

## SUPREME COURT OF CANADA

MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, MINISTER OF FOREIGN AFFAIRS, DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE and COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

- v. -

OMAR AHMED KHADR

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) and UNIVERSITY OF TORONTO, FACULTY OF LAW — INTERNATIONAL HUMAN RIGHTS CLINIC AND HUMAN RIGHTS WATCH

The Court —

[1] The respondent Khadr was apprehended by the American military in July 2002. He is presently detained in US Naval Station, Guantanamo Bay, Cuba. The appellants are appealing an order of the Federal Court of Appeal dated May 10, 2007, as amended June 19, 2007, which directs the appellants to provide the respondent with “*Stinchcombe-like*” disclosure of relevant materials in the possession of the appellants in order for the respondent to make full answer and defence to a US military commission trial.

[2] The parties to this appeal have filed a number of motions as follows:

1. Motion by the respondent for a sealing order in relation to proposed fresh evidence which was given as disclosure in the US proceedings, and which the US authorities will only allow counsel to file in this Court on condition of a sealing order being in place;
2. Motion by the appellants to strike certain paragraphs from the respondent's factum;
3. Motion by the appellants to strike the factum of the intervener BC Civil Liberties Association ("BCCLA") and revoke its intervener status;
4. Motion by the appellants to strike the joint factum of the interveners University of Toronto, Faculty of Law — International Human Rights Clinic and Human Rights Watch ("IHRCHRW") and revoke their intervener status.

A. Respondent's Motion for Sealing Order

[3] The respondent intends to file a second motion to adduce fresh evidence. The fresh evidence he intends to file is an affidavit from his US counsel, appending two documents from the disclosure in the US proceedings as exhibits. Because of restrictions on the use of the disclosure in the US case, the respondent cannot file the documents in this Court unless they are subject to a sealing order in this Court.

[4] At this stage, this Court is only being asked to grant a sealing order so that the documents, and legal argument in relation to them, can be filed. Admissibility and use of the documents will be determined once the documents have been filed, by the panel hearing the appeal.

[5] The motion is granted on the following terms:

(1) In the event that consent is received from the Deputy Assistant Secretary of Defense for Detainee Affairs, the respondent may file the proposed "Second Fresh Evidence Record", containing the Supplemental Affidavit of Lt. Cdr. William Kuebler, and exhibiting two documents, as well as written submissions of no more than three pages pertaining to the content of the said affidavit;

(2) The material shall be delivered to the Court in sealed envelopes, and shall be kept under seal by the Registrar and made available only to counsel for the respondent, counsel for the appellants, members of this Court and Court staff;

(3) The appellants shall be entitled to file a response to the motion to file further evidence, together with written submissions of no more than three pages in the event that the sealed material is admitted as evidence.

(4) The admissibility of the respondent's "Second Fresh Evidence Record" shall be determined by the Court hearing the appeal.

(5) There is no order as to costs.

**B. Motions to Strike Certain Paragraphs of Respondent's Factum and All of Interveners BCCLA and IHRC/HRW's Factums**

[6] The appellants move to strike out arguments raised by the respondent and the interveners BCCLA and IHRC/HRW that Canadian officials violated s. 7 of the *Canadian Charter of Rights and Freedoms* in interviewing the respondent at Guantanamo Bay and in subsequently giving summaries of the interviews to US authorities. It is argued by the respondent and the interveners that these actions violated international human rights obligations. The arguments are based on this Court's decision in *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 SCC 26. These arguments raise issues of the legality of the detentions at Guantanamo in international law, and whether the *Charter* was breached by some form of Canadian complicity by interviewing the respondent and giving summaries of the interviews to the Americans. The appellants make three arguments in support of the motions to strike:

- (i) that there is insufficient factual basis for the arguments;
- (ii) that the arguments are not justiciable;
- (iii) that these are new arguments not raised in the courts below.

[7] In the alternative, the appellants argue that the motion to strike should be deferred to the panel hearing the appeal, or in the further alternative, that the argument

made in appellants' motion to strike should be treated as a reply factum on the appeal proper.

