Government Responds to Khadr Ruling; Lawyers Ask Court to Quash Diplomatic Decision

On February 16, 2010, the Government of Canada announced its response to the latest Supreme Court of Canada ruling in the case of Omar Khadr. His lawyers reacted by filing an emergency motion in the Federal Court the next day, asking the court to reverse the government's decision.

The statement from Justice minister Rob Nicholson pointed out that the government continues to provide consular services to Khadr, and that the Supreme Court did not "require the Government to ask" for Khadr to be returned to Canada. Nicholson described the government's latest actions:

In response to the Supreme Court's ruling, the Government of Canada today delivered a diplomatic note to the Government of the United States formally seeking assurances that any evidence or statements shared with U.S. authorities as a result of the interviews of Mr. Khadr by Canadian agents and officials in 2003 and 2004 not be used against him by U.S. authorities in the context of proceedings before the Military Commission or elsewhere.[1]

The statement suggests that the government sees this diplomatic request as fulfilling its legal duty according to the Supreme Court's ruling.

The government sent Omar Khadr's lawyers a copy of the diplomatic note a few hours before it released the public statement.[2] Nathan Whitling, an Edmonton lawyer working for Khadr, revealed that Khadr's legal team had sent the Department of Justice a letter in the week of February 8, asking to make legal submissions on how the government should interpret the Supreme Court's January 29 ruling. The government's only response, said Whitling, was to provide them with a copy of the diplomatic note *after* it had been sent to the U.S. government.[3]

Khadr's lawyers responded on February 17 by filing an emergency motion in the Federal Court of Canada, asking the court to "quash" (that is, cancel or reverse) the government's decision to ask for assurances about the use of evidence against Khadr.[4] They ask for this motion to be heard by the end of March.[5]

The emergency Federal Court motion was quoted in a February 17 Canadian Press story:

The Conservative government's policy and decisions with respect to the Applicant are patently unreasonable and perverse, and were formulated in bad faith.... [This] sudden and automatic decision without regard for the basic principles of fairness would raise a reasonable apprehension of bias in the mind of an informed and objective observer.[6]

Whitling remarked: “It’s an egregious violation to just completely not even allow us to write a letter or event have notice of the fact that they are thinking of making a decision.”[7] He added: “We were quite shocked that they refused to listen to us before making the decision…. We requested an opportunity to tell them our side of the story before they made their decision. They just completely ignored us….”[8]

Federal opposition leaders criticized the government for not mentioning in its diplomatic note that Khadr was a minor – a “child soldier” – at the time of his capture and arrest in Afghanistan.[9] Sujit Choudhry, a University of Toronto law professor who was counsel to the British Columbia Civil Liberties Association in the Supreme Court hearing, observed: “This note would only potentially address the fruits of the interrogation, it would not address his detention…. The court laid the detention at the feet of the Canadian government and it didn’t just act.”[10]

The Supreme Court ruling – which allowed the government to exercise its discretion in responding to the breach of Khadr’s rights – said nothing about a process of considering alternatives or receiving legal submissions from Khadr himself.[11] Therefore, it is not obvious what standard of reasonableness or fairness the government might be expected to satisfy in weighing its options. A February 17 report said that unnamed government officials “privately concede that they expect Khadr will one day return to Canada as a free man, but they want him to undergo some kind of judicial process before that happens.”[12]

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[1] News release, “Statement by Justice Minister Rob Nicholson Regarding the Supreme Court of Canada Decision on Omar Khadr” *Department of Justice Canada* (16 February 2010). [2] “Khadr’s lawyers challenge Ottawa’s evidence request” *CTV.ca* (17 February 2010). [3] Canadian Press, “Khadr’s lawyers file new motion” *CBC.ca* (17 February 2010). [4] Bruce Campion-Smith, “U.S. asked to ignore Khadr requests” *Toronto Star* (17 February 2010). [5] *Supra* note 3. [6] Mike Blanchfield, “Khadr’s lawyers challenge Ottawa’s ‘perverse’ reaction to top court ruling” *The Globe and Mail* (17 February 2010). [7] *Supra* note 3. [8] *Supra* note 2. [9] *Supra* note 6. See also Aaron Wherry, “‘A test case in the indivisibility of Canadian citizenship’”*Macleans.ca* (17 February 2010). [10] Sarah Boesveld, “Ottawa asks U.S. to omit evidence in Khadr case” *The Globe and Mail* (17 February 2010). [11] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at para. 2. [12] *Supra* note 2.