it must seek Khadr's repatriation. The appeal is to be heard on June 23, 2009.[11]Meanwhile, the government may be considering a separate appeal of the decision to allow Khadr to sue Canada for torture.

Further Reading

Erin Jackson, Terror Suspects Complain of Cruel Treatment, *Centre for Constitutional Studies* (7 May 2007).

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[1] *Khadr v. Canada*, 2009 FC 497 ("*Khadr May 2009*") at para. 1.
[2] *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3 at para. 51.
[3] *Khadr May 2009* at paras. 3-4.
[4] *Khadr v. Canada*, 2008 FC 807 ("*Khadr June 2008*").
[5] *Khadr May 2009* at paras. 4-5.
[6] *Khadr May 2009* at para. 14.
[7] *Khadr May 2009* at para. 5; *Khadr June 2008* at para. 88.
[8] *Khadr v. Canada (Prime Minister)*, 2009 FC 405 ("*Khadr April 2009*").
[9] *Khadr April 2009* at para. 92.
[10] *House of Commons Debates, No. 044, Conservative officials backtrack on Khadr file" The Globe and Mail (25 April 2009).* (23 April 2009) at 36 (Rt. Hon. Stephen Harper); *House of Commons Debates*, No. 045(24 April 2009) at 2686 (Hon. Lawrence Cannon); Omar El Akkad, "
[11] Janice Tibbets, "Protection of citizens stops at border: Khadr appeal" *Ottawa Citizen* (3 June 2009).