

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

**THE PRIME MINISTER OF CANADA,
THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF
THE CANADIAN SECURITY INTELLIGENCE SERVICE, and
THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE**

Applicants
(Appellants)

- and -

OMAR AHMED KHADR

Respondent
(Respondent)

APPLICANTS' REPLY

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1. There are two points in the Respondent's response that call for reply.
2. First, his contention that no "duty to protect" was recognized by the courts below is belied by his own position, the judgment of O'Reilly J., and the judgment of the Court of Appeal. While the Respondent is right that the words "duty to protect" do not appear in the Court of Appeal judgment, the majority did state in paragraph 56 that Canada had "an obligation ... to take steps to protect Mr. Khadr." The distinction between an "obligation" and a "duty" is difficult to discern.

3. In any event, the alleged s.7 *Charter* breach cannot simply be the questioning of the Respondent by Canadian officials, because that has already been remedied. It is only if there has been a breach of some new duty of protection that the remedy imposed becomes in any way responsive to the breach found.

4. Second, the Respondent is wrong to characterize this case as one which is about the review of a discretionary remedy imposed by O'Reilly J. There is a "standard of review" issue in this case, but it arises *prior to* the issue discussed by the Respondent. The standard of review issue raised here is this: what level of deference is owed by the courts to the executive in making orders that interfere with the conduct of foreign relations? That issue was addressed by the trial judge—who said that the government's position was entitled to "particular weight" (para.49), but *not at all* by the majority of the Court of Appeal in considering whether there was a s.7 breach. Furthermore, the majority of the Court of Appeal made the extraordinary suggestion (in para.59) that the Applicants should have to adduce evidence of any potential harm to foreign relations that might arise because of the remedy ordered. Review of the Crown's prerogative under the *Charter* requires a much more rigorous treatment than that given by the majority.

5. The parties are agreed that the Respondent's circumstances are unique, but even so, it is not those circumstances *per se* but the singular nature of the order proposed that makes this case one which this Court should review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Ottawa, in the Province of Ontario, this 28th day of August, 2009.

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