[8] For the reasons that follow, the appellants' motions to strike part of the factum of the respondent, and all of the factums of the interveners BCCLA and IHRC/HRW are dismissed. The appellants' record on the motion to strike parts of the respondent's factum shall be put before the panel hearing the appeal as a reply factum.

(i) Alleged lack of factual basis for arguments

[9] The appellants argue that there is an insufficient factual basis for the respondent's and interveners' arguments that the detention at Guantanamo violates international law, and that Canadian complicity violates s. 7 of the *Charter*.

[10] The alleged lack of a factual basis for these arguments is not a reason to strike out paragraphs from the factums. The appellants may argue on the main appeal that the impugned arguments of the respondent and interveners should fail for an insufficient factual basis.

[11] Further, the factual basis for the impugned arguments is, in part, dependent on a fresh evidence motion filed by the respondent that has been deferred to the panel hearing the appeal by Order of the Chief Justice dated December 19, 2007. It is not

appropriate at this stage to strike out arguments on the ground that they lack a factual basis, because the factual basis is dependent on the result of the fresh evidence motion.

(ii) Allegation that arguments raise non-justiciable issues

[12] The appellants argue that the respondent's and interveners' arguments about violations of international law at Guantanamo Bay and Canadian complicity in them are not justiciable. It is argued that the issues are not justiciable because they require findings about the conduct of the US authorities, the US authorities are not before the Court, and that these issues should be litigated in the US courts.

[13] It is not necessary at this stage to address the merits of the appellants' claims about justiciability. These arguments are not a basis to strike out arguments from the respondent's and interveners' factums. Rather, the appellants may argue on the main appeal that the impugned arguments of the respondent and interveners should not be accepted because they raise unjusticiable issues.

(iii) Allegation that arguments are new/not argued below

[14] The appellants' final argument is that the arguments that Canadian officials breached s. 7 of the *Charter* by interviewing the respondent and giving summaries of the interviews to US authorities, and that these actions breached international law based on *Hape*, were not argued in the courts below.

[15] This argument also fails. The issues were sufficiently raised in the courts below. The arguments in the courts below focussed on whether the *Charter* applied on the facts of this case to the activities of Canadian officials, and whether there was a sufficient causal connection between the actions of Canadian officials and the US detention and charges. In the courts below, these arguments were based on this Court's decisions in *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, and *R. v. Cook*, [1998] 2 S.C.R. 597. These arguments raised the issue of the extent to which the Canadian government was constitutionally linked to US conduct. The Federal Court and Federal Court of Appeal addressed these arguments in their reasons: (2006), 290 F.T.R. 313, 2006 FC 509 and [2008] 1 F.C.R. 270, 2007 FCA 182. Although the way the argument is made has changed, focussing on whether the actions of Canadian officials violated international human rights obligations based on the *Hape* decision, it is not an entirely new argument.

[16] Counsel for the respondent advised counsel for the appellants in December 2007 that they were going to make arguments based on *Hape*. Any concern about the appellants' ability to respond is addressed by ordering that the appellants' motion record be put before the Court as a reply factum on the appeal.

C. Motions to Strike All of Interveners' Factums

[17] The appellants' arguments to strike out the interveners' factums are essentially the same as for the respondent's factum. For the reasons given above, the factual basis and justiciability arguments are not grounds to strike the factums. These issues can be argued as part of the main appeal.

[18] This leaves the argument that the interveners are raising new issues. The interveners' arguments are the arguments they said they would make when they sought leave to intervene. These motions to strike should not be used to relitigate the applications for leave to intervene. For the reasons given above, these are not entirely new issues. Further, interveners must have some latitude to approach legal arguments from a different perspective, given the requirement that interveners present a new and different perspective.

[19] The appellants object to the interveners relying in their factums on the fresh evidence the admissibility of which has not yet been determined by this Court. There is nothing objectionable about this approach by the interveners. If the Court holds that the fresh evidence is not admissible, it will not rely on it. Indeed, the interveners IHRC/HRW have highlighted in their factum where evidence they rely on is still subject to a decision on admissibility to make this clear to the reader and the Court.

[20] There are no orders for costs on any of the motions.